Written evidence from Lord Norton of Louth – RIS0023

Memorandum

Lord Norton of Louth

1. The House of Lords, like the Commons, has become a more specialised body over recent decades, principally through the use of select committees. The use of committees in the Commons has been more extensive, and comprehensive (in terms of policy sectors) than the Lords, but the use of such committees has arguably played more to the strengths of the Lords in terms both of its membership and its political culture. Its less partisan approach, based on the politics of justification rather than (as in the Commons) the politics of assertion, facilitates the generation of evidence-based and reasoned reports. It meshes with the House as an unelected House exercising the power of persuasion rather than coercion.¹

2. The use of sessional committees has enabled the House to examine subjects not covered by the Commons departmental select committees and to complement the Commons in fields in which there is scope for coverage by both (as with the European Union, the Commons going for breadth in scrutiny and the Lords going for depth,² or with science and technology). The use of ad hoc


committees has enabled the House to examine subjects of
totality and to do so promptly and in a fairly agile manner. The
expansion of the use of ad hoc committees in recent years has been
particularly beneficial. Using one committee for post-legislative
scrutiny has helped fill, albeit partially, a notable gap in respect of
legislative scrutiny.

3. My starting point is therefore that the use of select committees,
both sessional and ad hoc, has been valuable, enabling subjects to
be examined in a way that would not otherwise be possible and in
so doing fulfilling the functions usually ascribed to select
committees. They inform not just the House, but also government
and others in the field (not least organised interests – they enable
those interests to speak to Parliament and Parliament, through the
committee reports, to speak to them), as well as on occasion the
wider public; they ensure that government responds and engages
with the House; and they may influence public policy. Those
committees charged with scrutiny of primary or secondary
legislation, be it in process or substance, may impact the content or
form of the legislation. Given that the resources employed are
notable more for their quality (principally the time and goodwill of
members, as well as the use of clerks and not excessively
remunerated specialist advisers) than their burden on the public

purse, the use of select committees may be deemed to offer value for money.

4. However, there is a case for employing the current review of select committees to engage in a reconfiguration of the committee structure. The committees that exist have individually done sterling work, but they are the product of disparate and discrete pressures. The House has, essentially by default, a bottom-up, in effect, largely a member-driven, method of determining what committees exist. The current committees exist because of recommendations from disparate sources. The Constitution Committee, for example, has its origins in a recommendation of the Royal Commission on the Reform of the House of Lords. Some are the result of pressure from peers, most recently, for example, the International Relations Committee. In the case of ad hoc committees, the Liaison Committee makes recommendations to the House based on nominations from members. Though these nominations are assessed against set criteria, the Committee operates in reactive rather than proactive mode.

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5. There is much to commend a bottom-up approach, not least in that it responds to members’ concerns. However, there is a downside in that there is no over-arching framework. In terms of a committee system, the whole is the sum of the parts. There is no strategic framework, no means of identifying proactively gaps that need to be filled by committees. That is where the House could be more proactive.

6. There is a case for a more strategic approach, enabling the House to utilise its existing attributes, but to do so in a way that maximises its role as a scrutinising chamber. The House through the use of committees cannot cover all sectors of public policy (it does not have the resources) nor should it, given that the Commons already examines all sectors covered by government departments.

7. I would recommend therefore adopting a more top-down approach, determining (a) sectors that merit systematic parliamentary investigation, outwith those already covered by the Commons, and (b) doing so in the context of the distinctive attributes of the House (experience and expertise). The former may be taken to encompass three categories: (i) policy sectors (ii) legislation and (ii) processes. All three are covered to some degree by extant committees. An instance of the first category is the Science and Technology Committee; an instance of the second is the
Constitution Committee when it reports on Bills of constitutional significance; and instances of the third are the Delegated Powers and Regulatory Reform Committee (DPRRC) and Secondary Legislation Scrutiny Committee (SLSC).

8. In terms of priority, I would reverse the order. The House has the experience and expertise to examine the form and substance of primary and secondary legislation. It not only has the capacity, but it may be argued comes close to having the exclusive capacity to do so, especially when capacity is taken to include political will. The Commons is not likely to want to devote resources to examining legislative processes, undertaking the sort of work undertaken by the Secondary Legislation Scrutiny Committee. For MPs, the opportunity cost is too great.

9. My submission is that there is a compelling case for reconfiguring committees in the Lords in order to focus on legislative standards and post-legislative scrutiny. Doing so will play to the strengths of the House and has the potential to improve the quality of legislation. It will serve as a discipline when Bills are introduced, but also serve to rectify extant law where it is not having the desired effect.

RECOMMENDATIONS
10. I recommend the appointment of two sessional committees – on Legislative Standards and Post-Legislative Scrutiny – with the use of ad hoc committees to support the latter. They will complement existing committees, providing a suite of committees dedicated to enhancing the quality of the legislative process.

LEGISLATIVE STANDARDS

Committee on Legislative Standards

11. The proposal for a Committee on Legislative Standards has variously been made, most notably by the Political and Constitutional Reform Committee in the House of Commons in 2013, by the House of Lords Leader’s Group on Working Practices in 2011, and by the Constitution Committee in 2017. Bodies supporting the recommendation have included the Better Government Initiative, the Bingham Centre and the Hansard Society. The purpose of such a committee would be, as the Leader’s Group concluded, ‘to assess, immediately after introduction

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and before second reading, the technical and procedural compliance of Government bills with standards of best practice in bill preparation’.\(^9\) The case for a legislative standards checklist was developed by the Constitution Committee in 2004.\(^10\)

12. The case for a Legislative Standards Committee was well adumbrated by the Political and Constitutional Reform Committee:\(^11\)

95. We conclude that the overall concept of a Legislative Standards Committee is a good idea. We consider that, whilst Parliament and the Executive could agree standards without such a Committee, the introduction of a Legislative Standards Committee would have the following benefits:

- \(a\) It enables Parliament to be a full partner in ensuring standards;
- \(b\) It provides parliamentary oversight of the standards process, thereby encouraging change;
- \(c\) It allows for a continuing process of investigating and refining standards;

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d) It provides a public face for scrutiny of legislative standards, rather than relying upon the closed procedures of the Cabinet’s Parliamentary Business and Legislation Committee.

96. It is clear that the proposed Legislative Standards Committee should: a) Avoid consideration of the merits of policy; b) Use an agreed set of standards drafted and applied in a manner so as to prevent a tick-box approach; c) Be objective in its critique and recommendations; d) Meet the concerns raised by the Leader of the House as to delay and duplication.

13. The Committee addressed effectively the criticisms levelled at the proposal by the then Leader of the House, including that the process of checking standards is already undertaken by the government and that a committee would not have the time to undertake such work.\(^\text{12}\) It also quoted Lord Butler of Brockwell in advancing the merits of having such a committee: ‘it would be a useful thing that Parliament could do to press government in the right direction, because ministers do not like being criticised by a committee for not having maintained the standards that they themselves have set.’\(^\text{13}\)


\(^{13}\) Political and Constitutional Reform Committee, House of Commons, *Ensuring standards in the quality of legislation*, First Report, Session 2013-14, HC 85, para. 73.
14. As the Constitution Committee concluded in 2017:

_We continue to believe that there would be merit in producing a set of standards that legislation must meet before it can be introduced. We endorse the recommendations of the House of Lords Leader’s Group on Working Practices and of the House of Commons Political and Constitutional Reform Committee and support the creation of a legislative standards committee._

15. Given that the Commons has shown little interest in the creation of a joint committee, the task of establishing such a committee falls to the Lords. Appointing such a committee would not only give effect to the recommendations of the Political and Constitutional Reform Committee, the Constitution Committee and Leader’s Group, but would do so in the context of a wider strategic framework of committee scrutiny of the legislative process.

**POST-LEGISLATIVE SCRUTINY**

16. In its 2004 report on _Parliament and the Legislative Process_, the Constitution Committee looked at the legislative process

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holistically by examining pre- and post-legislation as well as the legislative stages. It recommended that most Acts should be subject to parliamentary scrutiny within three years of their commencement, or six years after enactment, whichever came first.\(^\text{15}\) It considered that a joint parliamentary committee would be the most appropriate vehicle for monitoring such review.

17. In its response, the Government acknowledged the value of post-legislative review and referred the matter to the Law Commission to consider the options. It did, though, state: ‘In general, however, the Government is minded to agree with the Committee that six years after a bill’s enactment provides a reasonable time-frame for review’.\(^\text{16}\)

18. The Law Commission recommended that consideration be given to setting up a joint parliamentary committee. If departmental select committees in the Commons did not engage in such post-legislative review, ‘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’.  

19. In response, the Government agreed with the Commission’s overall approach, but felt it appropriate for post-legislative review to be undertaken by Commons committees on the basis of memoranda produced by Government Departments and published as Command Papers, the reviews to be undertaken three to five years after enactment. It did not endorse the proposal for a joint committee.

20. In the event, departmental select committees have, not surprisingly, not prioritised post-legislative scrutiny, given their other commitments. Post-legislative scrutiny has been notable for its rarity. Rather, it has been the House of Lords that has shouldered the task of undertaking at least some review on a regular basis. The expansion of ad hoc committees in 2012 to include one dedicated to reviewing a particular Act, or measures in a particular area, has ensured that there is some post-legislative scrutiny. At least one committee is appointed each year to review a particular Act or legislation in a particular field. Committees have been appointed to consider adoption and extradition legislation as well as six specific Acts (Inquiries Act 2005, Mental Capacity Act

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17 The Law Commission, *Post-Legislative Scrutiny*, Cm 6945, October 2006, para. 3.47

2005, Equality Act 2010, Licensing Act 2003, Natural Environment and Rural Communities Act 2006, and the Bribery Act 2010). In addition, the Delegated Powers and Regulatory Reform Committee in 2015 reviewed the Legislative and Regulatory Reform Act 2006, following the assessment of it by the Department of Business, Innovation and Skills.19

21. The committees have proved worthwhile, they have filled an important gap in ensuring, or seeking to ensure, that legislation fulfils the purpose intended by Parliament, and they have drawn on the expertise of members. The work of the committees has, though, only scratched the surface and their appointment is dependent on particular peers identifying what they consider worthwhile candidates for review. There is a case for more systematic scrutiny. That can be justified on the grounds advanced by the House of Commons Procedure Committee,20 the Hansard Society,21 the Constitution Committee, the Law Commission and the Government.

Committee on Post-Legislative Scrutiny


22. Given that the House of Commons has shown no interest in the appointment of a joint committee on post-legislative scrutiny, it falls to the Lords to establish a committee to undertake such scrutiny. The committee would have the task of scrutinising the reviews of Acts published by Departments and would have a remit to

(a) determine which should be subject to further scrutiny, either by an ad hoc committee or by itself; and
(b) ensure that the reviews undertaken by Departments are of consistently high standard.

23. The Committee would have the potential, as envisaged by the Law Commission, to develop organically ‘and its role could extend to reviewing Bills to assess their suitability for later scrutiny and consideration of whether a review clause might be appropriate’.22

*Ad hoc committees*

24. The committee would be able to refer reviews for scrutiny to ad hoc committees, each formed of members qualified for such a task (as happens with the ad hoc committees established to date to

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undertake such scrutiny). The number of such ad hoc committees that could be in existence at any one time could be from three to six. They would be in addition to, but in the fullness of time may be in place of, the current sub-committees of the EU Committee and thus utilise similar resources. It would be up to the committee to refer a particular Act or measures in the same policy field.

25. Establishing a Committee on Post-Legislative Scrutiny would enable parliamentary scrutiny of Acts to determine if they have fulfilled their purpose, judged against the purpose or criteria delineated at the time of the introduction of the measure to Parliament. The committee would be able to identify if some modification is necessary or desirable. More generally, it would be able to determine what lessons, if any, may be learned for future legislation in the field. Having such a committee may also serve to discipline government in knowing that its measures will be assessed after enactment. It will potentially develop a culture of ministers seeing success in terms of effective legislation rather than Bills getting passed. Royal Assent will be seen as a staging post in a process, rather than the end point.

26. Utilising ad hoc committees will enable the House to be deft in undertaking such scrutiny. It will have the additional benefit of utilising the skills of different members from session to session.
That will enable a larger number of peers to be involved in committee scrutiny than is presently the case, and enabling each to put their particular experience or expertise to the benefit of the House and the legislative process.

CONCLUSION

27. The establishment of the two committees, complementing those already engaged on legislative scrutiny (DPRRC, SLSC, and the Constitution Committee), has the potential to achieve a paradigmatic change in the way legislation is produced in the UK. There would be a greater focus on the way it is constructed (according to consistent and high standards) and a clearer adumbration of what it is intended to achieve. The committees would thus undertake important, indeed necessary, work that would otherwise not be undertaken. They would reinforce, without duplicating or unduly overlapping with, existing committees. There would be a set of committees designed to implement a clear strategy of legislative improvement (top-down approach) while retaining the existing member-driven process of nominating ad hoc committees (bottom-up approach) in addition to those undertaking post-legislative scrutiny. One would thus retain and build on the existing strengths of the House and fill a gap that otherwise will
remain. Failure to fill that gap will be to the detriment of the statute book of the United Kingdom.

11 April 2018