



Post-legislative Scrutiny – The Government’s Approach





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Presented to Parliament
By the Lord Privy Seal, Leader of the House of Commons
and Minister for Women and Equality
By Command of Her Majesty
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Ministerial Foreword



The Rt Hon Harriet Harman QC MP
Leader of the House of Commons

Every year, the Government introduces many new laws, which directly affect the lives of people in the United Kingdom. Legislation implements government policy on a wide range of issues that are important to the public – from security, education, health, transport, the environment to policies for families.

This Government has introduced many reforms to improve legislation. They include the way that Parliament considers and scrutinises the details of bills, one of the fundamental roles of our legislature. For the first time last year a draft legislative programme was published in advance of the Queens Speech to allow for parliamentary and public involvement. This opened up a part of the political process that previously had been taking place behind closed doors.

However, one important area that needs a new approach is post-legislative scrutiny. This has been the subject of academic analysis and commentaries on the legislative process in recent years.

This document sets out the Government's approach to post-legislative scrutiny. We are grateful to the Law Commission for its thoughtful and considered review of this area which informed our response.

We are proposing in this paper that 3 years after a law has been passed, it is reviewed by the relevant Government Department and then by Parliament, to see how the law has worked out in practice. We hope this will have the effect of improving policy making legislation in the future.

Post-legislative Scrutiny – The Government's Approach

Updating and improving the legislative process

1. The Government attaches great importance to developing the parliamentary process and has introduced a number of reforms in this area. Many of these have come through the Select Committee on Modernisation of the House of Commons, appointed shortly after the Government came to office in 1997. Further developments are now being taken forward as part of the measures outlined in the *Governance of Britain* Green paper published in July 2007.¹
2. Some of these reforms have been designed to improve the work of Parliament generally, or to bolster in particular the process of holding the government to account for its actions. For the Commons, these have included updated sitting hours, shorter notice for oral questions (allowing them to be more topical), increased opportunities for backbenchers to hold government to account through debates in Westminster Hall, appearances by the Prime Minister before the Liaison Committee, and (for both Houses) opportunities for the tabling and answering of questions during the summer recess. For the Lords, these have included more regular sitting times, more topical oral questions, greater use of grand committees allowing more time for important debates in the Chamber, and greatly increased select committee activity.
3. But one of the fundamental roles of Parliament lies in the field of legislation, in particular the scrutiny of – and ultimately assent for – Government bills. Legislative procedures have long been the subject of debate and ideas for change,² a debate which has helped to give rise to reforms affecting all stages of the process. Since 1997, in addition to the development of programming of legislation in the Commons, these have included the following:
 - more frequent publication of bills in draft, allowing pre-legislative scrutiny both inside and outside Parliament

¹ Cm 7170 3 July 2007

² For example Hansard Society Commission *Making the Law* (chaired by Lord Rippon) November 1992; Commons Modernisation Committee *The legislative process* (HC 190, session 1997-98); Lords Constitution Committee *Parliament and the legislative process* (session 2003-04 HL Paper 173); Commons Modernisation Committee *The legislative process* (session 2005-06, HC 1097)

- publication of a draft legislative programme
- introduction of published Explanatory Notes on bills and Acts
- measured use of ‘carry-over’ of bills from one session to the next so as to help make better use of parliamentary time
- renaming of Commons standing committees on bills as ‘public bill committees’ and fuller explanatory material, to promote greater public understanding
- oral evidence-taking as a standard part of public bill committee work on programmed government bills starting in the Commons
- written evidence taking procedures in public bill committees.

Post-legislative scrutiny

4. One area mentioned in a number of commentaries on the legislative process, but in which no significant developments have taken place, has been that of post-legislative scrutiny. In 1992, the Rippon Commission concluded that “There is not enough post-legislative review of the working of Acts.”³ The issue formed a significant part of the Lords Constitution Committee report on *Parliament and the legislative process* in 2004. That Committee reviewed evidence it had received emphasising the potential benefits of greater post-legislative scrutiny and the inadequate and unsystematic nature of the scrutiny currently carried out. It noted also the need for a balanced approach and for exceptions. It recommended that “most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner”.⁴
5. In its reply to that report, the Government stated that it was giving: “close consideration to how post-legislative scrutiny can best be achieved. What is meant by ‘post-legislative scrutiny’ is often ill-defined. It could range from a wide-ranging policy review to a quite limited and technical evaluation of the effectiveness of the drafting. We have asked the Law Commission to undertake a study of the options, and to identify, in each case, who would most appropriately take on the role.”⁵

The Law Commission published its report in response to the Government’s request on 25 October 2006.⁶ The Government is most grateful to the Commission for its thoughtful and considered review.

³ See footnote 2 above (paragraph 316)

⁴ HL 173-I, session 2003-04, para 180

⁵ HL 114, session 2004-05, para 32

⁶ Cm 6945; Law Com No 302

The Government's overall approach to post-legislative scrutiny

6. The Commission noted that “No-one...has registered an objection to the proposition that there should be more post-legislative scrutiny”,⁷ but also identified some important factors which need to be taken into account in any system which is established. The need for flexibility – avoiding a ‘one-size-fits-all’ approach – was noted,⁸ and the Commission concluded there was no “merit in proposing blanket scrutiny of all measures”.⁹
7. The Government agrees with this overall approach. There are clear benefits in selective post-legislative scrutiny of Acts. Such scrutiny will help to improve the legislation itself, not only after it has been reviewed – if this leads to amendment – but also when it is being first formulated since the knowledge that it will be subject to some form of review after enactment should help to focus preparatory work more clearly. It will also allow lessons to be learned, both where problems are identified but also where things have gone well.
8. At the same time, it is important that any system must be proportionate to need. Any system must therefore:
 - concentrate on appropriate Acts, not waste resources attempting detailed reviews of every Act
 - avoid re-running what are basically policy debates already conducted during passage of the Act
 - reflect the specific circumstances of each Act (eg associated secondary legislation or surrounding policy environment)
 - be complementary to the scrutiny which can already take place, in particular through existing Commons select committee activity.
9. The Government therefore considers that the basis for a new process for post-legislative scrutiny should be for the Commons committees themselves, on the basis of a Memorandum on appropriate Acts submitted by the relevant Government department, and published as a Command paper, to decide whether to conduct further post-legislative scrutiny of the Act in question. In some cases (though not ordinarily if the Commons Committee has decided to conduct a review) it might be appropriate for a different parliamentary body – whether Lords or Commons or Joint – to conduct further scrutiny.

⁷ Cm 6945 para 1.7

⁸ Cm 6945 para 3.1

⁹ Cm 6945 para 3.2

In this way, all Acts¹⁰ would receive a measure of post-legislative scrutiny within Government and would be specifically considered for scrutiny within Parliament. Some, on a considered and targeted basis, would then go on to receive more in-depth scrutiny. This would reflect the approach proposed earlier by the Lords Constitution Committee.

10. The Commission's proposed model seeks to combine in a complementary fashion internal departmental scrutiny with parliamentary scrutiny, with the central power of initiative for parliamentary scrutiny itself balanced between the Commons departmental committees and other elements within Parliament. The Government broadly endorses this approach but considers that greater clarity is necessary in the way the prime role of the Commons committees should be recognised. Much of the activity of Commons committees, even if not overtly labelled in that way, in practice involves examination of the effectiveness of existing primary legislation. It would be undesirable for that work to be subject to duplication or conflicting work from other committees.
11. The Government considers that its proposal will be a valuable and proportionate approach towards achieving the objective of better post-legislative scrutiny. This approach is set out in more detail in the Government's response to the individual Law Commission recommendations, as appended. In practice, given the lengths of time involved in the passage of new legislation and the lead times involved for the preparation of the Memoranda envisaged in these proposals, the operation of the proposed system and its effectiveness will have to be kept under continuous review. If the kind of Memorandum for parliamentary scrutiny which is proposed involves a disproportionate workload in their production, or if they do not prove to be the kind of document which Parliament finds helpful, then it would be appropriate to consider alternative approaches.

[March 2008]

¹⁰ with certain exceptions – see Appendix paragraph 29

Appendix

Detailed Response to Law Commission Report on Post-legislative Scrutiny (Cm 6945)

Reasons for post-legislative scrutiny

Definition of post-legislative scrutiny

For the purposes of this report, we understand post-legislative scrutiny to refer to a broad form of review, the purpose of which is to address the effects of the legislation in terms of whether the 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. [para 2.4]

1. The Government accepts that, if the full value of post-legislative scrutiny is to be achieved, then – where a formal substantive review of a particular Act is necessary – it should properly be reasonably broad in scope. This would generally include assessment of the effects of the legislation relative to its stated objectives. The Government notes however that with some Acts the ‘objectives’ will be difficult to distinguish from fundamental policy propositions underlying the legislation, which may have been highly controversial during the passage of the bill. In such cases any reviewing committee will wish to take care to avoid the danger – identified by the Commission (see para 2.17) and contributors to the report – of post-legislative review becoming principally a re-run of the policy debate on the bill. To this extent, the phrase used by the Commission elsewhere in the report, of post-legislative scrutiny concentrating on “how the legislation is working out in practice”,¹¹ may be a helpful working description of what is needed.
2. The Government would also highlight the importance in any post-legislative review of the narrower aspects of such review not being overlooked. These would include, in addition to any drafting and

¹¹ see Cm 6945 para 2.7 for example

legal issues, a review of the extent to which the legislation and the supporting secondary legislation has been brought into force.

Reasons for post-legislative scrutiny

The headline reasons for having more systematic post-legislative scrutiny are as follows:

- *to see whether legislation is working out in practice as intended;*
- *to contribute to better regulation;*
- *to improve the focus on implementation and delivery of policy aims;*
- *to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.*

We recognise the real value of these arguments and are persuaded that together these reasons provide a strong case for more systematic post-legislative scrutiny. However, we also recognise the limitations. We acknowledge there are difficult challenges in relation to post-legislative scrutiny, namely: how to avoid a replay of policy arguments, how to make it workable within resource constraints and how to foster political will for it. [para 2.24]

3. The Government agrees with the reasons for conducting post-legislative scrutiny identified by the Commission. By way of context, the Commission draws attention to the volume of legislation and to the benefits of looking back to see what lessons may be learned as further legislation is introduced.
4. As the Commission indicates, the first of the reasons identified – how the legislation is working in practice – is to some extent the principal purpose, from which the others follow. As noted above the Government considers that this should be the prime benchmark for any post-legislative review of an Act. A focus on the practical effects of legislation will help to ensure that both parliamentary and departmental resources devoted to such reviews can lead to constructive and practical suggestions for future policy rather than more abstract criticism of general government policies in a particular field.
5. The Government agrees also with the point made in para 2.13 by the Hansard Society that reviews should not focus only on cases where legislation or its implementation may appear defective but should also be an opportunity to identify and learn from cases where things have gone well.

6. The other purposes specified are all fully consistent with the Government's own priorities of better regulation, focus on delivery, and sharing of good practice. Targeted and proportionate post-legislative scrutiny should assist in all these areas and underpin efforts towards evidence-based policy making.
7. The Commission and the witnesses to the inquiry also identify the need to avoid replaying policy arguments. The Government agrees that it would not be useful if this became a feature of specific post-legislative scrutiny inquiries carried out by parliamentary committees. This highlights the need for the terms on which such inquiries are conducted to be directed as far as possible towards practical effects and outcomes. It will be helpful, as the Law Commission notes,¹² for existing (or any new) select committees – and their witnesses – to work within these principles if Departments are to be asked to undertake significant work in support of such reviews. It would also be helpful if reviews normally considered only Acts which have received Royal Assent at least 3 to 5 years earlier: this would allow for a 'cooling-off' period from the parliamentary passage of the bill itself, as well as providing sufficient time, in most cases, for the implementation of the Act to be assessed.
8. The Commission also draws attention to the importance of making any system workable within resource constraints. The Government strongly agrees that a new system must both take into account the existing levels and forms of post-legislative scrutiny which take place and be targeted towards cases where it can be most effective. It would not be a proportionate use of resources for all – or even most – Acts to be subject to an in-depth review on top of the various forms of review to which they are already subject (whether by existing parliamentary committees, by the NAO, through internal government review, by other bodies or through the general process of political debate). The Government has had these factors in mind in coming to the more detailed conclusions set out below.

Post-legislative scrutiny mechanisms

Clarification of policy objectives

We consider that the clarification of policy objectives is critical. RIAs provide a good place for the clarification of policy objectives and the setting out of criteria for monitoring and review. Therefore RIAs should be enhanced in order to incorporate these considerations more effectively. [para 3.16]

¹² Cm 6945 para 2.15(1)

9. The Government agrees that clarification of policy objectives during the passage of a Bill is both desirable in its own right and as a means for enhancing any subsequent post-legislative review of the Act. The objectives of a Bill will in practice be set out in a variety of ways, including the Explanatory Notes on the Bill, any Impact Assessment (formerly Regulatory Impact Assessment), ministerial speeches (in particular, on the floor of either House) and in other policy documents.
10. The Commission notes (at para 3.17) that “a statement of policy objectives is likely to be quite general. By contrast in order for a statement to be useful at the review stage, it would have to be fairly narrowly and tightly drafted”. But it might be inappropriate for post-legislative scrutiny to be too directly linked to statements of objectives in a formalised way. Political objectives will sometimes, quite rightly, be expressed in quite high level terms and it is difficult to be prescriptive about the form in which objectives should be set, given the differing nature of different Acts. In some cases any post-legislative scrutiny will need to focus on assessment of the more detailed aspects of how an Act is working out in practice rather than by reference to overall objectives, if scrutiny is to avoid re-running the high level policy debates which may have taken place during passage of the bill.
11. Objectives, defined in different ways, are currently set out in different places tailored to the specific purpose. The new Impact Assessment template process requires policy makers to be mindful of post-implementation review from the very outset of policy development and asks policy makers to provide a short summary of the policy objectives and the intended effects of the policy. The Government guidance makes clear that the review should establish a baseline and include success criteria against which policy-makers will assess the effectiveness of the policy against delivering the objective. In developing objectives, policy makers should consider the guidance in the HM Treasury Green Book ‘Appraisal and Evaluation in Central Government’.
12. Equally, all bills will have Explanatory Notes, updated as the bill enters the second House and updated again on Royal Assent, which will set out the purpose of the legislation. These Notes are primarily directed towards elucidating the meaning of the bill’s provisions. The guidance issued on the content of Explanatory Notes to bills states that they will usually include a ‘summary and background’ section which “should explain briefly what the legislation does and its purpose, including any relevant background and describe in broad terms how the legislation goes about achieving its aims”.

13. The Lords Constitution Committee had recommended that the ENs should include “a clear and developed explanation of the purpose of the bill, incorporating or accompanied by the criteria by which the bill, once enacted, can be judged to have met its purpose.”¹³ In its response, the Government, while agreeing that ENs should clearly indicate the purpose of a bill, observed that there was a balance to be struck between detail and accessibility and that it “would need to consider how changing the approach to declaring the purposes of legislation would impact on the interpretation of law by the courts”.¹⁴
14. Broadly, the Government considers that ENs and the new IAs as currently drafted already provide a clear reference point for subsequent assessment of how an Act may be operating in practice. But the wording of the guidance in both cases will be reviewed both to see what further specific provision can be made and in the light of experience of future post-legislative reviews of Acts. Departments will in practice help to focus any subsequent post-legislative review on practical outcomes by setting out criteria for assessment at various points during the passage of the Bill. The Commission notes that “ultimately, it should be for the reviewing body to consider the legislation in conjunction with any document setting out its objectives and formulate its own benchmarks”.¹⁵ The Government agrees.

Government review

We consider that strengthened guidance from the centre of Government to departments will help to ensure that there is greater commitment from departments to post-enactment review work and that this would also strengthen the link between departmental review work and the Government's better regulation agenda. [para 3.29]

15. The Government agrees that commitment to post-enactment review work within Government is important. At present, much internal review work already takes place, but its nature will differ according to the nature of the legislation. In some areas, the annual bidding round for legislation for forthcoming sessions involves a form of review of the existing legislation. The annual Finance Bill always in practice involves measures in response to assessment of the effectiveness of existing legislation. And some Acts already contain specific requirements for some form of post enactment review after a number of years.

¹³ HL 173-I, session 2003-04, para 87

¹⁴ HL 114, session 2004-05, para 34

¹⁵ Cm 6945 para 3.17

16. Nevertheless, strengthened arrangements at the centre, as the Commission notes, would help to focus attention more within departments on this work. The Government accordingly proposes that henceforth the department currently responsible for a particular Act should in most cases¹⁶ – generally between 3 and 5 years have elapsed after Royal Assent¹⁷ – publish a Memorandum, for submission to the relevant departmental select committee. The Memorandum would be issued as a Command paper, and would report on certain key elements of the Act’s implementation and operation.¹⁸ This would reflect the approach proposed by the Lords Constitution Committee.¹⁹
17. The Memorandum would include:
- information on when and how different provisions of the Act had been brought into operation
 - information highlighting any provisions which had not been brought into force, or enabling powers not used, and explaining why not
 - a brief description or list of the associated delegated legislation, guidance documents or other relevant material prepared or issued in connection with the Act
 - an indication of any specific legal or drafting difficulties which had been matters of public concern (eg issues which had been the subject of actual litigation or of comment from parliamentary committees) and had been addressed
 - a summary of any other known post-legislative reviews or assessments of the Act conducted in Government, by Parliament, or elsewhere
 - a short preliminary assessment of how the Act has worked out in practice, relative to objectives and benchmarks identified at the time of the passage of the Bill.

Where applicable, to avoid duplication, the Memorandum could refer to or draw on any review already undertaken following commitments made under the Impact Assessment process. So far as possible it would be intended that the Memorandum would draw principally

¹⁶ In a number of cases such a Memorandum would not be necessary or appropriate (see paragraph 29 below), in which case the Department would provide the relevant Committee with a statement of the reasons for this. The Committee would of course be able to discuss the matter with the Department

¹⁷ This would apply retrospectively to all Acts passed in 2005 or subsequently. In some cases, a Department would propose to submit the Memorandum on a different timescale (see paragraph 18 below)

¹⁸ Where several Acts are the responsibility of a single Department and of a single select committee, one Memorandum might cover more than one Act

¹⁹ HL 173-I, session 2003-04, para 189

from existing information and knowledge rather than involve extensive fresh research.

18. The Memorandum would thus not in itself be a full post-legislative scrutiny of the Act. This would be unnecessarily burdensome and inflexible and would not be an effective use of resources. But it would be a formal and automatic process whereby the relevant departmental select committee could assess the state of play in relation to the Act and could decide on what further action to take or propose (in accordance with the processes set out at paragraphs 20-21 below). It would also be possible for the department to propose (and if necessary discuss with the relevant committee)²⁰ precisely when the Memorandum should be submitted. There will be cases where implementation of the Act follows some time after Royal Assent and it would be right for this to be taken into account leading to a later submission, although a period of 3 to 5 years after Royal Assent might be the norm. The Department would also discuss with the relevant select committee whether certain information should be included or omitted, or even occasionally to agree that no Memorandum was required (see paragraph 29 below). The process governing the requirement for this Command paper will be reflected in the next revision of the Cabinet Office's Guide to Legislative Procedures.

Parliamentary review

We recommend that consideration be given to the setting up of a new Parliamentary joint committee on post-legislative scrutiny. Select committees would retain the power to undertake post-legislative review, but, if they decided not to exercise that power, the potential for review would then pass to a dedicated committee. The committee, supported by the Scrutiny Unit, could be involved at pre-legislative as well as post-legislative stages in considering what should be reviewed, could undertake the review work itself or commission others to do so and would develop organically within its broad terms of reference. [para 3.47]

19. Close consideration has been given to the best structure for establishing a regular programme for post-legislative scrutiny by Parliament. Discussions on this point with the House of Commons Liaison Committee have indicated that, while Commons departmentally-related select committees feel that it will often be difficult to prioritise post-legislative scrutiny work – and thus that it is

²⁰ In cases where there is no clear responsible departmental select committee this role could be taken by the Liaison Committee

important for other parts of the parliamentary system, including the Lords, to be involved – any structure needs nonetheless to ensure that the Commons departmental committees are not displaced from their key and leading role in monitoring the policies and activities of government departments. A structure needs also to recognise the extent to which many departmental select committee inquiries involve elements of post-legislative scrutiny and that even where the Committee may not conduct an inquiry specifically described as ‘post-legislative scrutiny’ this may nonetheless be in effect what it is doing. It is difficult to give proper systematic recognition to this if there is a permanent Lords or Joint Committee responsible for post-legislative scrutiny.

20. The Government accordingly considers that the best approach would be for the proposed departmental Memorandum, as indicated above, to be submitted to the relevant Commons departmental select committee in the first instance.²¹ The Memorandum would be published as a Command paper, thereby allowing Lords and other interests to take up points raised in it. But the prime responsibility would rest with the Commons Committee initially to consider the Memorandum. It might be helpful if the issue of post-legislative scrutiny were specifically included by the Commons Liaison Committee within the ‘core tasks’ of the departmental select committees.
21. The Committee would decide whether it wished to conduct a specific post-legislative inquiry into the Act, or perhaps to include it as part of another inquiry within its work programme. It might also be considered whether a Lords Committee, or a Joint Committee of both Houses, might be well suited to carry out such a review (though not ordinarily where the Commons Committee has decided to undertake scrutiny).
22. The Committee’s report would contain such observations and conclusions about the implementation and operation of the Act as the committee thought fit. These would be directed towards Government, which would be expected to respond in the normal way. (Of course no assessment by a parliamentary committee would be binding in respect of judicial interpretation of the Act and there would be no obligation on the courts to consider the Select Committee’s views.)

²¹ See report of Lords Constitution Committee (session 2003-04, HL 173) para 189.

Independent reviewers

It already happens that legislation may provide for review by an external reviewer (for example in the Charities Bill). A new joint committee may wish to involve independent experts in its review work and in this context we do see a potential role for the National Audit Office. However, we do not see the need to create a new body independent of Parliament to carry out post-legislative scrutiny. [para 3.54]

23. Given the approach set out for both government and parliamentary review above, the Government agrees that there is no need to create a new body independent of Parliament to carry out post-legislative review. As suggested by the Commission, any individual select committee carrying out post-legislative scrutiny, whether a permanent or an ad hoc committee, may on occasion wish to involve outside bodies in their work. This would however be on an ad hoc basis to suit the particular need identified.

Triggers for review

Whether or not a Bill has formal pre-legislative scrutiny, we suggest that departments should give routine consideration to whether and if so how legislation will be monitored and reviewed. This can be addressed through strengthened guidance on RIAs. If there is a new joint committee on post-legislative scrutiny, it might also consider Bills and whether and if so how they should be reviewed post-enactment. The committee might recommend that, in certain cases, a carefully thought-out review clause would be appropriate. [para 3.59]

24. The Government agrees that it is useful and appropriate for consideration to be given during preparation of a bill (including during any pre-legislative scrutiny) to how the legislation should be monitored and reviewed. As noted by the Commission, the Government already gives guidance on this point. The new Impact Assessment process gives greater prominence to post-implementation review. It requests a commitment to a date when the actual costs and benefits will be reviewed to see whether the policy has achieved the desired effects. The supporting guidance suggests this should be after three years depending on the nature of the policy.²² The new requirement for an automatic departmental Memorandum to be published and submitted to the relevant departmental committee, generally between 3 and 5 years after Royal Assent, would

²² More information is provided in the Impact Assessment toolkit (see link at http://www.cabinetoffice.gov.uk/regulation/ria/toolkit/post_implementation.asp)

complement this process. Reference to the preparation of this Memorandum would be included within any additional post-legislative review plans specified in the IA.

25. As indicated above, the Government does not at this stage envisage establishing a permanent committee dedicated to post-legislative scrutiny, but certainly any parliamentary committee conducting pre-legislative scrutiny on a bill would wish to consider recommendations as to how the Act might be reviewed post-enactment.

We believe that any system of post-legislative scrutiny should ensure that interested parties are able to channel their concerns about the operation of legislation to the reviewing body and play a part in any subsequent review through consultation or by giving evidence. [para 3.68]

26. Any select committee carrying out post-legislative review of an Act under the scheme set out above would contact interested parties as a matter of course, in order to give them an appropriate opportunity to contribute to the review. This would be a matter for the individual committee to determine, but would typically include organisational stakeholders, government and the public. Where relevant, committees may wish to hold hearings outside Westminster.
27. Internal government reviews should also expect to include an opportunity for stakeholders to contribute. Such work can build on the developing techniques used for consultation with interested parties at earlier consultation stages and on pre-legislative scrutiny, as noted by the Lords Constitution Committee.²³ These can include consultation with both the public and other key stakeholders, through seminars, informal meetings, e-consultation and so on.²⁴

Types of legislation suitable for review

For Parliamentary review, we consider that a new joint committee will be best placed to decide which legislation should be reviewed. For departmental review, the decision should be for the department in accordance with guidance from the centre of Government. [paras 3.72 and 3.81]

28. As indicated above, the Government envisages that the initiative for deciding whether a full and specific parliamentary post-legislative scrutiny of an Act should be carried out should rest with the relevant

²³ See report of Lords Constitution Committee (session 2003-04, HL 173) para 190.

²⁴ Such methods were used for example during the (pre-)legislative scrutiny of the Government’s draft Coroners Bill in 2006

Commons select committee. This would not preclude the possibility of other committees – whether *ad hoc* Lords or Joint Committees or existing committees – conducting an inquiry, potentially as a result of the departmental Memorandum.

29. The Government proposes that it would not be expected that a Memorandum should be submitted for certain kinds of Act which are routine in nature or which regularly receive post-legislative review or for which it would be otherwise unnecessary. Memorandums would not be submitted for Consolidated Fund and Appropriation Acts, Finance Acts and any consolidation or Tax Law Rewrite Acts. Submission of a Memorandum would also be unnecessary, for example, where Acts have been repealed, or where Acts have only a very limited policy significance, or where a review is already committed to (eg. following a pilot scheme). Where a Department had submitted evidence to a select committee in connection with other inquiries by the committee, then in that case also a Memorandum would not be appropriate. Where, in these additional cases or for any other reason, a Department envisages not submitting a Memorandum, it would submit an explanation to the committee of the reasons for this.

Timescale for scrutiny

We remain of the opinion that the timescale for review should not be prescribed in order to allow for flexibility of approach depending on the type of legislation under review and the type of review.
[para 3.75]

31. The Government agrees that the timing for any review is one of the areas in which flexibility is needed. Some Acts take longer to bring fully into force than others (though conversely it would sometimes be delay in bringing Acts into force which might be one of the issues for examination by a reviewing committee) and some Acts will take longer for the effects to be felt. As indicated above, the Government proposes that between 3 and 5 years is a reasonable benchmark to adopt for assessing whether a more substantial post-legislative review is required. It would be open to the department and its departmental Commons committee (or the Liaison Committee if there is no specific relevant departmental committee) to discuss when within this period the Memorandum should be submitted for a particular Act. And in some cases the Department would propose that the Memorandum be submitted on a later timescale.

Post-legislative scrutiny outcomes

We invite the Government to consider whether departmental reviews should be published and possibly laid before Parliament. [para 3.77]

31. The proposed Memorandum to be submitted to the relevant Commons departmental committee and to Parliament by the appropriate department will be published as a Command paper. Where a wider departmental review has been carried out it may be difficult to be categorical in advance, but the Government recognises that the full benefits of an internally conducted post-legislative review of an Act would be more likely to be gained if the review were published in some form. There may be occasions where a particular review, or part of a review, would not be appropriate for publication, but in general the Government would expect to publish such post-legislative reviews as a Command paper.²⁵

Parliamentary and departmental review of delegated legislation

We suggest that in the light of experience of post-legislative scrutiny of primary legislation by a new committee serving this purpose, there is scope for the development of Parliamentary post-legislative scrutiny of secondary legislation. [para 4.7]

32. Like the Commission, the Government takes the view that it would be premature at this stage to attempt to establish a dedicated system for post-legislative review of secondary legislation as such.²⁶ However, review of an Act should properly include the consideration of all or much of the delegated legislation made under the Act, though any such scrutiny should of course reflect any work already done by other committees of the House including the existing delegated legislation scrutiny committees (the JCSI and the Lords SI Merits Committee). In this way, much significant delegated legislation should be capable of receiving appropriate review.

²⁵ Or as an ‘Act’ paper if the review is required pursuant to an Act.

²⁶ The Government proposes that any Northern Ireland policing and criminal justice legislation made by Order in Council should be treated in the same way as Acts. But since this legislation generally follows directly from equivalent England & Wales legislation it should be considered in the context of that legislation rather than on its own, with appropriate consultation between the Northern Ireland Affairs Committee and other relevant departmental select committees

Access to legislation and consolidation

We suggest that Government give more thought to consolidation of secondary legislation with the aim of improving the management and accessibility of secondary legislation. [para 4.14]

33. This point also arose in the report of the Lords Committee on the Merits of Statutory Instruments on management of secondary legislation. In the response, the Government indicated that key considerations as to whether an instrument should be consolidated – whether formally by amending legislation or informally – are the convenience and ease of comprehension for users, and the potential contribution to better regulation. On the other hand, consolidation can create costs where there are end-users who would be required to purchase copies of larger documents on a regular basis. Consolidation can also be a highly complex and resource intensive operation. And even with informal consolidations (for example complete up to date amended texts placed on departmental websites) Departments have to be careful to prevent any possibility of accidental errors occurring on which users might rely and to avoid generating any confusion as to what is the authoritative text.
34. The Government indicated in its response to the Merits Committee that it would continue to dedicate resources to the task of formally consolidating instruments in appropriate cases. Likewise Departments will continue to identify opportunities for informal consolidations, assisted by new technology, where it is feasible to do so and where the additional resources required are manageable. These commitments were reiterated during the debate in the House of Lords on the Merits Committee report on 29 November 2006. DCA (now Ministry of Justice) Ministers have subsequently written to all departments on this point.

We recommend that steps should be taken to ensure that the related provisions of primary and secondary legislation should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search. [para 4.15]

35. Her Majesty's Stationery Office (HMSO) and the Statutory Publications Office (SPO), which produces the Statute Law Database, are to work together to create a single, powerful and free to access online legislation service. The launch of the SLD has been a milestone in government's online legislation publishing.

36. Over the last two years HMSO, via the OPSI website (www.opsi.gov.uk) has embarked on wide ranging improvements to how legislation is published online, taking account of key usability features for layout and navigation. This work is being undertaken as part of “The Transforming Legislation Publishing Programme”. The aim has been to present legislation in the most accessible and useable way, whilst maintaining the traditional strengths of immediacy and accuracy. One of the benefits is that it affords the opportunity to provide links to related information. Initially these links will be to the Explanatory Note for Acts or the Explanatory Memorandum for Statutory Instruments. Alongside this is also published an ATOM feed for the piece of legislation. This provides visitors with an easy way to keep up to date with subsequent additions to the website, like the addition of Explanatory Notes for an Act, and also the enacting or making of other related legislation such as Commencement Orders or, longer term, amending legislation. In future HMSO will be adding explicit links to Commencement Orders, and where legislation implements an EU Directive, a link also to that Directive.
37. HMSO/OPSI and SPO will continue to work together and with government’s online legislation visitors, to improve the service and ensure that UK legislation is available in a high quality and straight forward terms, with a freely available and powerful search.



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