



# The Law Commission

(LAW COM No 302)

## POST-LEGISLATIVE SCRUTINY

*Presented to the Parliament of the United Kingdom by the Secretary of State  
for Constitutional Affairs and Lord Chancellor by Command of Her Majesty  
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The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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<sup>1</sup> With effect from 1 August 2006.

<sup>2</sup> Until 31 July 2006.

**THE LAW COMMISSION**  
**POST-LEGISLATIVE SCRUTINY**

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# THE LAW COMMISSION

## POST-LEGISLATIVE SCRUTINY

To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

### PART 1 INTRODUCTION AND SUMMARY

#### TERMS OF REFERENCE

- 1.1 In 2004, the House of Lords Select Committee on the Constitution published a report, 'Parliament and the Legislative Process'<sup>1</sup> in which it recommended that:

...in order to ensure proper scrutiny of legislation most Acts other than Finance Acts should be subject to some form of post-legislative scrutiny.<sup>2</sup>

- 1.2 The Government responded to the House of Lords Constitution Committee report in April 2005<sup>3</sup> stating that:

...the Government believes that strengthening post-legislative scrutiny further could help to ensure that the Government's aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect. ... What is meant by post-legislative scrutiny is often ill-defined. It could range from a wide-ranging policy review to a quite 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.<sup>4</sup>

- 1.3 In our Ninth Programme of Law Reform<sup>5</sup> we agreed to carry out this work and stated that:

As the body charged with keeping all the law under review we naturally are concerned both at the volume of legislation that is passed by Parliament each year and whether it accurately gives effect to the policy aims avowed. We are also concerned if the law has unintended consequences which makes the law in general less certain and more complex.<sup>6</sup>

- 1.4 Work began on the post-legislative scrutiny project in July 2005.

<sup>1</sup> (2003-04) HL 173-I.

<sup>2</sup> Above, p 44, para 180.

<sup>3</sup> Parliament and the Legislative Process: Government's Response (2004-05) HL 114.

<sup>4</sup> Above, p 9, paras 31 and 32.

<sup>5</sup> (2005) Law Com No 293.

<sup>6</sup> Above, p 24.

## **THE CONSULTATION PROCESS**

- 1.5 This is an unusual project for the Law Commission. We are usually concerned with reform of substantive law. This project relates to the legislative process and analyses Parliamentary, Governmental and external processes for the evaluation of legislation once it has been brought into force. We recognised from the outset of this project that it was crucial for us to draw upon the expertise of those with detailed knowledge of the legislative process. We embarked upon an early consultation exercise on the scope of the project, with an open invitation for input posted on our website from September 2005. We targeted and received valuable suggestions from Parliamentarians, Parliamentary Counsel, Parliamentary clerks, Government departments, academics and others.
- 1.6 The early consultation exercise generated ideas that we distilled and set out in our consultation paper<sup>7</sup> that was published on 31 January 2006. On 1 March 2006 we held, in conjunction with the Statute Law Society, an open seminar on post-legislative scrutiny which proved to be a valuable part of the consultation process. During the consultation period we made a number of presentations on post-legislative scrutiny<sup>8</sup> and were particularly grateful for the opportunity to meet with the Liaison Committee in the House of Commons and the Chairs of select committees in the House of Lords. The consultation period ended on 28 April 2006. We received 29 written responses to our consultation paper. We are extremely grateful to everyone who has played a part in the consultation process. A full list of respondents to the consultation paper and participants in the consultation process can be found in Appendix D.
- 1.7 No one, through written response or other means of participation in the consultation exercise, has registered an objection to the proposition that there should be more post-legislative scrutiny. Although the principle has attracted very considerable support, a greater divergence of views has transpired in relation to the mechanisms that could be used for a more systematic form of post-legislative scrutiny. The consultation questions were deliberately framed broadly in order to elicit a full range of ideas on the purpose and benefits of post-legislative scrutiny and how it may be carried out more effectively. The resulting responses are wide-ranging.

## **OVERVIEW OF FINDINGS**

- 1.8 We have found there to be overwhelming support for the principle that there should be a more systematic approach to post-legislative scrutiny and that the process for such scrutiny should be controlled by Parliament. The more pertinent question is not whether systematic post-legislative scrutiny is desirable but whether there is an appropriate mechanism that can be used to achieve it. On that front, the way forward seems to us to be the setting up of a new joint Parliamentary committee on post-legislative scrutiny.

<sup>7</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178.

<sup>8</sup> These included an address to the Study of Parliament Group at their annual conference, participation in a staff seminar organised by the House of Commons Scrutiny Unit and a presentation to Government lawyers at the Office of the Deputy Prime Minister.

## **STRUCTURE OF THIS REPORT**

- 1.9 In Part 2 we analyse responses in relation to the reasons for post-legislative scrutiny. In Part 3 we focus on mechanisms for post-legislative scrutiny. Part 4 addresses delegated legislation. Part 5 considers responses and recent developments in relation to European legislation. Part 6 sets out a summary of our findings and conclusions. Appendix A lists case studies and candidates for post-legislative scrutiny that have been helpfully suggested by our respondents. Appendix B contains examples of post-legislative scrutiny in other jurisdictions. Appendix C contains statistics on the annual volume of legislation passed by Parliament. Finally, as mentioned, Appendix D contains a list of respondents and participants in the consultation process.



## **PART 2**

# **REASONS FOR POST-LEGISLATIVE SCRUTINY**

### **INTRODUCTION**

- 2.1 This part analyses responses on the purpose and benefits of post-legislative scrutiny and also examines its limitations.

### **DEFINITION OF POST-LEGISLATIVE SCRUTINY**

- 2.2 In Part 6 of the consultation paper<sup>1</sup> we noted that post-legislative scrutiny is a broad and undefined expression, which means different things to different people. This statement is certainly borne out by the responses we have received. The best approach to defining post-legislative scrutiny is to consider what its purposes and benefits should be and we do this in detail below.
- 2.3 In our consultation paper<sup>2</sup> we described a spectrum of review ranging from a narrow, legal form of review to a broader review which would address whether the intended policy objectives have been met by the legislation and, if so, how effectively. It is fair to say that the vast majority of respondents have indicated that post-legislative scrutiny should serve much broader purposes than a narrow review of legal consequences. Only two respondents indicated that a narrow review was preferable. Professor Colin Reid expressed preference for a narrow and technical review on the basis that “wider policy issues are more likely to be raised through the usual political channels without reliance on any automatic review procedure”. The Association of District Judges noted that the most important considerations for review were likely to be “difficulties in interpretation and unintended legal consequences”.
- 2.4 **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.**

<sup>1</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 31, para 6.6.

<sup>2</sup> Above, p 31, paras 6.6 to 6.7.

## **VOLUME OF LEGISLATION**

- 2.5 The need for post-legislative scrutiny arises in the context of the huge and increasing amount of legislation enacted every year, much of which does not, due to practical constraints, receive the fullest scrutiny during the legislative process.<sup>3</sup> Much of this primary legislation generates further regulation either in the form of secondary legislation or in the form of codes and guidance. We recognise that post-legislative scrutiny would not have any impact at all in stemming the flow or volume of new legislation, but the fact of the flow necessitates looking back to see what lessons may be learnt.<sup>4</sup> Many respondents have referred to the need to pause and reflect on existing law before embarking on further legislative change. We agree with this approach.

## **THE REASONS FOR POST-LEGISLATIVE SCRUTINY**

- 2.6 In Part 6 of the consultation paper, we set out the arguments for more systematic post-legislative scrutiny that had, at that stage, been suggested to us as a result of our early consultation.<sup>5</sup> Those arguments were well received by respondents. As a matter of generality, there was overwhelming support among consultees for the idea of developing more systematic post-legislative scrutiny. Respondents also suggested other purposes and benefits beyond those cited in our consultation paper. We now summarise the arguments advanced for more systematic post-legislative scrutiny and the cautions expressed before turning in Part 3 to what most consultees saw as major issues, ie questions of process and practicality.

### **Is legislation working in practice?**

- 2.7 Legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively. There was very wide support for this as a principal purpose of post-legislative scrutiny.

<sup>3</sup> See Appendix C for statistics on the volume of legislation.

<sup>4</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 30, para 6.2.

<sup>5</sup> Above, p 30, para 6.2.

### **Better regulation**

- 2.8 Post-legislative scrutiny should translate into better regulation. If there is to be commitment to better regulation, an obvious part of it is the examination of legislation once it has been brought into force; it may be that wider lessons can then be learnt about the method of regulation and the necessity for legislation.<sup>6</sup> The Insolvency Service comments that if post-legislative scrutiny is undertaken in a meaningful way, it should contribute to better regulation. Reviewing regulation is an important part of the work of the Better Regulation Executive within Cabinet Office.<sup>7</sup> We consider post-legislative scrutiny to be very much in keeping with the Government's current better regulation agenda.<sup>8</sup>

### **Focus on implementation**

- 2.9 Many consider that knowledge that there will be post-legislative scrutiny of a measure will have a salutary effect at the legislative stage in concentrating minds and sharpening the focus on implementation and its likely effects. They also argue that there is a need for greater clarification at the legislative stage of the objects of the legislation and, where appropriate, the timescale of its intended results. Opponents of this view argue that those responsible for the preparation of legislation already try to give full consideration to its anticipated effects.<sup>9</sup> JUSTICE specifically agreed with the first statement above and was "strongly sceptical" of the opposing view. The Hansard Society made the following comments about implementation more generally:

The practical and administrative impact of legislation should be a critical feature in many post-legislative reviews. Put most simply, it may be that the Act itself is sound (both in terms of the policy on which it is based and its legal expression) but it is the way that it has been put into practice which has caused issues of concern. There are numerous examples, the implementation of Tax Credits legislation being one, where the practical issues are as crucial to the success of the legislation as the policy underpinning it.

- 2.10 The Bar Council pointed out that:

The need is to ensure that a mechanism does exist for ensuring that where new legislation has created, or indeed is creating, difficulties in implementation, the causes of those difficulties can be examined and lessons learnt for the future.

<sup>6</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 30, para 6.2.

<sup>7</sup> [http://www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/) (last visited on 27 July 2006).

<sup>8</sup> The Government's commitments to better regulation are considered briefly at paras 3.23 to 3.29 below.

<sup>9</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 30, para 6.3.

### **Effect on delivery of policy aims**

- 2.11 There was also support for the view that knowledge that there is likely to be post-legislative scrutiny of a measure will provide a continuing spur to those responsible for delivery of the policy aims of the legislation.

### **Good practice**

- 2.12 The clearest articulations of the broad reasons in favour of more systematic post-legislative scrutiny can be considered under the heading of “good practice”. The Study of Parliament Group focused on “good practice”, explaining that:

The primary purpose of post legislative scrutiny carried out by or under the auspices of Parliament should be to identify and disseminate good practice (both in the process by which legislation is produced from the germ of an idea in Government to the ultimate Act of Parliament and its bringing into force, and in the substantive content of the legislation) and to enable Government, Parliament and others to learn from experience how to avoid negative and unintended consequences from legislation. ... In time, post legislative scrutiny should generate lessons drawn from the successes or failures that it reveals in the Acts scrutinised.

- 2.13 The Hansard Society also picked up the theme of good practice stating that:

Post-legislative scrutiny should not focus exclusively on defective legislation, much less be solely an exercise in the identification of failure and the allocation of blame. It is important that post-legislative scrutiny also encourages the identification and dissemination of best practice. It is vital that lessons are learned from the examples of legislation that works well in order to strengthen future policy and legislative development. We have noted that much discussion on this subject tends to assume that post-legislative scrutiny should only apply when something has gone wrong.

### **Quality of legislation**

- 2.14 The Hansard Society thought that “the knowledge that legislation may be formally reviewed may have the effect of improving the quality of legislation when it is being drafted and passed by Parliament, thereby reducing the need for amending legislation”. We consider that post-legislative scrutiny is bound to reveal lessons that can be learnt for the future, not only relating to the content of legislation but also for the method of regulation.

### **CAUTIONARY NOTES: THE LIMITATIONS OF POST-LEGISLATIVE SCRUTINY**

- 2.15 In our consultation paper, we made three cautionary comments about post-legislative scrutiny:<sup>10</sup>

<sup>10</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 32 to 33, paras 6.14 to 6.16.

- (1) **Risk of replay of arguments:** Post-legislative scrutiny should concentrate on the outcomes of legislation. Unless self-discipline is exercised by the reviewing body, and those giving evidence to it, there is a danger of it degenerating into a mere replay of arguments advanced during the passage of the Bill.
- (2) **Dependence on political will:** The evolution of a more systematic approach to post-legislative scrutiny will depend on a combination of political will and political judgement.
- (3) **Resource constraints:** Post-legislative scrutiny will place demands on resources that could be used elsewhere.

2.16 These cautionary comments were widely endorsed by respondents.

### **Risk of replay of arguments**

2.17 David Laverick, Pensions Ombudsman observed that, “there must be a danger that the more wide ranging scrutiny to establish whether the legislation has achieved its social or political purpose will reopen debates about the merits of that purpose”. The Study of Parliament Group wrote that the focus of post-legislative scrutiny “should not be on allocating or avoiding blame or political point scoring, since that would undermine the credibility and authority of post legislative scrutiny reports”. JUSTICE recognised the value of certainty and that political will for post-legislative scrutiny may be weakened if legislation is seen to be constantly open to being re-argued. However, they expressed “doubt that such an easy division between policy arguments, on the one hand, and outcomes, on the other, is sustainable”. The Law Society emphasised that:

Post-legislative review should be widely publicised as a “no-blame” process. Seeking to “name and shame” would be as counter-productive as it would be unpleasant. Frankness and openness about where things went wrong will not be encouraged if those identified face the prospect of a public drubbing ... Reviews should be conducted in a constructive and future-oriented manner, with the aim of ensuring that errors are fully identified and lessons are learnt.

### **Dependence on political will**

2.18 Many of the Parliamentarians to whom we have spoken have recognised lack of political will as the greatest hurdle to more systematic post-legislative scrutiny. However, speaking on behalf of the Government on 6 June 2005, Baroness Amos said:

Parliament and Government have a common interest in strengthening post-legislative scrutiny. From the Government’s point of view, it could help to ensure that the Government’s aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect.<sup>11</sup>

<sup>11</sup> Hansard (HL), vol 672, no 10, col 769.

2.19 Mr Geoff Hoon, in his capacity as Leader of the House of Commons, provided written evidence to the Modernisation Committee for its report on the legislative process.<sup>12</sup> In addressing post-legislative scrutiny, he identified a range of potential benefits from such scrutiny, including-

- (1) the immediate lessons for present and future policy (legislative and non-legislative) in the area covered by the Act;
- (2) the discipline that the knowledge of such a process would place on the preparation of the legislation;
- (3) the opportunity for scrutiny of the delegated legislation made under the Act; and
- (4) the wider lessons for preparation of bills in other areas.

2.20 At the same time, Mr Hoon cautioned that “there would be little net benefit in establishing a burdensome system of review which applied irrespective of need and which was not capable of feeding in effectively to the decision-making process. An effective case would therefore need to be made for supplementing the present ad hoc scrutiny which emerges from the normal political process with a more systematic structure”.<sup>13</sup>

#### **Resource constraints**

2.21 Professor Andrew Burrows warned that the “resource implications are huge ... to do it properly would take up vast amounts of Parliamentary time”. The Law Society support the introduction of a systematic process of post-legislative scrutiny but cite their main concern as being a practical one: “would, in reality, sufficient Parliamentary time be made available to implement the changes to legislation which post-legislative scrutiny processes recommended?” The Study of Parliament Group noted that while it is true that post-legislative scrutiny could place additional burdens on those involved, notably Parliamentarians, improvement of the legislative process could mitigate this.

<sup>12</sup> House of Commons Select Committee on Modernisation of the House of Commons, The Legislative Process, First Report, (2005-06), HC 1097, Ev 106.

<sup>13</sup> Above.

## **THE IMPORTANCE OF PRE-LEGISLATIVE SCRUTINY**

- 2.22 A number of respondents emphasised the importance of pre-legislative scrutiny.<sup>14</sup> Lord Newton of Braintree said that if there was to be a priority in the use of resources then it should be targeted at better pre-legislative scrutiny rather than post-legislative scrutiny. Better pre-legislative scrutiny would decrease the need for post-legislative scrutiny. The Study of Parliament Group made a similar argument, noting that “a greater degree of focus on ‘front end’ (ie pre-legislative and legislative scrutiny) ... would arguably serve to reduce errors and the scope for unintended outcomes”. David Laverick, the Pensions Ombudsman, said that, “we should not lose sight of the benefits of greater pre-enactment scrutiny. Post-legislative scrutiny does smack of shutting (or considering whether to shut) a stable door after the horse has bolted”. But seeing whether the horse has bolted, and if so why, can be valuable precisely because of the lessons it may provide for the future. In written evidence to the Modernisation Committee for its report on the legislative process, Sir Nicholas Winterton MP expressed the view that post-legislative scrutiny is arguably even more important than pre-legislative scrutiny, noting that “although the likely or possible impact of a law can be assessed, this cannot compare with an assessment of how legislation has operated in real, practical terms”.<sup>15</sup>
- 2.23 In summary, we recognise the value of pre-legislative scrutiny but also recognise that post-legislative scrutiny has a different role to play. Post-legislative scrutiny should not jeopardise commitment to pre-legislative scrutiny. However, it is useful to consider how pre-legislative scrutiny can facilitate post-legislative scrutiny; we look at this in more detail in Part 3. As we noted in our consultation paper, it is helpful to consider the two types of review as part of one process.<sup>16</sup>

## **CONCLUSION**

- 2.24 **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.**

<sup>14</sup> We discussed the experience of pre-legislative scrutiny in Part 4 of our consultation paper.

<sup>15</sup> House of Commons Select Committee on Modernisation of the House of Commons, The Legislative Process, First Report, (2005-06), HC 1097, Ev 123.

<sup>16</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 22, para 4.5.

**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. These hurdles are addressed through the mechanisms described in Part 3.**



# **PART 3**

## **POST-LEGISLATIVE SCRUTINY MECHANISMS**

### **INTRODUCTION**

- 3.1 As we noted in Part 2, respondents considered post-legislative scrutiny to have a wide range of purposes. We do not think it would be wise to exclude any of the purposes that have been cited. However, we recognise, as pointed out by the Study of Parliament Group that different aspects of post-legislative scrutiny require vastly different kinds of expertise. This is one of the main reasons why a one-size-fits-all approach to post-legislative scrutiny is inappropriate. In recognition of this, the key to any system is flexibility.
- 3.2 In our consultation paper we said that, in order to be of value, the scrutiny work is likely to be quite detailed and therefore time-consuming. We said that it would be far more preferable to have effective review of a few pieces of legislation a year rather than a perfunctory review of many Acts.<sup>1</sup> We stand by those comments and for pragmatic reasons do not see any merit in proposing blanket scrutiny of all measures.
- 3.3 Another factor that should be considered in the context of post-legislative scrutiny is the cumulative effect of legislation. Constant legislative change in a particular area by successive layers of new legislation and regulation may have a bewildering cumulative effect. It may not be possible to conduct effective post-legislative scrutiny of a single enactment if that enactment is simply one jigsaw piece in the puzzle.
- 3.4 A strong message that we have received from respondents is that Parliament should have ownership of the process of post-legislative scrutiny. In this Part, we briefly summarise our approach in the consultation paper before analysing respondents' ideas for a system of review and proposing a way forward.

### **SUMMARY OF APPROACH IN THE CONSULTATION PAPER**

- 3.5 In our consultation paper, we noted that a process of post-legislative scrutiny could be Governmental, Parliamentary or external or it might involve elements of all three.<sup>2</sup> We proposed two complementary avenues for review which incorporated all three of these elements. Avenue 1 contemplated pre-planned post-legislative scrutiny for which a positive commitment to review is made in advance of enactment. Avenue 2 relied upon post-enactment triggers for review. We described the two avenues in outline as follows:

<sup>1</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 49, para 7.57.

<sup>2</sup> Above, p 35, para 7.5.

**Avenue 1:** A positive commitment to review is made during the passage of the Bill. After an appropriate period post-enactment, the relevant Government department carries out an initial review, which is then published as a report and laid before Parliament. This process could be overseen by central Government to ensure that it is effective. The relevant departmental select committee then reviews the report and if it thinks it appropriate follows it up by conducting its own scrutiny of the effect of the legislation. It may choose to take evidence (in writing or orally) and it may commission further research by an independent body. Where more than one departmental select committee has an interest in the subject matter, it would be for them to decide between themselves how to proceed. This avenue is broadly based on the approach proposed by the House of Lords Constitution Committee.<sup>3</sup> If the departmental select committee does not intend to conduct post-legislative scrutiny of the Act, a committee of the House of Lords might consider doing so. Alternatively, there could be a new joint committee of both Houses to co-ordinate the process of post-legislative scrutiny. The joint committee could either carry out scrutiny work itself, based on the departmental review, or perform a sifting function, directing work to another committee or to a sub committee.

**Avenue 2:** No positive commitment to post-legislative scrutiny is made during the passage of the Bill. This does not necessarily mean that the Bill is deemed inappropriate for review, but may simply reflect the fact that Government is not likely to commit to more post-legislative scrutiny than it has the resources to carry out effectively. This avenue does not presuppose a departmental review and in some respects reflects the status quo. The decision to review a particular piece of legislation is reactive and taken post-enactment, rather than being pre-planned as in avenue 1. Therefore, there are different triggers for post-legislative scrutiny in avenue 2. Central Government, as part of its better regulation agenda, could have a role in identifying, post-enactment, legislation that should be reviewed in order to kick-start a review process. Alternatively, the departmental select committee, or (if established) the new joint committee may decide that a particular Act or provisions within an Act should be reviewed. The committee could (as a departmental select committee already can) request information from the department or commission research from an independent body or undertake the review itself by launching its own inquiry and taking evidence before producing a final report. The decision by Government or a Parliamentary committee to initiate a review of the Act might result from input by an external body.

<sup>3</sup> Described in Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 10, para 2.16.

- 3.6 These suggestions elicited a wide range of ideas from respondents as to how and by whom post-legislative scrutiny might be undertaken. Given the variety of responses, we think that the best way to proceed in this report is not to mirror the “avenues” approach taken in the consultation paper but to concentrate on the stages of the review process.

### **CLARIFICATION OF POLICY OBJECTIVES**

- 3.7 The prelude to any system of post-legislative scrutiny must be the clarification of policy objectives. We invited views from consultees on whether it is desirable to clarify policy objectives at an early stage and if so on the most suitable document or documents for so doing. On the *desirability* point, the overwhelming response was that the clarification of policy objectives is vital to legislative scrutiny at every stage, not just post-legislative scrutiny. However, there was a greater divergence of views on *location*, ie in which document objectives should be specified.

#### **Desirability**

- 3.8 With regard to the clarification of objectives, Lord Norton of Louth stated: “I believe that the crucial requirement is that the objectives of a Bill and possible criteria for review are clearly adumbrated at the time that a Bill is published”. The Insolvency Service wrote that the “clarification of policy objectives at an early stage is essential. This is, after all, a key issue to ensure that the legislation proposed is fit for purpose ...”. Liberty noted that the clarification of policy objectives was a “significant issue for post-legislative scrutiny. Unless the benchmark standards against which legislation will be scrutinised post-enactment are identified, post-legislative scrutiny is impossible”.
- 3.9 In April 2006, the Better Regulation Commission published its review of the implementation of the Licensing Act 2003.<sup>4</sup> One of the Commission’s conclusions was that: “A key element of good regulation is being clear about the objectives and sticking to them. We believe that this did not happen with the Licensing Act and this is where the problems began”.<sup>5</sup>

#### **Location<sup>6</sup>**

- 3.10 Nine respondents specifically considered the document in which objectives should be clarified. Of the nine, two made an argument in favour of purpose clauses on the face of the Bill. A number of other respondents specifically rejected the notion that objectives should be spelled out in the legislation itself. Professor St. John Bates stated that:

The real difficulty is to achieve sufficient particularity to support post-legislative review without providing a hostage to political fortune.

<sup>4</sup> Implementation of the Licensing Act 2003: A review by the Better Regulation Commission (April 2006).

<sup>5</sup> Above, p 21, para 48.

<sup>6</sup> See pages 36 to 38 of Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178 for a full discussion of the options.

- 3.11 Professor St. John Bates also pointed to the well-known political, drafting and procedural pitfalls of using purpose clauses and added that it is doubtful that even an elaborate purpose clause would provide the detailed underpinning required for post-legislative review.
- 3.12 In its response<sup>7</sup> to the House of Lords Constitution Committee Report, Parliament and the Legislative Process,<sup>8</sup> the Government agreed that “explanatory notes should clearly indicate what the purpose of a bill is”.<sup>9</sup> However, the Government was not persuaded that it would be appropriate to include in the explanatory notes the criteria by which the Bill, once enacted, can be judged to have met its purpose. Arguments for and against using explanatory notes for these purposes were evenly split. The Bar Council would welcome “clear policy statements made by Ministers during the course of the Parliamentary process”. The Government also favoured policy documents,<sup>10</sup> but as Professor St. John Bates pointed out, this was “procedurally ineffective” and a “rather untidy” approach.

### ***Regulatory Impact Assessments***

- 3.13 A number of respondents argued in favour of setting out the objectives of the bill in Regulatory Impact Assessments, (RIAs). Lord Norton commented that they would be an “acceptable vehicle” and that they would also have the advantage of coming within the purview of the Better Regulation Commission. The Law Society thought that “the RIA is an excellent place to state the aims of the measure, since RIAs are required for both primary and secondary legislation, and such a statement is already a required part of the RIA”. Cabinet Office guidance on RIAs states that the objective of the proposal should be clearly defined so that it sets out the intended outcome.<sup>11</sup> We endorse the view of Lord Norton that responsibility for the way in which the objectives of a Bill are set out rests with the Government and Cabinet Office Guidelines could be the means through which guidance is given to ensure consistency.

<sup>7</sup> (2004-05) HL 114.

<sup>8</sup> (2003-04) HL 173-I.

<sup>9</sup> (2004-05) HL 114, p 9, para 34.

<sup>10</sup> Above, para 35.

<sup>11</sup> [http://www.cabinetoffice.gov.uk/REGULATION/ria/ria\\_guidance/purpose\\_and\\_intended\\_effect.asp](http://www.cabinetoffice.gov.uk/REGULATION/ria/ria_guidance/purpose_and_intended_effect.asp) (last visited 12 September 2006).

3.14 We noted in our consultation document that RIAs are scrutinised by the Better Regulation Commission and the National Audit Office. The latter found in a recent survey that six out of ten RIAs did not give any details of monitoring or evaluation procedures despite the requirement to do so as set out in Cabinet Office guidelines.<sup>12</sup> On 28 June 2006, the National Audit Office published its report, Evaluation of Regulatory Impact Assessments 2005-06.<sup>13</sup> The NAO found that implementation, monitoring and evaluation are “often tackled poorly” in RIAs and stated that: “Robust monitoring and evaluation strategies will help departments to identify those regulations which are effective, those that need to be adjusted, and those which can be removed without compromising benefits”.<sup>14</sup> The NAO Report also addressed post-legislative scrutiny and stated that Government departments had focused their attention on regulatory impact assessment, with limited efforts to evaluate the impact of legislation after it comes into force. The NAO concluded that:

Departments do not, therefore, have sufficient oversight of whether their regulations are delivering the intended impacts and there is no systematic feedback on the robustness of the assumptions used in the RIA.<sup>15</sup>

3.15 The NAO found a wide variation between departments in the extent to which they had considered the need for, and had begun to evaluate, the impact of regulation and cited the DTI as having undertaken the most strategic work.

3.16 **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.**

#### **IDENTIFICATION OF REVIEW CRITERIA**

3.17 It is clear that the policy objectives will provide a good starting point for considering criteria against which post-legislative review could be undertaken. However, as pointed out by the Law Society, 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. As we noted in our consultation paper, “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 against which to measure the effects of the legislation”.<sup>16</sup> We stand by those comments.

<sup>12</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 38, para 7.15.

<sup>13</sup> Report by the Comptroller and Auditor General, HC 1305 Session 2005-06.

<sup>14</sup> Above, p 20, para 2.17.

<sup>15</sup> Report by the Comptroller and Auditor General, HC 1305 Session 2005-06, p 13, para 1.17.

<sup>16</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 39, para 7.19.

## **SYSTEMATIC REVIEW: THE ROLES OF GOVERNMENT, PARLIAMENT AND INDEPENDENT REVIEWERS**

- 3.18 At present, we have various forms of review which could be built upon.<sup>17</sup> Departments carry out internal reviews. The Better Regulation Executive within Cabinet Office is concerned with the efficiency of government regulation. Departmental select committees sometimes carry out reviews in line with one of their core tasks: to examine the implementation of legislation and major policy initiatives. Independent bodies such as the National Audit Office carry out reviews and sometimes legislation provides for the appointment of an independent reviewer. We acknowledge the value of existing forms of review but note that there is no established process for the review of legislation and that the reviews that are undertaken are done so on an ad hoc basis.
- 3.19 There is however a strong belief that there is a need for more systematic post-legislative scrutiny. We think:
- (1) that the approach should be evolutionary (consistent with the way in which the system of government has developed),
  - (2) that it should build upon what is already in place, and
  - (3) that more systematic post-legislative scrutiny may take different forms.

We consider in turn how methods of post-legislative scrutiny might be developed involving Government, Parliament and independent reviewers. These are not mutually dependent.

### **GOVERNMENT REVIEW**

- 3.20 In our consultation paper, we posed the question whether the relevant Government department should ordinarily carry out an initial review of legislation. Fourteen respondents addressed this point specifically, of which only two, the Insolvency Service and the Association of District Judges, answered in the affirmative. A further two respondents, the Association of Charitable Foundations and the Children's Legal Centre and National Children's Bureau (joint response) thought that any initial Government review should be followed up by an independent review. The Hansard Society thought that: "Government departments have a key role to play in post-legislative scrutiny. They should be encouraged to produce reports as a matter of routine on the effects of legislation and make such material available to Parliament". The Bar Council was resigned to the fact that "there will be situations where scrutiny is pre-planned and where the appropriate body, at least initially, for carrying out that scrutiny will be the sponsoring department". However, the Bar Council thought that where scrutiny is sparked by perceived difficulties following enactment, it is important that it should be independent of the sponsoring department. Seven respondents did not agree that the Government department should carry out the initial review. David Laverick noted that:

<sup>17</sup> See Part 3 of Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178 for a full discussion of existing forms of post-legislative scrutiny.

The Government Department which has sponsored the legislation will clearly have a role to play in any post-legislative review but should not itself be the starting point for that review. If post-legislative scrutiny is to be effective ... it should be owned by, and directed by Parliament. The Government will of course be a major contributor to that review but should not be in charge of the process or be in a position unduly to influence that process.

- 3.21 The Study of Parliament Group thought that objections to Government conducting its own review were likely to be that it will “overstate the gains and understate the losses”. The Group went on to point out that looking to others such as research bodies or academics would in turn mean that the department would either (a) want to make its own input to the report, or (b) publish its own separate report by way of response. If Parliament is also going to commission research, the Study of Parliament Group commented that post-legislative scrutiny would become a very expensive business. However, Professor John McEldowney pointed out that the question of how to assess the effectiveness of legislation is likely to have to be department led and involve similar considerations to the value for money work carried out on behalf of Parliament by the National Audit Office. The Centre for Public Scrutiny observed that, although reviews by departments have recently increasingly incorporated evidence and the public view, “their very position in government and the core executive compromises their ability to act in an independent manner”.
- 3.22 It is important to note that these responses were based on proposals in our consultation paper that there ought to be a two-stage review process, initiated by Government and followed up by Parliament. In this context, it is clear that most respondents would prefer to see post-legislative scrutiny Parliament-led rather than Government-led although there is significant acknowledgement that Government departments would necessarily have an important role to play. On reflection, the two-stage process described in the consultation paper may not be the most efficient approach to post-legislative scrutiny. As we noted in our consultation paper, Government already undertakes a large amount of important review work.<sup>18</sup> We do not take from consultees’ comments the message that Government should undertake less review work, rather that Parliament should undertake more.

### **The role of central Government**

- 3.23 That central Government should have a role in triggering post-legislative scrutiny has been greeted with cynicism in some quarters. However, we do not share this cynicism and see merit in Government involvement in post-legislative scrutiny as part of the better regulation agenda. Furthermore, we see this role as entirely consistent with good governance and the Government’s support for better pre-legislative scrutiny and strengthened regulatory impact assessments. We see the Parliamentary role as vital to the success of a system of post-legislative scrutiny but consider that it will work best if Government is committed to it.

<sup>18</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, pp 13 to 14, paras 3.2 to 3.11.

3.24 In the light of these observations, we therefore pose the question why Government would not be prepared to take some central responsibility for post-legislative scrutiny? A natural part of any drive for better regulation is to conduct some form of scrutiny of regulations which have been introduced. If it is to be more meaningful than a tick box exercise, it could not be done for every measure. However, central Government could realistically make it part of its better regulation agenda that there should be a rolling programme of post-legislative scrutiny involving an audit of a cross-section of new legislation. This would build upon the role of the Better Regulation Executive within Cabinet Office which works on a number of projects to review regulation.<sup>19</sup>

3.25 This would also build on the commitments already made by Government in its Response<sup>20</sup> to the Better Regulation Task Force Report, Regulation – Less is More.<sup>21</sup> The Task Force recommended that by September 2006, all departments, in consultation with stakeholders, should develop a rolling programme of simplification to identify regulations that can be simplified, repealed, reformed and/or consolidated. The Task Force also recommended that:

Departments should undertake post-implementation reviews of all major pieces of legislation, the results of which should feed into their rolling simplification programme.

3.26 The Government responded that departments are required to conduct reviews of regulations to ensure that they are having the intended effect and that guidance on RIAs would be strengthened to ensure that departments record how and when new regulations will be monitored and reviewed. The RIA checklist<sup>22</sup> states that major new regulations will have to be reviewed within three years of coming into force. However, at present, “major new regulations” are not defined; the review refers to internal review only and the checklist is only guidance.

3.27 The Government has also pledged to produce departmental simplification plans as part of its better regulation agenda. The aim is for these to be published before the pre-Budget Report in late 2006. These plans will “need to demonstrate how a net reduction in administrative burdens will be delivered. This means that as well as reducing administrative burdens from existing regulation, the administrative burden of new regulation will have to be minimised”.<sup>23</sup> The Better Regulation Commission will scrutinise the emerging simplification plans and publish assessments of whether they are “credible to stakeholders, properly quantified, ambitious and deliverable”.<sup>24</sup>

<sup>19</sup> [http://cabinetoffice.gov.uk/regulation/reviewing\\_regulation/](http://cabinetoffice.gov.uk/regulation/reviewing_regulation/) (last visited 27 July 2006).

<sup>20</sup> Better Regulation Executive, Formal Government Response to Regulation – Less is More. Reducing Burdens, Improving Outcomes (18 July 2005).

<sup>21</sup> Better Regulation Task Force, Regulation – Less is More. Reducing Burdens, Improving Outcomes (March 2005).

<sup>22</sup> [http://www.cabinetoffice.gov.uk/regulation/ria/ria\\_guidance/ria\\_checklist.asp](http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/ria_checklist.asp) (last visited 27 July 2006).

<sup>23</sup> [http://www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/reducing\\_admin\\_burdens/faqs.asp](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/reducing_admin_burdens/faqs.asp) (last visited 27 July 2006).

<sup>24</sup> See <http://www.brc.gov.uk/scrutiny/> (last visited 27 July 2006).



3.28 During the Committee Stage of the Legislative and Regulatory Reform Bill in the House of Lords, Lord Bassam of Brighton stated on behalf of the Government: “We believe that all departments should keep their legislation under review”.<sup>25</sup> He pointed to the Panel on Regulatory Accountability chaired by the Prime Minister and the regulatory reform Ministers in the main regulatory departments as evidence of the commitment to reviewing legislation.

3.29 **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.**

### **PARLIAMENTARY REVIEW**

3.30 There is a strong view that, however desirable it is to have more Government-led post-legislative scrutiny, Parliament has a separate and important interest and role to perform. The conclusion that we were able to draw from the 1 March seminar on post-legislative scrutiny was that there was general agreement that Parliament should have a strong involvement in any system of post-legislative scrutiny and that review work should not be left to Government departments alone. This is strongly reflected in the written responses and perhaps reflects the reality that the “scrutiny gap” that post-legislative review would seek to fill is Parliamentary rather than Governmental. JUSTICE made the following point:

We consider that there is a positive, constitutional reason why post-enactment review of legislation is more appropriately the work of Parliament – namely that it contributes to the core function of the legislative branch to make laws wisely.

3.31 As we cited in our consultation paper, the House of Commons Liaison Committee has said that, “committees are well-suited to undertaking post-legislative scrutiny, in part because they can be more candid than government-led or government-sponsored reviews, and more responsive to the views of stakeholders”.<sup>26</sup> We discussed in our consultation paper how departmental select committees do have the power to conduct post-legislative scrutiny and have in fact conducted some of this kind of work but that there are limitations on capacity.<sup>27</sup> We endorse the approach of Lord Norton who stated that:

Parliament must retain, and exercise, its discretion as to whether or not to engage in post-legislative scrutiny. One advantage of having in place a dedicated Parliamentary mechanism for post-legislative scrutiny is that it is likely to concentrate the minds of Ministers and officials in justifying a decision that a measure does not require post-legislative review.

<sup>25</sup> HC Hansard 10 July 2006, col 494.

<sup>26</sup> House of Commons Liaison Committee Annual Report 2004, HC (2004-05) 419, para 74.

<sup>27</sup> See Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, pp 15 to 16, paras 3.14 to 3.17 and p 43, para 7.35.

- 3.32 We focus now on the scope for a Parliament-led review. It is worth repeating here, as we acknowledged in our consultation paper, that ultimately any Parliamentary system of post-legislative scrutiny is a matter for Parliament to determine. In the comments that follow, we are simply reporting the responses that we have received. **The idea that has gained the most support from respondents is that there should be a new joint Parliamentary committee on post-legislative scrutiny.** We consider next the arguments in favour of setting up such a committee and the roles that it could play.

#### **The role of a joint committee on post-legislative scrutiny**

- 3.33 In our consultation paper, we sought views from consultees on the most appropriate Parliamentary body or bodies for conducting post-legislative scrutiny. We also asked consultees whether they saw any value in having a joint committee on post-legislative scrutiny even if such a committee does not in fact undertake all of the scrutiny work itself.<sup>28</sup>
- 3.34 Seventeen of the written responses envisaged a role for a joint committee on post-legislative scrutiny. This was also an idea that proved popular at the 1 March seminar and with many of the Parliamentarians to whom we have spoken. There was a wider divergence of views in relation to what a new joint committee would actually do. Some respondents did not see the joint committee undertaking review work itself but rather acting as a committee having oversight of the process. The Hansard Society gave a useful summary of the options:

The formation of a joint committee on post-legislative scrutiny has been widely proposed. We believe that this model should be closely considered. Such a committee could act as a co-ordinating or sifting committee, identifying legislation suitable for post-legislative review and the type of post-legislative scrutiny best suited to a particular situation. It could have the power (perhaps triggered by departmental reviews, requests from the public etc) to refer cases to a departmental select committee or an ad hoc committee. Alternatively it could commission external bodies to undertake research on the impact of an Act. In certain cases, it might decide to conduct an inquiry itself. There are a number of ways in which a joint committee could operate and we are attracted to the potential of this model. It is widely recognised that joint committees of both Houses can bring different sets of expertise and political (and frequently non-political) experience as well as combining the status and authority of both Houses. Successful examples of joint committees, such as the Joint Committee on Human Rights, are testament to that fact.

<sup>28</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 44, para 7.40.

- 3.35 The Study of Parliament Group put forward a proposition for a new independent body to undertake post-legislative scrutiny.<sup>29</sup> In this context the following points were made about the potential role of a joint committee:

There may be value in one overarching joint committee to draw lessons horizontally, from the variety of post-legislative scrutiny reports. Such a committee could also have a wider remit. For instance, if it were accepted that an independent expert authoritative body should be available to carry out some post legislative scrutiny, that body could be given its tasks by and report to such a joint committee. The committee could sift through the various requests for post-legislative scrutiny that would no doubt surface if a commitment were made to such a system either by Government or by the two Houses of Parliament. It is to be anticipated that members of each House would identify aspects of legislation that they considered due for post legislative scrutiny, and they would be approached by interest groups, NGOs and other bodies to press for post legislative scrutiny of some kind to be carried out. A joint committee could, with the assistance of its support staff, identify legislation the post-legislative scrutiny of which should be prioritised and given to the [independent body]. The committee could identify of its own motion suitable objects of post-legislative scrutiny by the [independent body].

- 3.36 We discuss further the role of an independent review body in paragraphs 3.49 to 3.53 below. Lord Norton of Louth produced a detailed and considered argument for a joint Parliamentary committee. We endorse his approach and summarise his main arguments below:

***The advantage of a joint committee***

- 3.37 Lord Norton proposed a joint Parliamentary committee, analogous to the Joint Committee on Human Rights, with the capacity to draw on the resources of the Scrutiny Unit,<sup>30</sup> complemented by the capacity to commission research. He observes that “where departmental select committees already carry an onerous burden, measures that justify post-legislative review may slip through the net. This makes the case for a dedicated committee”. Crucially, under Lord Norton’s proposal, “departmental select committees would retain the prerogative to undertake post-legislative review, but, if they decided not to exercise their prerogative, the potential for review would then pass to a dedicated committee”.
- 3.38 Another advantage of a joint committee, consisting of members from the Commons and the Lords would be that this composition would assist its objectivity as a reviewing body.

<sup>29</sup> This proposition is discussed at paragraph 3.49 below.

<sup>30</sup> The Scrutiny Unit was established as part of the Committee Office of the House of Commons in 2002. The Unit consists of Parliamentary clerks, economists, lawyers and a statistician. The present role of the Unit is to assist select committees with pre-legislative scrutiny of draft Bills and to provide advice on matters relating to the scrutiny of expenditure by Government departments.

### ***Terms of reference of a new joint committee***

- 3.39 Lord Norton argued that the joint committee should be vested with broad terms of reference to consider which Acts of Parliament require review and to report accordingly. This would allow the committee to determine its own approach and to adapt it in the light of experience. Under the model proposed by Lord Norton, it would be for the joint committee to decide which Acts should be subject to review<sup>31</sup> and to determine the appropriate timescale for review. Lord Norton also envisaged that the joint committee would follow the practice of the Joint Committee on Human Rights in encouraging submissions from outside organisations, not only once it has decided to review a particular Act but also prior to any consideration.
- 3.40 The committee could develop organically and its role could extend to reviewing Bills to assess their suitability for later scrutiny and consideration of whether a review clause<sup>32</sup> might be appropriate.

### ***The role of the Scrutiny Unit***<sup>33</sup>

- 3.41 Lord Norton observed that the Scrutiny Unit has already proved its value in terms of assisting Parliamentary committees in pre-legislative scrutiny. It has a range of expertise that lends itself to post-legislative scrutiny. Indeed, the expertise extends beyond subject competence to an understanding of legislative scrutiny. It is therefore ideally placed to assist the joint committee. It would help maximise the resources of the existing Unit and would not necessarily entail a large increase in the resources of the Unit if the joint committee were empowered to commission research.

### ***Independent research***

- 3.42 Lord Norton recognised that there are various bodies that have the capacity to undertake research appropriate to particular measures; these include universities, the National Audit Office, and independent research bodies, such as the Institute for Fiscal Studies. Universities have departments and units that have expertise relevant to particular types of legislation. Enabling a joint committee to commission research would “ensure that the expertise remained on tap while the committee remained on top”.

<sup>31</sup> We discuss this in more detail in paragraphs 3.68 to 3.70 below.

<sup>32</sup> See para 3.55 below.

<sup>33</sup> See n 29 above on the current role of the Scrutiny Unit.

### ***Form of scrutiny***

- 3.43 Lord Norton envisaged a joint committee that is able to determine for itself how best to approach its task of post-legislative scrutiny. This would encompass the form of scrutiny and a clear and transparent checklist would ensure some element of standard-setting. He suggested that the basic checklist could be that adumbrated by the Law Commission for “broader review”,<sup>34</sup> as favoured by most Parliamentarians consulted. In our consultation paper, we suggested that a broader form of review would address the question whether the Act has delivered what was intended in practical as well as legal terms. This would involve questions such as:

Have the policy objectives been achieved?

Has the legislation had unintended economic or other consequences?

Has it been over-cumbersome?

Do any steps need to be taken to improve its effectiveness/operation?

Have things changed so that it is no longer needed?

- 3.44 We also see scope for a new joint committee to carry out a narrower form of scrutiny. We mentioned in our consultation paper that narrow scrutiny could include whether legislative provisions had been brought into force and if not, why not. This form of scrutiny is not onerous and ought to be undertaken regularly. If a joint committee on post-legislative scrutiny is set up, it could undertake this task. In 1997, the Cabinet Office published a document called *Bringing Acts of Parliament into Force*.<sup>35</sup> The document was published in response to a recommendation from the House of Lords Select Committee on Procedure of the House that the Government should lay before Parliament a list of Acts and provisions within Acts which had been enacted but which had been neither repealed nor brought into force, giving reasons for the delay in each case. This was a one-off exercise. We suggest that it should be undertaken at least once in the lifetime of a Parliament (ie between elections). Although the majority of legislation is brought into force, in terms of accountability it is important for Government to state publicly provisions that have not been brought into force and the reasons for this.

### ***The effectiveness of a new joint committee***

- 3.45 Lord Norton noted that as with the Joint Committee on Human Rights – and, indeed, other select committees – the leverage of the joint committee in achieving change will derive not from any formal sanctions (it will have none) but from the authoritative and persuasive nature of the reports it produces.

<sup>34</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 47, para 7.51.

<sup>35</sup> Cm 3595.

### **The role of departmental select committees**

- 3.46 As we pointed out in our consultation paper, departmental select committees can, and sometimes do, undertake post-legislative scrutiny.<sup>36</sup> However, as Lord Norton and many others have pointed out, departmental select committees are already heavily burdened, some especially so. Despite this, some respondents felt that the select committees are the most appropriate Parliamentary bodies to undertake post-legislative scrutiny. For example, the Centre for Public Scrutiny believed that select committees are best placed to provide a “critical friend” challenge to the Executive and thought that select committees’ core tasks should be updated to formalise an enhanced role in post-legislative scrutiny. The Centre acknowledged that additional resources would be required but thought that co-opting members of the House of Lords, external experts and an enhanced Scrutiny Unit could provide support.<sup>37</sup>

### **Conclusion**

- 3.47 **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.**

### **THE LINK BETWEEN GOVERNMENT REVIEW AND PARLIAMENTARY REVIEW**

- 3.48 We are not suggesting that post-legislative scrutiny should necessarily be a two stage process, stage one in the hands of Government and stage two in the hands of Parliament. This would be too rigid. Departmental reviews are important in their own right and will be enhanced by the knowledge that they can and might be followed up by Parliament in a formal sense. This is dependent on Parliament having in place a visible and dedicated committee. The link between Government review and Parliamentary review is therefore envisaged to be two-way and flexible. A new joint Parliamentary committee could if it wished pick up a departmental review and conduct further review on the same provisions. Alternatively, the committee can decide that a review should be undertaken and request data from the relevant department.

### **INDEPENDENT REVIEWERS**

#### **A new independent post-legislative scrutiny body?**

- 3.49 Two respondents made strong arguments for a new independent body charged with undertaking post-legislative review work. These propositions will be considered in turn.

<sup>36</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, pp 15 to 16, paras 3.14 to 3.17 and p 43, para 7.35.

<sup>37</sup> We discuss the role of the Scrutiny Unit in Consultation Paper No 178, p 23, para 4.7 and p 38, para 7.17.

- 3.50 The Study of Parliament Group (SPG) proposed that some of the responsibility for post-legislative scrutiny should lie with one or more authoritative and expert non-party-political bodies. The SPG thought that the National Audit Office provides a helpful model for such a body, as it already carried out post-legislative scrutiny, primarily against financial or value for money criteria. Its statutory remit could be extended to embrace a wider range of criteria or alternatively a separate body could be established. Such a body could report to a Parliamentary committee, in much the same way as the National Audit Office and Comptroller & Auditor General report to the Public Accounts Committee. A new joint committee on post-legislative scrutiny would be appropriate for this role and would have the power to refer particular legislation to the new body for review. The SPG envisaged a body which could either consist of staff of the two Houses of Parliament or be independent. There would be a small permanent staff and people with necessary experience, engaged on an ad hoc basis, to scrutinise parts of particular legislation. The body should have specific standing terms of reference for example to enquire into and report on the legal workability of the provisions under scrutiny, and any lessons in the way of good practice or mistakes to be avoided in future. The SPG left open the question of whether there should be consideration of the merits of the policy of the legislation and questioned whether effective post-legislative scrutiny can be undertaken at all divorced from consideration of the merits. However, it is worth noting that the National Audit Office does not consider the merits of policies as part of its scrutiny work.
- 3.51 The Law Society also put forward the idea of an independent co-ordinating body to handle post-legislative reviews. Such an organisation could either be based in an existing body such as the National Audit Office or an expanded Law Commission, or a body newly created for the purpose, possibly answerable to a joint committee on post-legislative scrutiny. The Law Society thought that if sufficient additional resources were made available for this to be fully effective, it would be preferable for one such overall independent body to be charged with managing and co-ordinating the work of post-legislative review processes from all sources. The Law Society envisaged that anyone could ask the central body to arrange reviews but requests from Government departments and Parliamentary committees would carry particular weight. The body should be able to commission research and could act as a central collecting and monitoring point for problems with legislation generally and would be accessible to members of the public.

### **The role of the National Audit Office**

- 3.52 The response that we received from the National Audit Office (NAO) specifically addressed the possible role it might have in any system of post-legislative scrutiny. The NAO noted a link between its financial audit and post-legislative scrutiny. In central Government and for specified health entities and probation boards there is an explicit statutory requirement on the auditor to provide an additional statement on the regularity of transactions underlying the entity's financial statements. Regularity includes the requirement that financial transactions are in accordance with authorising legislation or regulations issued under governing legislation. Where the audit opinion is qualified as a consequence of material irregularity, the NAO provides Parliament with a detailed explanation. In most cases the irregular payments are likely to be the result of fraud or departmental error. But there may be occasions where the irregularities arise from inadequate legislation.
- 3.53 The NAO noted that post-legislative scrutiny designed to assess whether the intended policy objectives have been met by the legislation and if so, how effectively, would have clear links to the value for money work undertaken by NAO. However, there would be little synergy between the mainstream work of the NAO and a narrower form of post-legislative scrutiny which concentrated on the legal effects of legislation. The NAO concluded that:

Any significant involvement in post-legislative scrutiny, particularly of legislation which does not involve the use of significant taxpayer resources, would represent a new stream of work for the NAO. However, recognising that the NAO is well placed to meet requirements for expert advice in many areas, Parliament has provided additional resources for the NAO to contribute its expertise to the work of Parliament more widely. Under this work stream we would consider any proposals inviting our assistance with post-legislative scrutiny.

### **Conclusion**

- 3.54 **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.**



## TRIGGERS FOR REVIEW PRE-ENACTMENT

3.55 In our consultation paper, we discussed pre-enactment triggers to review which would ensure that a commitment to review would be made before or during the passage of a Bill. The types of trigger we discussed were ministerial undertakings, review clauses and sunset clauses.<sup>38</sup> However, we envisaged that pre-enactment triggers would only be used, as they are now, in a minority of cases. This is borne out by the responses. Only one consultee, (Professor Burrows) thought that post-legislative scrutiny should be confined to “flagged-up in advance review (eg sunset clauses) or, where in order to get the Bill through, assurances as to reviews were given”. Professor Reid stated that:

Given the unpredictability of events and the pressure on Parliamentary resources, trying to predict in advance which Acts will need scrutiny risks creating a counter-productive strait-jacket, that forces unnecessary reviews in place of more useful ones and renders the whole process formulaic.

3.56 JUSTICE was “sceptical” about the quality of debate triggered by the sunset clauses in the Anti-Terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005, noting that “the annual debates triggered by these measures have typically been rushed affairs and seem to us to offer little of the substantive scrutiny that is required in respect of such sweeping measures (indefinite detention of foreign nationals and control orders respectively)”.

3.57 There were stronger arguments in favour of carefully thought-out review clauses. Francesca Quint, a barrister specialising in charity law, thought that the “need for or desirability of review should be considered in advance”. Ms Quint cited the example of the Charities Bill<sup>39</sup> which was subject to thorough pre-legislative scrutiny. One of the issues that emerged as a result of the pre-legislative scrutiny was the need for the legislation to be reviewed after implementation. Clause 73 of the Bill<sup>40</sup> provides for the Secretary of State, within 5 years of enactment, to appoint a person to review the operation of the Act. The review should address a number of very broad questions which are also set out in clause 73, including the effect of the Act on public confidence in charities and the level of charitable donations. The reviewer will produce a report that will be laid before Parliament. Francesca Quint was in favour of review clauses and thought that they “should routinely be considered, alongside a list of broad headings about what the review should cover”. The advantage of pre-legislative scrutiny is that it allows for this consideration to be made.

<sup>38</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 39, para 7.23.

<sup>39</sup> Also discussed in Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 38, para 7.17.

<sup>40</sup> Bill 213 2005-06 as at 13 July 2006.

3.58 In its recent report on the legislative process, the House of Commons Modernisation Committee suggested that “a substantive third reading debate might in some circumstances present an opportunity for Members to express a view on the criteria by which an Act might be judged to have succeeded or failed”.<sup>41</sup> This approach was endorsed in oral evidence to the Committee by Mr David Kidney MP who thought that maybe “the third reading should have tacked onto it the day when the post-legislative scrutiny door opens to be the second anniversary of passing or the third anniversary or whatever is thought to be appropriate, or no date if it is not regarded as one that needs it”.<sup>42</sup> Although we have not consulted on this point, it seems to us to be a sensible idea, worthy of careful consideration, to factor into the legislative process an opportunity for Parliamentarians to consider if, when and how post-legislative scrutiny should be undertaken.

### **Conclusion**

3.59 **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 (see also paragraph 3.48). If there is a new joint committee on post-legislative scrutiny, it might also consider Bills 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.**

### **TRIGGERS FOR REVIEW POST-ENACTMENT**

3.60 In our consultation paper we discussed ways in which post-legislative scrutiny could be triggered if it is not planned in advance of enactment.<sup>43</sup>

#### **The role of central Government**

3.61 The role of central Government in enhancing departmental review work is discussed above at paragraphs 3.23-3.29 above.

#### **The role of a joint Parliamentary committee on post-legislative scrutiny**

3.62 If there was a new joint committee as mentioned in paragraphs 3.33-3.36 above, Parliamentary post-legislative review could be directed and determined by that committee.

<sup>41</sup> House of Commons Select Committee on Modernisation of the House of Commons, The Legislative Process, First Report (2005-06), HC 1097, p 36.

<sup>42</sup> Above, at Ev 10.

<sup>43</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, pp 45 to 46, paras 7.43 to 7.45.

### **The role of external bodies**

- 3.63 We received a number of reactions to the role in which non-Parliamentary and non-Governmental bodies could play in drawing to the attention of Parliament legislation which they consider should be reviewed. Geoffrey Lock suggested a wide range of triggers, including in no special order: judicial pronouncements, comments in both Houses of Parliament and the Welsh Assembly, items in the legal press and national newspapers; and submissions from the Bar Council, the Law Society, university teachers of law, Citizens Advice Bureau, representative bodies generally and individuals. Francesca Quint thought that the number of possible types of trigger should not be limited. The Hansard Society considered that a formal system of post-legislative scrutiny would be a mechanism to involve the public and interested parties “as full review would be able to take evidence from experts, pressure groups and those directly affected by the legislation”. We see two levels of involvement for the public and interested parties: first, in being able to help to identify legislation that might benefit from review, and, second, in providing input to the review itself, through consultation exercises.
- 3.64 The Association of Charitable Foundations considered that post-legislative scrutiny would be most effective if it encouraged external bodies with relevant expertise to give evidence as part of the process. The joint response from the Children’s Legal Centre and National Children’s Bureau suggested that international bodies such as the UN Committee on the Rights of the Child could feed into a review process but stressed that they would not want to limit those who can put forward an Act for scrutiny. They also pointed out that consideration should be given to how organisations might appropriately bring their own practice, evidence and concerns to the attention of the reviewing body and there should be a clear and transparent process for doing this.

### ***The role of Ombudsmen***

- 3.65 Ombudsmen become familiar with legislation not working well and sometimes their recommendations go beyond individual instances. It has not been suggested to us by the Ombudsmen that they would wish to have a more formal role in post-legislative scrutiny, but we envisage that they could be of real help to a joint committee on post-legislative scrutiny because of the relevant experience they would be able to bring to its attention.

### ***The Better Regulation Commission***

- 3.66 The Better Regulation Commission is an independent advisory body whose terms of reference are to advise the Government on action to reduce unnecessary regulatory and administrative burdens; and to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted.<sup>44</sup> The role of the Commission is clearly relevant to any system of post-legislative scrutiny. The Commission's review of the implementation of the Licensing Act 2003<sup>45</sup> revealed that the majority of those consulted thought that although the idea behind the reforms was good, the implementation process had been badly handled.<sup>46</sup> The Commission recommended not only that the Government should review the effect of the Licensing Act after its provisions have been in force for three years, but also that the Regulatory Impact Assessments are reassessed as part of that review, to gauge whether the true costs and savings have been represented for all sectors.<sup>47</sup>

### ***The Judges' Council***

- 3.67 The Lord Chief Justice of England and Wales responded to the proposal that the Judges' Council might have a role to play in any system of post-legislative scrutiny. The response emphasised that where judges have been asked to take part in pre-legislative scrutiny, they do not comment on Government policy and therefore involvement in a broad form of post-legislative review would not be appropriate. The response acknowledged that criticism made in judgments about difficulties in interpretation of legislation could be made available to the body undertaking post-legislative review but this task would be too onerous for the Judges' Council to undertake itself. There was more support for the idea that if a system of post-legislative scrutiny was set up, individual judges might send any comments they have made about legislation in judgments to the body undertaking scrutiny work and that judges should be made aware of this possibility but not obliged to follow this route.
- 3.68 **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.**

### **TYPES OF LEGISLATION SUITABLE FOR REVIEW**

- 3.69 In our consultation paper, we discussed suitable types of legislation for which post-legislative review would be a beneficial exercise. We have received a number of helpful responses suggesting legislation that would or could have benefited from post-legislative scrutiny. We set out a sample of these case studies in Appendix A to this Report.

<sup>44</sup> <http://www.brc.gov.uk> (last visited 27 July 2006). The Better Regulation Commission was established in 2005 to continue the role previously carried out by the Better Regulation Task Force. In contrast, the Better Regulation Executive is part of Cabinet Office.

<sup>45</sup> Discussed above at para 3.9.

<sup>46</sup> Implementation of the Licensing Act 2003: A review by the Better Regulation Commission (April 2006), p 26, para 71.

<sup>47</sup> Above, p 20, para 43 and p 23, para 63.

- 3.70 Lord Norton suggested that it should be for a new joint committee on post-legislative scrutiny to determine which Acts should be subject to a review. It may well determine that certain categories – such as Finance Acts and other Acts – should not normally be subject to review. It may generate criteria to determine a hierarchy of Acts, those falling in the category at the top constituting measures that prima facie should be considered for review and those at the bottom that would normally receive a quick check and be cleared from further consideration. Examples of measures falling in the first category would be emergency legislation and legislation affecting human rights; the joint committee would be informed as to the significance of the legislation by the reports of the Joint Committee on Human Rights. The same would apply – should the joint committee decide to include Acts affecting the nation’s constitutional arrangements – to reports from the Constitution Committee of the Lords. It would be for the joint committee to determine, in the light of reports from other committees, from representations made to it, or in the light of its own initial investigation, to review particular provisions of an Act rather than the measure as a whole.
- 3.71 We endorse the approach of Lord Norton set out in the preceding paragraph. However, we would note that although a hierarchy of Acts might emerge over time, the decision to review need not be either event-driven or exclusively subject-driven. There are different factors which may culminate in the need for a review and a joint committee should not be constrained in deciding which legislation is suitable for review.

### **Conclusion**

- 3.72 **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.**

### **TIMESCALE FOR SCRUTINY**

- 3.73 We addressed the question of timescale for scrutiny in our consultation paper.<sup>48</sup> We emphasised the need for flexibility of approach depending on the particular Act. This approach was endorsed by all the respondents who addressed timescale, although some suggested timeframes as well. JUSTICE thought that three years was not too short a time frame but represented “sufficient time in which to identify any serious, unanticipated issues or operational problems”. A number of respondents warned that there would often be considerable delay before effective post-legislative scrutiny could take place. The joint response from the Children’s Legal Centre and National Children’s Bureau explains the point:

<sup>48</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 50, paras 7.61 to 7.63.

In dealing with changes to the law and practice in relation to public sector providers there is a tendency to underestimate the time required for full and successful implementation. It is possible to rewrite the statute, the regulations and the guidance but the development of the cultural change required to ensure proper implementation is a longer process. For example, some local authorities are still adjusting to the changes brought in by the Children (Leaving Care) Act 2000, and the Every Child Matters programme is expected take up to ten years to implement in full.

- 3.74 The Insolvency Service did not think that timescale could be prescribed and advocated the use of interim reports, “to keep stakeholders informed as to the progress of the scrutiny and to ensure that the body responsible for the scrutiny is progressing it in a timely manner”. The Insolvency Service currently issues interim reports on its evaluation of the Enterprise Act 2002, the final report being due in 2007. Lord Norton’s proposal for a joint committee on post-legislative scrutiny envisages that it would be for the committee to determine the appropriate timescale for review which may be a standard period or a variable timescale, depending on the type of legislation involved. However, he thought it would be sensible to retain a degree of discretion.
- 3.75 **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.**

#### **POST-LEGISLATIVE SCRUTINY OUTCOMES**

- 3.76 At the 1 March seminar, Paul Jenkins, now the Treasury Solicitor, emphasised the importance of addressing what is to happen after post-legislative scrutiny and, in particular, what is to be done with the product of a review.<sup>49</sup>
- 3.77 One of the problems that we identified in the consultation paper was that the outcomes of departmental reviews vary and it is only on some occasions that the findings of the review are actually implemented.<sup>50</sup> **One solution may be for departmental reviews to be published and possibly laid before Parliament. We invite the Government to consider this approach.**
- 3.78 As to Parliamentary post-legislative scrutiny, the reviewing committee would produce its own conclusions and recommendations, to which the Government would be expected to respond. The Government would obviously not be bound to accept all or any of the committee’s views, but if (as intended) the committee approaches its task in a manner which is objective and focused on outcomes, we would expect its recommendations to be influential.

<sup>49</sup> See also discussion on this point in Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 46, paras 7.47 to 7.48.

<sup>50</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 14, para 3.10.

## **A PILOT SCHEME**

- 3.79 In our consultation paper, we floated the idea of a pilot scheme to test post-legislative scrutiny mechanisms and identify appropriate legislation for review.<sup>51</sup> It is quite a popular idea, the main objection being that it would lead to delay in setting up a system of post-legislative scrutiny. We consider that it should be for the reviewing body, preferably a joint Parliamentary committee, to decide whether there would be any merit in a pilot scheme.

## **CONCLUSION**

- 3.80 On the need for Parliamentary post-legislative review, the central plank of our findings is that careful consideration should be given to establishing a new joint committee on post-legislative scrutiny. Our proposal mirrors that put forward by Lord Norton in his paper to us and we can do no better than to conclude by adopting Lord Norton's conclusion:

The recommendations ... are designed to enable progress to be made without getting bogged down in detail. They are designed to maximise the political will for post-legislative scrutiny, without imposing a significant additional burden on Parliament, and enabling Parliament to fulfil a new and potentially highly productive role of scrutiny. The new role is a means to an end: that is, improving the quality of legislation. It has the potential to identify problems with legislation. Its greatest potential, though, is in acting as a deterrent and improving the quality of measures prior to their introduction.

- 3.81 On the need for departmental post-legislative review, we are of the view that it is possible to build on departmental reviews and the work of the Better Regulation Executive and Better Regulation Commission by identifying post-legislative scrutiny as something that ought to be done (not on a universal basis) but involving commitment from the centre of Government as part of the better regulation agenda. A rolling programme by which selected post-legislative scrutiny is carried out would be for central Government to determine in consultation with departments.

<sup>51</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 51, para 7.65.

# **PART 4**

## **DELEGATED LEGISLATION**

### **INTRODUCTION**

- 4.1 We discussed the scope for post-legislative scrutiny of delegated legislation in Part 8 of our consultation paper. We noted that about 3000 Statutory Instruments are issued each year. We also noted that when considering the need for post-legislative scrutiny of delegated legislation, a paradox emerges. In one respect it may be argued that the need is greater as Parliamentary scrutiny is not as thorough as for primary legislation. However, the sheer volume of secondary legislation would mean that, practically, post-legislative scrutiny would be an extremely difficult task. The majority of participants in the consultation process focused their attention, as we have, on primary legislation. However, in our consultation paper, we invited the views of consultees on post-legislative scrutiny of delegated legislation, in general, and on whether there may be advantages in making greater use of sunset clauses in secondary legislation.
- 4.2 The general feeling amongst consultees was that secondary legislation should not be treated differently from primary legislation in terms of the need for review. For example, The Insolvency Service pointed out that there needs to be a focus on ensuring that the post-legislative scrutiny is appropriate to the policy objectives, regardless of the legislative vehicle used to implement the changes. Professor Colin Reid also thought that review of delegated legislation was desirable for the same reasons as primary legislation. The Law Society thought it was as important to cover regulations as it is to cover primary legislation and did not see any reason in principle to treat them differently.
- 4.3 In some cases, it is not possible to have meaningful post-legislative scrutiny of primary legislation, without consideration of the secondary legislation which flows from it. This is particularly so where the primary legislation is framework legislation<sup>52</sup> and the only way to examine the outcome of the primary legislation is by examination of the secondary legislation.

### **PARLIAMENTARY AND DEPARTMENTAL REVIEW OF DELEGATED LEGISLATION**

- 4.4 Post-legislative scrutiny of primary legislation may well necessitate consideration of the related secondary legislation but a separate question is whether there should be post-legislative scrutiny of secondary legislation in its own right. Pensions Ombudsman, David Laverick thought that where scrutiny of primary legislation is undertaken, such scrutiny should extend to consideration of the secondary legislation but there may be times when it would be appropriate for a scrutiny committee to confine its consideration only to the secondary legislation.

<sup>52</sup> Framework legislation sets out the general objectives but allows for the detailed provisions to be drafted in secondary legislation.



- 4.5 With reference to Scotland, Elizabeth Watson, writing for the Study of Parliament Group response, pointed out that although the Subordinate Legislation Committee of the Scottish Parliament has not undertaken any post-legislative scrutiny, it is arguable that there may be a role for post-legislative scrutiny to be undertaken where there has been little detail on the face of a Bill and a great deal has been delegated to subordinate legislation. Post-legislative scrutiny of this kind could allow comparisons to be drawn between executive assurances of how a power will be used and how that power has been used in practice. Post-legislative scrutiny would also enable review of whether proper use was being made of negative and affirmative procedures. Information of this kind could be useful to inform future consideration of Bills.
- 4.6 In March 2006, the House of Lords Merits of Statutory Instruments Committee published a report on *The Management of Secondary Legislation*.<sup>53</sup> The report considered post-implementation review of secondary legislation. The Committee looked at the work of a few Government departments and found some arrangements in place to review whether existing secondary legislation was working as intended. However, it was not clear to the Committee that those arrangements were structured with sufficient precision to ensure that each significant piece of secondary legislation is placed under the spotlight at some point in its life. The Committee concluded as follows:

We recommend therefore that departments, when they draw up their plans for secondary legislation, should include against each instrument a target date for post-implementation review and that the outcomes of such reviews should be reported when completed.

- 4.7 We endorse this view. Lord Norton suggested that review of delegated legislation is something that a new joint committee on post-legislative scrutiny could consider after it is established.<sup>54</sup> **We agree and 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.**

#### **SUNSET CLAUSES**

- 4.8 The Better Regulation Task Force considered the increased use of sunseting in its report, *Regulation – Less is More*.<sup>55</sup> The Task Force suggested that judicious use of sunseting could reduce the need for later simplification. The Task Force stated that when regulations have sunset clauses, they would need to be reviewed and the case set out for their continuation, simplification or removal based on how well and at what cost they are meeting their intended objectives. The Task Force went further and said that if it found that departments are not undertaking post-implementation reviews effectively, it would advise Government to consider greater use of sunseting as a means to trigger reviews and ultimately to get rid of unnecessary or unsuccessful regulations.

<sup>53</sup> 29th Report of Session 2005-06, HL Paper 149-I.

<sup>54</sup> Lord Norton thought the same in relation to EU legislation – see para 5.9 of this report.

<sup>55</sup> Better Regulation Task Force, *Regulation – Less is More. Reducing Burdens, Improving Outcomes* (March 2005).

- 4.9 On the whole, the idea of sunset clauses did not find much favour among consultees. Lord Newton of Braintree warned at the 1 March seminar that it was unrealistic to expect any Government to accept the idea of making greater use of sunset clauses in primary or secondary legislation. Pensions Ombudsman, David Laverick could see no stronger argument for introducing sunset clauses in secondary legislation than in primary legislation.
- 4.10 Professor St John Bates favoured “adding to the terms of reference of the SI scrutiny committees a capacity to recommend that an individual SI within prescribed classes of SI should contain a sunset clause (or a sunset clause with review). This would allow, with Parliamentary attrition, the practice to develop over time”.

#### **ACCESS TO LEGISLATION AND CONSOLIDATION**

- 4.11 One theme related to delegated legislation, on which a number of consultees commented, was access to legislation. The joint response of the Children’s Legal Centre and National Children’s Bureau addressed the problem that despite their familiarity with the broader legal framework, they still found access to be a real problem:

The lack of access to statutes with appropriate links to the regulations and guidance which are currently in force must be a cause of serious inconvenience to anyone who does not have access to specialist services. We are concerned when information so fundamental to a democracy is difficult to identify, obtain and understand, and is frequently out of date. It is frequently the case that secondary legislation and guidance are overlooked in the process of scrutiny, although their impact on the day-to-day operation of the law is as significant as the primary statute.

- 4.12 The joint response stated that experience of practice in childcare suggests that many injustices are the result not of failure to comply with the statute, but of failure to know about, understand or access secondary legislation. The response cites an example. The placement of children in emergency foster homes is found not in the Placement of Children Regulations 1991, but in the Fostering Services Regulations 2002, which are made not under the Children Act 1989, but under the Care Standards Act 2000. The reason would appear to be because there are specific provisions in relation to the emergency approval of foster carers. However, the Children’s Legal Centre regularly receives queries which arise when a local authority, in ignorance of these provisions, wishes to move a child from a friend or relative.
- 4.13 Professor Reid suggested that one useful technique that will make legislation easier to use is to require consolidated re-enactment after a piece of delegated legislation has been amended a certain number of times, as opposed to permitting a continuing series of amendments that makes it unduly awkward to trace the appropriate version of the legislation.

- 4.14 In our consultation paper, we discussed the problems of access to legislation, the lack of consolidation and whether sunset clauses could be employed as a method of pressing departments to consolidate provisions so that they may be found together. **We suggest that Government give more thought to consolidation of secondary legislation with the aim of improving the management and accessibility of secondary legislation.**
- 4.15 It is also important that all related statutory provisions, whether primary or secondary, should be capable of being readily accessed together. We are aware of the work being undertaken on the Statute Law Database and recognise that public access to that resource is a step in the right direction. **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.**

## PART 5

# EUROPEAN LEGISLATION

- 5.1 The benefits of post-legislative scrutiny described in Part 2 of this Report are equally applicable to legislation derived from the European Union. In our consultation paper, we considered post-legislative scrutiny at the national level and also at European level.<sup>1</sup>
- 5.2 At the national level, the Government has already made some commitments in its Response<sup>2</sup> to the Better Regulation Task Force Report, Regulation – Less is More.<sup>3</sup> The Task Force recommended that departments’ rolling programmes of simplification<sup>4</sup> should include “revisiting the implementation of EU directives, particularly framework directives”. The Government accepted this recommendation and responded by saying that:

When undertaking a post implementation review, departments should consider the scope for simplification, including revisiting EU directives as part of the European programme of simplification where relevant.

- 5.3 In a recent Parliamentary Question, Lord Stevens of Ludgate asked Her Majesty’s Government: “How much of all United Kingdom legislation has its origins in European Union legislation”. The Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Lord Triesman replied that:

The UK welcomes the European Commission’s continued commitment to the better regulation agenda in particular its rolling programme to simplify existing legislation and the withdrawal so far of around 70 pending proposals. The Government also welcomes the European Council invitation to the Commission to make proposals by 2007 on how to reduce administrative burdens on business by 25 per cent.

We estimate that around half of all UK legislation with an impact on business, charities and the voluntary sector stems from legislation agreed by Ministers in Brussels. Parliamentary analysis of UK statutory instruments implemented annually under the European Communities Act suggests that on average around 9 per cent of all statutory instruments originate in Brussels.<sup>5</sup>

<sup>1</sup> See Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, Part 9.

<sup>2</sup> Better Regulation Executive, Formal Government Response to Regulation – Less is More. Reducing Burdens, Improving Outcomes (18 July 2005).

<sup>3</sup> Better Regulation Task Force, Regulation – Less is More. Reducing Burdens, Improving Outcomes (March 2005).

<sup>4</sup> See para 3.27 above.

<sup>5</sup> Hansard HL, 29 June 2006, WA 183.

- 5.4 In our consultation paper, we noted that some EU Directives contain a provision providing for post-implementation review by the European Commission.<sup>6</sup> We asked whether consultees favoured a UK review before the EU review and how practically that might be done. More generally, we welcomed the views of consultees on the scope for post-legislative scrutiny of the implementation of EU legislation into domestic law.
- 5.5 We are pleased to note that there has been significant and growing interest in European regulatory reform and the implementation of European directives. In March 2005, the Regulatory Impact Unit in Cabinet Office published a Transposition Guide on how to implement European directives effectively.<sup>7</sup> The Government's stated policy on implementation of EU legislation is to implement so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business.<sup>8</sup>
- 5.6 In November 2005, Lord Davidson QC, Advocate General for Scotland was appointed by the Government to lead an independent review to look at how the UK puts EU legislation into practice. Supported by the Cabinet Office, the review aims to identify and consider ways to simplify any unnecessary burdens created by over-implementation and will report with recommendations to Government by the end of 2006.<sup>9</sup> The review will consider gold-plating – where implementation goes beyond an EU directive by, for example, using wider legal terms than the directive or extending the scope; double banking – where EU legislation covers the same ground as domestic legislation and the two regimes have not been fully streamlined; and regulatory creep – where regulatory burdens are increased through guidance or other non-statutory means. In July 2006, the Davidson Review team published an interim summary of responses to its call for evidence.<sup>10</sup> We considered the issue of gold-plating in Part 9 of our consultation paper and thought that there would be a case for post-legislative scrutiny to see if the effect of the method of implementation is more burdensome than intended.

<sup>6</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178, p 58, para 9.15.

<sup>7</sup> <http://www.cabinetoffice.gov.uk/regulation/documents/pdf/tpguide.pdf> (last accessed 27 July 2006).

<sup>8</sup> [http://www.cabinetoffice.gov.uk/regulation/documents/davidson\\_review/principles.pdf](http://www.cabinetoffice.gov.uk/regulation/documents/davidson_review/principles.pdf) (last accessed 27 July 2006).

<sup>9</sup> [http://www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/davidson\\_review/index.asp](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/index.asp) (last accessed 27 July 2006).

<sup>10</sup> [http://www.cabinetoffice.gov.uk/regulation/reviewing\\_regulation/davidson\\_review/summary.asp](http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/summary.asp) (last accessed 27 July 2006).

- 5.7 As we noted in our consultation paper,<sup>11</sup> some directives contain review clauses, requiring the European Commission to submit a report on the application of the directive. This may go beyond an implementation check. The Bar Council in its response to our consultation indicated that it would favour a position that the European Commission should as a matter of course review all directives adopted. This echoes calls made by the House of Lords European Union Committee in its report, *Ensuring Effective Regulation in the European Union*.<sup>12</sup> That Committee made the following recommendation:

We recommend that ex-post assessment of the regulatory impact of European Union legislation should be the rule rather than the exception and that the first such assessment should be carried out by the Commission no more than one year after the entry into force of the instrument in question.<sup>13</sup>

- 5.8 This type of assessment would go further than the implementation check performed by the Commission in its role as guardian of the Treaties, in ensuring and monitoring the uniform application of Community law by the Member States pursuant to Article 211 of the EC Treaty.<sup>14</sup>

- 5.9 In a recent report, the European Policy Forum<sup>15</sup> drew attention to the fact that implementation of EU legislation has suffered because of the problem of shared ownership and that therefore “Member States have to be heavily involved in ex post evaluation”.<sup>16</sup> Professor St John Bates thought that relatively more Parliamentary time should be spent on the domestic implementation of EU obligations by primary and secondary legislation than on draft Community legislation, with the Parliamentary scrutiny system placing more emphasis on the scope and merits of the implementation. However, he cautioned against domestic Parliamentary procedures being further developed to augment Community post-legislative scrutiny of Community legislation. Lord Norton suggested that one way of approaching review of EU and delegated legislation would be in terms of rolling scrutiny: that is, to consider it as something that may be introduced in the light of experience once a joint Parliamentary committee on post-legislative scrutiny is established. Lord Norton concluded that:

<sup>11</sup> *Post-Legislative Scrutiny* (2006) Law Commission Consultation Paper No 178, p 58, para 9.15.

<sup>12</sup> 9<sup>th</sup> Report, Session 2005-06, HL Paper 33

<sup>13</sup> Above, para 74.

<sup>14</sup> European Commission, 22nd Annual Report from the Commission on Monitoring the Application of Community Law (2004) Brussels, 5/11/2005, COM (2005) 570.

<sup>15</sup> European Policy Forum, *Evaluating Better Regulation: Building the System*, City of London, City Research Series, Number Nine, (September 2006).

<sup>16</sup> Above, p 36.

Once a joint committee is bedded in, and it is possible to estimate the likely demands in respect of additional post-legislative scrutiny, either the joint committee or another committee, such as the Constitution Committee in the Lords or the Procedure Committee in the Commons, could be invited to report on the potential for extending scrutiny to delegated legislation and measures that transpose EU legislation, either through extending the work of the joint committee, possibly through sub-committees (though another possibility would be a sub-committee of the European Union Committee in the Lords) or separate committees.

- 5.10 We support the view of Lord Norton. Rather than make a specific recommendation on European legislation, we think that it would be better to await the outcome of the Davidson review and allow for post-legislative scrutiny to develop organically in respect of primary legislation in the initial phases of any new system of post-legislative scrutiny.

## **PART 6**

# **SUMMARY OF FINDINGS AND CONCLUSIONS**

- 6.1 This Part contains all the findings and conclusions that we have made throughout this report.
- 6.2 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]
- 6.3 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]

- 6.4 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]
- 6.5 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]
- 6.6 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]



- 6.7 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]
- 6.8 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]
- 6.9 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]
- 6.10 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]
- 6.11 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]
- 6.12 We invite the Government to consider whether departmental reviews should be published and possibly laid before Parliament. [para 3.77]
- 6.13 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]
- 6.14 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]
- 6.15 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]

*(Signed)*

TERENCE ETHERTON, *Chairman*  
HUGH BEALE  
STUART BRIDGE  
JEREMY HORDER  
KENNETH PARKER

STEVE HUMPHREYS, *Chief Executive*  
27 September 2006

# APPENDIX A

## CASE STUDIES

### INTRODUCTION

- A.1 In order to crystallise the case for post-legislative scrutiny, it is important to consider examples of legislation which may have benefited from post-legislative scrutiny or which should be subject to post-legislative scrutiny in the future. In response to the invitation in our consultation paper inviting views of consultees on the most suitable types of legislation for post-legislative scrutiny,<sup>1</sup> a number of respondents have very helpfully provided case studies of legislation to illustrate the need for post-legislative scrutiny and these are set out below.

### Compensation Recovery

- A.2 The following extract from the Hansard Society response cites the Social Security Act 1989 as an example of legislation which has caused unintended difficulties and which has failed to translate policy effectively into law:

The example of the legal changes made to the system of compensation recovery shows the dangers that exist when legislation is not subject to effective post-legislative scrutiny. The Social Security Act 1989 introduced a new legal mechanism to deduct from compensation settlements an amount equal to the level of social security benefits that the claimant had received as a result of injury or disease. After this deduction had been made, many individuals found that their settlement was almost extinguished.

During the early 1990s, groups campaigning on their behalf (often connected with industrial accidents and disease) began to lobby Parliament and the media about the iniquities of the system and the hardship caused to individuals. In 1995 the House of Commons Social Security Select Committee received many representations on this issue, including some from other Members of Parliament, and as a result, decided to conduct an inquiry into the policy and practice of the 1989 Act.

The Committee's report, Compensation Recovery, was passed unanimously in June 1995 (Social Security Committee, (1994-95), Compensation Recovery, HC196). It found that the principle of deducting benefits from settlements in certain cases was sound (to avoid individuals receiving "double compensation" for the same period) but that the details of the legislation were seriously flawed, and that the calculations contained in the Act, had caused, according to the Committee, "manifest unfairness". The Conservative Government accepted the Committee's recommendations and passed an amending law, the Social Security (Recovery of Benefits) Act 1997.

<sup>1</sup> Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178 , p 50, para 2.60.

The case of compensation recovery clearly demonstrates how slowly the current “informal” method of conducting post-legislative scrutiny brings about required changes. Several years were allowed to elapse before what was finally recognised as an example of poor quality legislation was rectified. Even then the Parliamentary process, and the eventual amending legislation, was only triggered by a lengthy and well-organised campaign. If there had been a formal review of legislation, it is much more likely that these obvious difficulties would have been spotted and resolved much more quickly.

### **Children (Leaving Care) Act 2000**

- A.3 Children’s Legal Centre and National Children’s Bureau joint response gives two case studies to illustrate the benefits of undertaking post-legislative scrutiny in relation to two pieces of legislation. The first example is the Children (Leaving Care) Act 2000:

The Children's Legal Centre has been involved in the development and implementation of the Children (Leaving Care) Act 2000. This Act amended the Children Act 1989, and sought to ensure that local authorities took responsibility for the long-term welfare of young people whom they had been looking after. Although local authorities had had the power to provide leaving and aftercare services for many years, this power was exercised to only a very limited degree.

The new provisions have now been in place for several years and have themselves been subject to interpretation in both case law and statutory guidance. The Hillingdon Case (R ex parte Berhe Kidane Munir and Ncube v London Borough of Hillingdon and the Secretary of State for Education and Skills, High Court, 29 August 2003) led to a ruling that Hillingdon had failed in its duty to a group of young people when it refused to assist them under leaving care legislation because they had been “accommodated” rather than “looked after” by the council. This duty was further clarified in a new circular, LAC2003 (13), which permitted local authorities to fund support for young people without looking after them. However, neither case law, guidelines nor the 2000 Act itself have led to the wholesale improvements in practice envisaged when the Bill was originally drafted. Research from NCB and others demonstrates that the Act has not been implemented consistently across local authorities, and may still be failing to reach many of its policy objectives. Post-legislative scrutiny could assist Parliamentarians to ascertain why this might be the case and, once again, raise the profile of leaving care services in terms of legislative scrutiny.

### **Equality Act 2006**

- A.4 The second example given by the Children's Legal Centre and National Children's Bureau is the Equality Act 2006. This example is useful as it has wider implications for cases in which framework legislation sets up a new body or system, allowing the detail to be provided by secondary legislation. In such a case it is only post-legislative scrutiny (rather than pre-legislative or legislative scrutiny) that can play a role in assessing the effectiveness of the new body or system:

The Equality Act 2006 establishes a new Commission for Equality and Human Rights (CEHR) responsible for enforcing anti-discriminatory measures, and promoting a culture of respect for human rights. Despite raising the issue during Parliamentary debates, only now is the government attempting to clarify how the CEHR will work with the three existing Children's Commissioners in England, Scotland and Wales, a task further complicated by the different roles and responsibilities in law of each Children's Commissioner. For Wales, Part V of the Care Standards Act 2000 established the post, with the role more clearly developed in the Children's Commissioner for Wales Act 2001 and accompanying regulations. The office of the Scottish Commissioner was created by the Commissioner for Children and Young People (Scotland) Act 2003. The role of the English Commissioner is defined in Part 1 of the Children Act 2004. Existing disability and race discrimination law add to the legal frameworks that need to be reviewed.

We would argue that improved specialist scrutiny during the passage of the Bill would have helped disentangle some of the potential areas of confusion or disagreement that may arise as the CEHR is set up – a confusion that can only work against the interests of children and their parents/carers. However, we see a positive role for post-legislative scrutiny as well since clarification about which office would most appropriately and effectively respond to a discrimination or human rights issue will become most apparent when all of them are established and functioning.

### **Criminal Justice System**

- A.5 The Children's Legal Centre and National Children's Bureau joint response make the following comments about the criminal justice system and the scope for post-legislative scrutiny in respect of the effects on children:

Many pieces of legislation, particularly those relating to crime and disorder or asylum and immigration, have had consequences for children. It is by no means clear whether the consequences as currently observed have been either effective or desirable. For example, forthcoming research from the Department of Social and Policy Sciences at the University of Bath (due August 2006) will demonstrate that the youth justice policies and legislation introduced since the Crime and Disorder Act 1998 have created a contradictory system that advocates prevention and support, but practises punishment, often drawing more under-18s into the criminal justice system. These findings are borne out within the various pieces of legislation that have arrived almost annually since 1998, including in particular the Anti-Social Behaviour Act 2003. It would be an interesting concept for post-legislative scrutiny to look at a number of associated pieces of legislation (Crime and Disorder Act 1998, Youth Justice and Criminal Evidence Act 1999, Anti-Social Behaviour Act 2003) or sections of legislation (the child or youth justice-related areas in the Criminal Justice Act 2003 and Children Act 2004) in order to provide a more holistic picture of how each is operating within an allegedly unified system like that set up for youth justice.

#### **The differing form of legislative provision in the constituent parts of the UK**

- A.6 David Laverick, the Pensions Ombudsman, suggested that Part III of the Local Government Act could provide a useful case study in the context of the differing forms of legislative provision in the constituent parts of the UK. He noted that, with the same purpose in mind (the promotion of high standards of conduct for members in Local Government) there are different structural arrangements established by the Westminster Parliament for England and Wales whilst a third option has been devised by the Scottish Parliament. On the same theme, Geoffrey Lock makes the point that when a law has been implemented in one part of the UK but not elsewhere, lessons can be learned by looking back before its more widespread application. He points out that such an opportunity occurred when the Community Charge was introduced in Scotland a year before it was levied in England and Wales, but the Scottish experience was not taken into account. Mr Lock's proposal for a pilot study of post-legislative scrutiny is an examination of The Council Tax (Valuation Bands) (Wales) Order 2003. He proposes that this would provide a chance to learn from experience as the re-banding of domestic properties for Council Tax has gone ahead in Wales but not in England and Scotland.

## Human Rights

- A.7 Liberty suggest two examples of legislative provisions, passed in the current Parliamentary session, that might usefully benefit from post-legislative scrutiny to assess their impact on human rights The first is the Identity Cards Act 2006:

### ***“Identity Cards Act 2006***

During its scrutiny of the ID Cards Bill the Joint Committee on Human Rights identified a number of concerns about the impact that the ID cards scheme might have on human rights. For example, it highlighted the following risks: (A) that the designation of documents could give rise to a risk of disproportionate interference with Article 8 rights [under the European Convention on Human Rights] and in some cases, to a risk of discrimination in breach of Article 14 read in conjunction with Article 8; and (B) that the phased-in compulsory registration risks disproportionate and discriminatory interference with Article 8 rights. Despite these recommendations, the Bill was not amended to remove the risks.

Whether the delegated powers in the Bill are exercised in a way that does have this impact on Article 8 and Article 14 rights can only be ascertained post-enactment. This is also an example of a case in which scrutiny by the courts might be less-suited to assessing the human rights impact of the legislation than scrutiny by a Parliamentary committee. The judicial process is likely to focus on the impact of the Act on one litigant and would not, therefore, be capable of assessing whether designation or compulsion has disproportionately affected wider groups of people”.

- A.8 Liberty’s second example is the Terrorism Act 2006:

### ***“Terrorism Act 2006***

The Joint Committee on Human Rights identified a number of provisions of the Terrorism Bill which it considered might lead to human rights violations. For example, it expressed concerns that increasing the maximum period of pre-charge detention to 28 days could lead to violations of Article 5 and to ‘independent breaches of Article 3 European Convention on Human Rights, and to the inadmissibility at trial of statements obtained following lengthy pre-charge detention’.

The impact of this power on the detainees’ human rights will depend upon the way it is exercised in practice. Post-legislative scrutiny could play an important role in scrutinising whether violations of Article 5 have occurred due to the duration of detention periods and/or the safeguards that have been made available to the detainee. In addition, after enactment, it would be possible to assess whether statements obtained during detention under these powers have been found to be inadmissible or whether Article 3 violations have occurred.

Arguably, the courts would be able to identify such concerns during the course of litigation. However, systematic post-legislative scrutiny of the way the powers have been used would be capable of creating a broader view of how the powers have affected the human rights of a number of detainees and might even be capable of identifying practical concerns before a person becomes a victim of a serious rights violation. It is also likely that Parliamentary consideration of the powers, informed by post-legislative scrutiny, would be better able to identify additional safeguards that should be included in the Bill or to take the politically controversial decision to reduce the maximum duration of detention”.

- A.9 It is worth noting that in a recent report on its future working practices, the Joint Committee on Human Rights stated that it intended to undertake more work on post-legislative scrutiny, "for example on implementation of primary legislation through regulations or guidance, or on whether the implementation of legislation has produced unwelcome human rights implications".<sup>2</sup>

<sup>2</sup> Joint Committee on Human Rights, The Committee's Future Working Practices, 23rd Report (2005-06) HL Paper 239/HC 1575, p 26.

## **APPENDIX B**

# **POST-LEGISLATIVE SCRUTINY IN OTHER JURISDICTIONS**

- B.1 In Part 5 of our consultation paper, we considered post-legislative scrutiny mechanisms in other jurisdictions and although we did not find evidence of formal review systems, we did identify some countries where innovative methods were adopted in order to improve the scrutiny of legislation which has been brought into force. We asked consultees for their views or experiences of post-legislative scrutiny in the jurisdictions to which we referred in the consultation paper or elsewhere. We received two substantive responses, on post-legislative scrutiny in Scotland and in Switzerland, which may usefully be added to the examples we discussed in the consultation paper, and we also received notification of useful guidance prepared by the former Law Reform Commission of Canada.<sup>1</sup>

### **SCOTLAND**

- B.2 Elizabeth Watson, Head of the Committee Office in the Scottish Parliament wrote about post-legislative scrutiny in Scotland for the Study of Parliament Group response to our consultation. We had covered some aspects of Scottish post-legislative scrutiny in Part 5 of our consultation paper and we are grateful to have been provided with a fuller picture. The following paragraphs summarise Elizabeth Watson's report.
- B.3 The Guidance on the Operation of Committees which was published in 2002 contains specific reference to post-legislative scrutiny as being part of the functions of the committees. The reference is in the following terms: "Committees will conduct inquiries and carry out the following functions in relation to competent matters: Consider and report on the policy and administration of the Scottish Administration, including post-legislative scrutiny ...". It is therefore clear that in the Scottish Parliament, the committees see post-legislative scrutiny as part of their role in holding the Executive to account. There are practical time constraints on the committees which can limit their ability to undertake a structured programme of post-legislative scrutiny. Even so, there are number of examples of post-legislative scrutiny which provide some interesting insights into how the committees undertake this work. To all intents and purposes, post-legislative scrutiny is indistinguishable from any other inquiry work undertaken by a Scottish Parliament committee.
- B.4 The work undertaken so far includes:
- (1) Local Government and Transport Committee - Inquiry into issues arising from Transport (Scotland) Act 2001 with particular emphasis on provision and regulation of bus services.
  - (2) Social Justice Committee - Post-legislative scrutiny of the Housing (Scotland) Act 2001.

<sup>1</sup> The Law Reform Commission of Canada was abolished in 1992 and was replaced by the Law Commission of Canada which was created in 1997.



- (3) Justice 1 Committee - Post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001.
- (4) Justice 2 Committee - Adults with Incapacity (Scotland) Act 2000
- (5) Health Committee - Post-legislative scrutiny into the Regulation of Care Act 2001 and Community Care and Health Act 2002

B.5 The triggers for post-legislative scrutiny and the timing of the decisions to undertake such scrutiny vary. In the case of the Housing (Scotland) Act, it was identified during the passage of the Bill and research was commissioned to start the process off at that early stage. Successor committees have continued the work, although not obliged to do so. In the case of the Local Government and Transport Committee, the proposal arose when the committee was considering its work programme at the start of the second session. The topic was of concern to constituents and of interest to members. The Justice 1 Committee undertook its post-legislative scrutiny of the Protection from Abuse (Scotland) Act 2001 as the result of a recommendation contained in the "Legacy Report" from the Justice 1 Committee in the first session. The first session committee recommended that the post-legislative scrutiny be undertaken "after a reasonable time period". It also highlighted that the Protection from Abuse (Scotland) Act 2001 was the subject of a review by the Scottish Executive Central Research Unit to ascertain the influence and effectiveness of the Act. The Justice 2 Committee's post-legislative scrutiny into the Adults with Incapacity (Scotland) Act 2000 came about as the result of the fact that by 2003, members were aware from constituency cases that, despite continued support for the principles of the Bill, not all the intended practical benefits were being achieved.

B.6 As can be seen, the post-legislative scrutiny undertaken has been into Acts passed between 2000 and 2002. For these broad policy type reviews, it is unlikely that early scrutiny would be worthwhile. The provisions require not just to be commenced but to be fully implemented and bedded down to make the exercise worthwhile. The time required for this will vary depending on the Act to be reviewed.

## **SWITZERLAND**

B.7 Professor Luzius Mader, Federal Office of Justice, Switzerland responded to our consultation paper by sending a report on post-legislative scrutiny in Switzerland, which is summarised below.

B.8 Article 170 of the new Swiss Federal Constitution (enacted in 2000) contains a broad evaluation clause: "The Federal Parliament shall ensure that the efficacy of measures taken by the Confederation is evaluated." This provision – from its historical context – must be interpreted very broadly, including for instance prospective and retrospective evaluation and extending not only to the criteria of efficacy, but of effectiveness and of efficiency as well.

B.9 Regulatory impact analysis is compulsory for Bills on statutes and ordinances. The Division on Legislative Projects and Methodology urges offices to present aims and the logical model of a legislative project clearly and to study its likely effects.

- B.10 The Parliament, according to article 27 of the law on Parliament, may ask the Executive branch to conduct evaluations (a power it has started to use frequently), may examine the quality of evaluations effected by the Executive branch (a competence it has only used once) and may commission evaluations itself. It has a small evaluation unit (Parliamentary Administrative Audit Unit) that supports the Parliamentary oversight committee and effects evaluations on demand of that committee or of legislative committees. The Conference of the Presidents of the Oversight Committees, according to article 54 of the law on Parliament, has co-ordination powers regarding evaluations, in order to streamline demands from various Parliamentary organs (legislative committees, oversight committees, the two chambers etc.)
- B.11 The Executive branch in 2004 set up its own devices for post-legislative scrutiny. Offices (administrative units below the ministries) are required to lay out evaluation strategies (describing objectives, organisation, form of reporting, quality assurance). Major evaluations are announced in the Federal Council's strategy for the coming year (around 30 per year). Major evaluations which have been completed during the past year are listed in the Federal Council's annual report. Most evaluations in the executive branch are commissioned to universities or to evaluation firms. To assure independence and objectivity of mandates, other federal offices (such as the office of finance or the office of justice) may be associated. All evaluation reports are made accessible.
- B.12 In 2005, 38 important evaluations were listed in the annual reports of the Federal Council, of the Parliamentary Administrative Audit Unit and of the National Audit Office. 12 evaluations were triggered by legislative mechanisms (evaluation clauses) and 26 evaluations by post-legislative mechanisms (8 by the Parliament, 12 by the government and 6 by the National Audit office). Of the 38 evaluations, 26 were carried out by services of the executive branch, 4 by the Parliamentary Administrative Audit Unit and 8 by National Audit Unit.
- B.13 Part of the progress of evaluation in Switzerland can be explained by developments prior to the creation of article 170 of the Swiss Federal Constitution. Evaluation development in Switzerland had been encouraged in the 1990s by a National Research Program on "Effectiveness of Public Measures", a pilot project for evaluations. One of its spin-offs was the founding, in 1996, of the Swiss Evaluation Society. Even earlier, the Swiss Department of Justice and Police had set up a working group on legislative evaluation.

## **CANADA**

- B.14 Professor John McEldowney, writing in the Study of Parliament Group response drew attention to lessons from Canada. He pointed out that selecting the appropriate legislation for post legislative review needs to be given particular attention in respect of evaluating the policy and objects of legislation. In this respect, there is guidance to be gained from the Law Reform Commission of Canada's Working Paper on Policy Implementation, Compliance and Administrative Law,<sup>2</sup> which identified issues associated with implementation of policies and strategies for reform. That Paper pointed out that:

<sup>2</sup> Law Reform Commission of Canada, Working Paper 51 (Canada, 1986).

Administrators do not apply law mechanically: an analysis of day-to-day implementation activity reveals its more typical, informal nature. Implementation is a human process, involving ongoing interactions among government and private parties; policy implementation is mainly a relational process.<sup>3</sup>

- B.15 Professor McEldowney's response points to the need for a scrutiny body to have a wide remit if it is to perform its task effectively. The scrutiny body may have to obtain input from a very diverse range of groups who are in a position to comment on the positive and negative effects of the legislation. These groups may, of course, themselves have ideas on how the negative effects can be countered, and the positive effects reinforced, that should feed into the work of post-legislative scrutiny.
- B.16 The Working Paper also recognised that what the law seems to suggest administrators should be doing, and what is actually done, are often significantly different. The Paper cites Schumacher, writing in 1974: "Policy is in the implementation".<sup>4</sup> The Law Reform Commission added that there are gaps between law and reality, and between capabilities and expectations, gaps which may or may not be capable of being closed.
- B.17 These observations chime with the cautionary notes about the limitations of post-legislative scrutiny sounded in Part 2 of this report. They also link with an observation made during the 1 March seminar. Considering how a review would be carried out, one participant explained that there were two factors to consider here: the *measure* to be applied for testing legislation and the *level* at which it takes place. The measure would depend on the level. At a technical level, specific questions could be addressed and measures made of, for example, any unnecessary costs that the implementation of the legislation had generated. A political level of testing would be much more difficult; the effect of the legislation might be dependent on other factors. For example, if considering safety legislation, one would also have to take into account the resources that had been allocated to enforcement. Testing at a cultural level would present similar challenges. Most would agree that since the Race Relations Act 1976 came into force there has been a cultural change in the approach to race relations. This is in part due to the Act but also due to other factors and therefore it would be very difficult to measure the effect of the Act itself. The same could be said for the legislation on disability discrimination.

<sup>3</sup> Above, p 75.

<sup>4</sup> Above, p 75.

## APPENDIX C

### VOLUME OF LEGISLATION<sup>1</sup>

Although the table below is a snapshot, it shows that the number of pages of legislation has more than doubled in the 40 years from 1965 to 2005. In addition to this increase, the size of each page of legislation has also increased by 11%.

<b>Year</b>	<b>1965</b>	<b>2005</b>
Number of Public General Acts (PGAs)	83	24
Pages of PGAs	1817	2868
Number of Consolidation Acts	14	-
Pages of Consolidation Acts	683	-
Number of Rewrite Acts	-	1
Pages of Rewrite Acts	-	595
Number of Statutory Instruments (SIs)	2201	3602
Number of pages of SIs in annual edition.	6433	13000 approx
Total number of pages of PGAs and SIs (excluding Consolidation and Rewrite Acts)	7567	15200 approx
European Directives	-	88
European Regulations	-	461
Number of pages in OJ <sup>2</sup>	-	5583
<b>Total number of pages</b>	<b>7567</b>	<b>20800 approx</b>

<sup>1</sup> We are very grateful to Mr Charles Carey, Research Counsel, Parliamentary Counsel Office, 36 Whitehall, London, SW1A 2AY for providing data for the table above.

<sup>2</sup> The number of pages is that of the Directives and Regulations in question ie those noted in bold print with an asterisk in the table of contents in the Official Journal. The Official Journal (OJ) is a daily publication split into three parts, which cover legislation (in its L series), communications (C series) and invitations to tender (S series). All EU legal acts are published in the Official Journal. (This definition is from the Local Government International Bureau website: <http://www.lgib.gov.uk> (last visited 27 July 2006) ).

# **APPENDIX D PERSONS AND ORGANISATIONS WHO PARTICIPATED IN THE CONSULTATION PROCESS**

Those who responded in writing to Post-Legislative Scrutiny (2006) Law Commission Consultation Paper No 178 are marked with \*.

Parliament

HOUSE OF COMMONS

Rt Hon Hilary Armstrong

Rt Hon Alan Beith

Mr Christopher Grayling

Mr John Greenway

Mr Oliver Heald

Rt Hon Geoffrey Hoon

Rt Hon Alan Williams

Dr Tony Wright

Liaison Committee (Members in attendance: Rt Hon Alan Beith, Mr Malcolm Bruce, Mr Andrew Dismore, Mr Frank Doran, Dr Hywel Francis, Mr Mike Gapes, Rt Hon Greg Knight, Mr Edward Leigh, Mr Andrew Miller, Dr Phyllis Starkey, Mr Phil Willis, Rt Hon Sir George Young)

HOUSE OF LORDS

Rt Hon Baroness Amos

Rt Hon Lord Carter

Lord Dahrendorf KBE

Lord Filkin CBE

Lord Goodhart QC

Lord Grenfell

Rt Hon Lord Grocott

Rt Hon Lord Holme of Cheltenham CBE

Lord Kirkwood of Kirkhope

Rt Hon Lord McNally

Rt Hon Lord Newton of Braintree OBE

Professor Lord Norton of Louth\*

Baroness Prashar CBE

Rt Hon Lord Wakeham DL\*

## Parliamentary Officials

Mr Dorian Gerhold, Head of Scrutiny Unit, House of Commons

Mr Paul Hayter LVO, Clerk of the Parliaments

Mr Murray Hunt, Legal Adviser to the Joint Committee on Human Rights

Ms Helen Irwin, Clerk of Committees, Department of the Clerk of the House, House of Commons

Sir Roger Sands KCB, Clerk of the House of Commons

Mr Rhodri Walters, Clerk of Committees, House of Lords

Mr Robert Wilson, Principal Clerk of Select Committees, Department of the Clerk of the House, House of Commons

## Government Departments and Agencies

Sir Geoffrey Bowman KCB, of Parliamentary Counsel

Sir Edward Caldwell KCB, QC, of Parliamentary Counsel

Mr Robin Fellgett, Deputy Head of Economic and Domestic Affairs Secretariat, Cabinet Office

Foreign and Commonwealth Office\*

Insolvency Service\*

Paul Jenkins, now Treasury Solicitor

Mrs Marie-Anne Mackenzie, Better Regulation Executive Scrutiny Team, Cabinet Office

Mr Tony O'Connor, Director, Prime Minister's Delivery Unit, Cabinet Office

Mr Crispin Poyser, Adviser on Parliamentary Procedure, Economic and Domestic Affairs Secretariat, Cabinet Office

## Ombudsmen

Ann Abraham, Parliamentary and Health Service Ombudsman\*

David Laverick, Pensions Ombudsman\*

Walter Merricks, Financial Ombudsman

## Judiciary

Lord Justice Buxton\*

Lord Justice Carnwath\*

Lord Chief Justice of England and Wales, Lord Philips of Worth Matravers\*

The Association of District Judges\*

## Academics

Professor St. John Bates, University of Strathclyde\*

Professor Vernon Bogdanor, Brasenose College, University of Oxford

Professor Andrew Burrows, St Hugh's College, University of Oxford\*

Professor Robert Hazell, University College, University of London

Professor Luzius Mader, Federal Office of Justice, Switzerland\*

Professor Dawn Oliver, University College, University of London

Professor Colin Reid, University of Dundee\*

## Individuals

Geoffrey Lock, former Head of Research Division, House of Commons Library 1977-1991\*

Francesca Quint, Barrister, Radcliffe Chambers\*

Mr Alec Samuels, formerly Reader in Law, Southampton University\*

Dr A S Zigmund, Consultant Psychiatrist\*

## Organisations

Association of Charitable Foundations\*

Bar Council\*

Central Council of Physical Recreation\*

Centre for Public Scrutiny\*

Children's Legal Centre and National Children's Bureau (joint response)\*

Hansard Society\*

JUSTICE\*

Law Society\*

Liberty\*

National Audit Office\*

Study of Parliament Group\* (response prepared by Professors David Miers (Cardiff), Dawn Oliver (UCL) and John McEldowney (Warwick) and Elizabeth Watson (Head of the Committee Office, Scottish Parliament))