



# Library Note

## Work of the Ad Hoc Committees in 2013–14

This House of Lords Library Note provides an overview of the work of the five ad hoc Lords Select Committees which reported in the 2013–14 session, these were:

- Committee on Soft Power and the UK's Influence
- Committee on Olympic and Paralympic Legacy
- Committee on Personal Service Companies
- Committee on the Mental Capacity Act 2005
- Committee on the Inquiries Act 2005

The Note provides background information regarding each committee and the summarised recommendations contained in its report, the government response to its recommendations and the subsequent debate of the report and response in the Chamber. In addition, the Note provides an update on developments which have occurred since each committee reported, with particular regard to correspondence between the Chairman of Committees and relevant government departments concerning government progress in the implementation of committee recommendations.

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## I. Introduction

On 21 March 2013, the House agreed the recommendations in the Liaison Committee's [Review of Select Committee Activity and Proposals for New Committee Activity](#).<sup>1</sup> As outlined by the then Chairman of Committees, Lord Sewel, this entailed:

Ad hoc committees on five subjects, as follows: first, a committee on the use of soft power in promoting the UK's interests abroad; secondly, a committee on the strategic issues for regeneration and sporting legacy from the Olympics and Paralympic Games, to report by late 2013; thirdly, a committee on the consequences of the use of personal service companies for tax collection, following the completion of the work of the committee on the Olympic and Paralympic Games legacy; fourthly, a post-legislative scrutiny committee to examine the Mental Capacity Act 2005; and, fifthly, a post-legislative scrutiny committee to examine the Inquiries Act 2005.<sup>2</sup>

The five committees reported between late 2013 and early 2014; Table I below provides details on the subsequent government responses and debates in the Chamber for each committee.

**Table I**

Committee	Report (of session 2013–14)	Government Response	Debate in the House of Lords
Committee on Soft Power and the UK's Influence	<a href="#">Persuasion and Power in the Modern World</a> 28 March 2014 HL Paper 150	<a href="#">Government Response</a> June 2014 Cm 8879	HL Hansard 10 March 2015 <a href="#">cols 548–620</a>
Committee on Olympic and Paralympic Legacy	<a href="#">Keeping the Flame Alive: the Olympic and Paralympic Legacy</a> 18 November 2013 HL Paper 78	<a href="#">Government and Mayor of London Response</a> February 2014 Cm 8814	HL Hansard 19 March 2014 <a href="#">cols 216–68</a>
Committee on Personal Service Companies	<a href="#">Personal Service Companies</a> 7 April 2014 HL Paper 160	<a href="#">Government Response</a> 9 June 2014 Cm 8878	HL Hansard 17 June 2014 <a href="#">cols 764–90</a>
Committee on the Mental Capacity Act 2005	<a href="#">Mental Capacity Act 2005: Post-Legislative Scrutiny</a> 13 March 2014 HL Paper 139	<a href="#">Government Response</a> June 2014 Cm 8884 Supplementary <a href="#">Correspondence</a> and <a href="#">Response</a> 9 March 2015	HL Hansard 10 March 2015 <a href="#">cols 620–50</a>
Committee on the Inquiries Act 2005	<a href="#">The Inquiries Act 2005: Post-Legislative Scrutiny</a> 11 March 2014 HL Paper 143	<a href="#">Government Response</a> June 2014 Cm 8903	HL Hansard 19 March 2015 <a href="#">cols 1134–79</a>

<sup>1</sup> House of Lords Liaison Committee, [Review of Select Committee Activity and Proposals for New Committee Activity](#), 13 March 2013, HL Paper 135 of session 2012–13.

<sup>2</sup> [HL Hansard, 21 March 2013, col 674](#).

Concern about an ad hoc committee's ability to follow-up the recommendations after it had reported was acknowledged by the Liaison Committee who noted:

The downside of ad hoc committees is that they cease to exist once they have reported, and are thus unable to engage in follow-up. We accordingly considered how this point of weakness might be addressed. On the one hand, the new ad hoc committees were set up as fixed-term entities: any likely follow-up mechanism would be difficult to limit both in time and in resource. A further consideration is that once ad hoc committees have reported the protection of Parliamentary Privilege ceases. On the other hand committees exist to make recommendations and if these are not followed up the value of committee reports is diminished.<sup>3</sup>

The Liaison Committee concluded that the 2013–14 session ad hoc committees should be encouraged to identify issues which they thought sufficiently important to merit one year follow-up. In addition, the Liaison Committee undertook to write to the relevant government departments to follow-up recommendations made by the five ad hoc committees.<sup>4</sup> The government's response to this correspondence is available on the [Liaison Committee's website](#).

This Library Note provides an overview of the work of each of the five ad hoc committees in the 2013–14 session and includes details of each committee's report, the Government response and the subsequent debate in the Chamber. In addition, the Note provides an update on developments which have occurred since each committee reported, with particular regard to correspondence between the Chairman of Committees and relevant government departments following up on government progress in the implementation of committee recommendations.

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<sup>3</sup> House of Lords Liaison Committee, [Review of Select Committee Activity and Proposals for New Committee Activity](#), 17 March 2014, HL Paper 145 of session 2013–14, p 9.

<sup>4</sup> House of Lords Liaison Committee, [Investigative Select Committees in the 2010–15 Parliament](#), 15 June 2015, HL Paper 5 of session 2015–16, p 25.

## 2. Executive Summary

The following summary provides a brief overview of the work of each committee and its subsequent follow up. More detailed analysis regarding each committee is available in the relevant sections below.

**Select Committee on Soft Power and the UK's Influence:** The Committee argued that soft power has become increasingly relevant as major shifts affected the conditions under which international relations are conducted. The report included over 80 recommendations for improving the way in which soft power was used by the UK in the future. For example, it recommended better coordination between Government departments and the establishment of a small unit at the centre of government to coordinate “the soft power story throughout Whitehall”; greater resources for embassies; improvements in visa policy and changes to the calculation of net migration figures; and greater engagement with “networks of the future”. The Government has rejected calls for a central unit to coordinate soft power in Whitehall and for a change in the calculation of net migration figures and emphasised work in a number of areas mentioned by the Committee, for example in the resourcing of embassies and the future of government-funded scholarships. There have been several reports and debates regarding soft power since the Committee reported. In November 2015, the *National Security Strategy and Strategic Defence and Security Review* included a reference to enhancing the UK’s “position as the world’s leading soft power”. The Spending Review and Autumn Statement 2015 noted that the FCO’s budget was protected in real terms and emphasised funding to open new embassy buildings and the protection of the funding for the British Council in real terms, it also announced efficiency saving of £53 million by 2019–20.

**Select Committee on Olympic and Paralympic Legacy:** Although the Committee noted that the Olympic and Paralympic Games were an “outstanding success”, it expressed concern regarding participation levels in sport, the regeneration of East London and the governance arrangements in place to deliver an Olympic and Paralympic legacy. Since the Committee report there have been several other reports on delivering the Olympic legacy. The most recent figures from the Active People Survey show a decline in participation in sport. There have also been several debates in the House of Lords on the topic, most recently in November 2015. On 17 December 2015 the Government published *Sporting Future: A New Strategy for an Active Nation*, which detailed plans to replace the Active People Survey and to base funding decisions on “the social good that sport and physical activity can deliver”.

**Select Committee on Personal Service Companies:** The Committee examined IR35 legislation, which the Government uses to ensure tax is collected from those using personal service companies. Following Committee recommendations HMRC has produced a further estimate regarding the costs of abolishing IR35 legislation and the administrative costs which taxpayers incur in dealing with IR35. A Committee recommendation that questions related to personal service company usage on tax return forms be either amended or removed has been accepted by the Government and the questions will be removed at the “earliest opportunity”. Following Committee recommendations Business Entity Tests have been withdrawn. Committee concerns regarding the use of personal service companies by lower paid workers, and a recommendation that the Low Pay Commission examine this area, have not been taken forward.

**Select Committee on the Mental Capacity Act 2005:** The Committee concluded that the Mental Capacity Act “was a visionary piece of legislation”, but determined that the Act suffered from a lack of awareness and understanding, which prevented the Act from becoming widely embedded in health and social care. The Committee recommended the establishment of a single independent oversight body to monitor and drive forward implementation of the Act. In addition, the Committee was critical of the Deprivation of Liberty Safeguards (DoLS) which were described as “poorly drafted and overly complex”, and recommended that the Government conduct a comprehensive review of DoLS with a view to replacing them. The Government has asked the Law Commission to carry out a fundamental review of DoLS, which is due to report to the Government with draft legislation by the end of 2016. Furthermore, the Government has set up a National Forum on Mental Capacity; in October 2015 it was announced that Baroness Finlay of Llandaff would chair the Forum. Some concerns have been expressed about the timescales of the Law Commission review and the remit of the Forum.

**Select Committee on the Inquiries Act 2005:** The key Committee recommendation was for the Government to establish a central inquiries unit within Her Majesty’s Courts and Tribunals Service. This has not been accepted, with the Government aiming to improve the current system of support available through the Cabinet Office. Recommended changes to the 2005 Act and the Inquiry Rules 2006, with particular regard to the use of warning letters by inquiries, have not yet been implemented. The Government recently described these changes as “in hand” and has undertaken to review the relevant rules “as we take forward work to amend the Inquiry Rules 2006”.

### 3. Select Committee on Soft Power and the UK's Influence

The Committee argued that soft power has become increasingly relevant as major shifts affected the conditions under which international relations are conducted. The report included over 80 recommendations for improving the way in which soft power was used by the UK in the future. For example, it recommended better coordination between Government departments and the establishment of a small unit at the centre of government to coordinate “the soft power story throughout Whitehall”; greater resources for embassies; improvements in visa policy and changes to the calculation of net migration figures; and greater engagement with “networks of the future”. The Government has rejected calls for a central unit to coordinate soft power in Whitehall and for a change in the calculation of net migration figures and emphasised work in a number of areas mentioned by the Committee, for example in the resourcing of embassies and the future of government-funded scholarships. There have been several reports and debates regarding soft power since the Committee reported. In November 2015, the *National Security Strategy and Strategic Defence and Security Review* included a reference to enhancing the UK’s “position as the world’s leading soft power”. The *Spending Review and Autumn Statement 2015* noted that the FCO’s budget was protected in real terms and emphasised funding to open new embassy buildings and the protection of the funding for the British Council in real terms, it also announced efficiency saving of £53 million by 2019–20.

#### 3.1 Background

On 21 March 2013, the House agreed the recommendations in the Liaison Committee’s [Review of Select Committee Activity and Proposals for New Committee Activity](#), these included a proposal to establish an ad hoc committee on the use of soft power in promoting the UK’s interests abroad.<sup>5</sup> The Committee on Soft Power and the UK’s influence was appointed on 16 May 2013 “to examine the use of soft power in furthering the United Kingdom’s global influence and interests”; it was instructed to report by 14 March 2014.<sup>6</sup>

The Committee held 24 meetings and took evidence from 60 witness, it also received 146 detailed written submissions.<sup>7</sup> The Committee’s report was ordered to be published on 11 March 2014.

#### 3.2 Committee Report: Key Recommendations

In 1990, the US political scientist, Professor Joseph Nye, defined soft power as “the ability to affect others to obtain the outcomes one wants through attraction rather than coercion or payment”.<sup>8</sup> The inquiry sought to examine the UK’s use of soft power and to provide recommendations about the way in which it should be used by the UK in the future.

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<sup>5</sup> [HL Hansard, 21 March 2013, col 674](#).

<sup>6</sup> [HL Hansard, 16 May 2013, col 542](#).

<sup>7</sup> House of Lords Select Committee on Soft Power and the UK’s Influence, [Power and Persuasion in the Modern World](#), 28 March 2014, HL Paper 150 of session 2013–14, p 23. The evidence which the Committee received can be viewed at the [Committee website](#).

<sup>8</sup> House of Lords Select Committee on Soft Power and the UK’s Influence, [Power and Persuasion in the Modern World](#), 28 March 2014, HL Paper 150 of session 2013–14, p 23.

The Committee identified major shifts in the conditions under which international relations were conducted, which made the concept of soft power increasingly relevant. These included: unprecedented international access to state information; the complexity of modern trade chains and multinational corporate operations; and the increasing asymmetry of modern warfare.<sup>9</sup> These changes were taking place alongside a shift in the international balance of power, as non-Western countries experienced rising economic and political power, sometimes referred to as “the rise of the rest”.<sup>10</sup> The Committee concluded that “the UK cannot simply proceed as before”, and included over 80 recommendations to “change fundamentally the way it [the UK] interacts with other nations and communities [...] to protect and promote its interests”.<sup>11</sup>

The Committee called on the Government to “to acquire a much deeper understanding of how others see the UK, and how the very most can be made of undoubtedly unique assets” and to “build on the UK’s strengths, support the already efficient success of soft power projection in many fields [and] avoid the false economies of short-termism in areas where results take time to mature”.<sup>12</sup>

The Committee recommended the establishment of a small unit at the centre of government specifically to assist the Prime Minister in “reinforcing the consistency of the soft power story throughout Whitehall” and the Committee’s report included a range of recommendations on a number of topics.<sup>13</sup> For example, the report included recommendations about the role of the Department for International Development in promoting soft power through its work; the importance of language skills for government officials; the importance of teaching of language skills in schools; the need to better resource the British Council for the teaching of British English; and the role of culture, and particularly the BBC World Service, in promoting soft power.

Amongst the key recommendations identified in the report’s summary were:

- A recommendation which called on the Government to commit more resources to its embassies, expressing concern that “the Government might have spread the UK’s diplomatic representation too thin”.<sup>14</sup>
- Recommendations for a review of how well the Department for International Development (DFID), the Ministry of Defence (MOD) and the Foreign and Commonwealth Office (FCO) cooperated in Afghanistan, with a view to providing lessons for any future post conflict reconstruction efforts; the Committee recommended that the Government should publish the results of the review as a Command Paper within a year of the withdrawal from Afghanistan.<sup>15</sup>
- The Committee emphasised the importance of “fully grasping the importance of hard power in knitting together with soft power to create ‘smart power’; the Armed forces, as they face the demands of a still faster-changing role, should be properly resourced to

<sup>9</sup> House of Lords Select Committee on Soft Power and the UK’s Influence, [Power and Persuasion in the Modern World](#), 28 March 2014, HL Paper 150 of session 2013–14, p 5.

<sup>10</sup> *ibid*, p 5.

<sup>11</sup> *ibid*, p 5.

<sup>12</sup> *ibid*, p 6.

<sup>13</sup> *ibid*, p 7.

<sup>14</sup> *ibid*, p 11.

<sup>15</sup> *ibid*, p 6.

meet these challenges”.<sup>16</sup> The Committee recommended that the Government, as part of the 2015 Strategic Defence and Security Review, undertake a thorough analysis of the contribution that soft and smart power might make to the UK’s security.

- The Committee argued that the UK must engage more actively and flexibly with the networks of the future that represent key emerging powers, with the aim of the UK being the best-networked state in the world. In particular, the Government should put greater emphasis on the potential of the Commonwealth; the Minister of State with responsibility for Commonwealth matters should have that task as his or her main role, and should be seen to do so.<sup>17</sup>
- The Committee recommended “taking positive steps to link soft power deployment and support for the country’s exports, its enterprise and its innovative capacities”.<sup>18</sup>
- The report included several recommendations relating to both immigration and visa policy. Noting the “highly complex challenge” of managing immigration the Committee concluded that every effort should be made “to ensure that legitimate visitors can access UK visas quickly, easily and cheaply”.<sup>19</sup> In addition, the Committee recommended that students should be removed from net migration targets.

On 9 April, the Committee on Soft Power and the UK’s Influence held a roundtable event hosted by the Committee chair, Lord Howell of Guildford (Conservative), to discuss the issues raised by the Committee’s report. Attendees included Minister Counsellor Mark Tokola (Acting Deputy Chief of Mission, US Embassy), Dr Afzal Ashraf (Royal United Services Institute), Ben Trim (National Security Secretariat), Professor Dame Helen Wallace (British Academy), Mike Lake (Consultant Director, Royal Commonwealth Society), Thomas Kielinger (*Die Welt*), Peter Horrocks (Director, BBC World Service Group), Sir Richard Ottaway MP (Chair, House of Commons Foreign Affairs Committee), Emile Simpson (author of *War from the Ground Up*), Richard Burge (Chief Executive, Wilton Park), Dr Robin Niblett (Director, Chatham House), Sir Martin Davidson (Chief Executive, British Council), Hugh Elliott (Director of Communication and Engagement, FCO), James Robbins (BBC diplomatic correspondent), and Richard Norton-Taylor (*Guardian*).

The participants discussed issues such as the roles of hard and soft power in the Ukraine crisis, and the part that the Government should—and shouldn’t—play in supporting the UK’s soft power; a [Lords Library Note](#) detailing some of the themes covered during the event was published on 22 April 2014.<sup>20</sup>

### 3.3 Government Response

The Government Response was published in June 2014.<sup>21</sup> The response was grouped into nine themes: Defining the UK’s Purpose and Direction and Communicating its Soft Power Strengths;

<sup>16</sup> House of Lords Select Committee on Soft Power and the UK’s Influence, [Power and Persuasion in the Modern World](#), 28 March 2014, HL Paper 150 of session 2013–14, p 6.

<sup>17</sup> *ibid*, p 6.

<sup>18</sup> *ibid*, p 6.

<sup>19</sup> *ibid*, p 6.

<sup>20</sup> House of Lords Library, [Committee on Soft Power and the UK’s Influence: Roundtable Discussion—9 April 2014](#), 22 April 2014.

<sup>21</sup> HM Government, [Government Response to the House of Lords Select Committee on Soft Power and the UK’s Influence: Persuasion and Power in the Modern World](#), June 2014, Cm 8879.

Government Coordination; Maximising the UK’s Position in Shifting Power Networks; Government Resourcing of the UK’s Soft Power Assets and Instruments; Cultural Assets and Institutions; Education and Science; Business and Exports; Smart Power and the Military; and the Department of International Development (DFID) and International Aid Programmes.

### **Defining the UK’s Purpose and Direction and Communicating its Soft Power Strengths**

The Government highlighted work that was being undertaken to communicate with the public and “increase public understanding of the Government’s work to project soft and smart power”.<sup>22</sup> It reiterated the importance of the US and EU relationship with the UK, for example by using the EU to “amplify UK efforts”, and highlighted the work of the “GREAT Britain” campaign to “showcase the bets of what Britain has to offer”.<sup>23</sup>

### **Government Coordination**

Responding to recommendations regarding soft power coordination the Government did “not believe that comprehensive central coordination of soft power is either feasible or desirable”.<sup>24</sup> It rejected the Committee recommendation calling for the creation of a unit at the centre of government to assist the Prime Minister “in reinforcing the consistency of the soft power story throughout Whitehall”.<sup>25</sup> In relation to the coordination of soft power promotion and the GREAT campaign, the response detailed examples of GREAT campaign coordination success, noting it would highlight “the benefits of departments joining up their promotional efforts [...] in the campaigns materials which are publicly available”.<sup>26</sup> The response emphasised work to promote the “UK’s values and direction”, for example in the speeches, statements and visits within and outside the UK.<sup>27</sup>

The Government disagreed with the Committee regarding the impact of visa policies upon “the assets that build the UK’s soft power”, and outlined work undertaken to ensure that the UK attracts “new and repeat visitors through easily accessible, straightforward and predictable visa services”.<sup>28</sup> It rejected the Committee’s recommendation to remove students from net migration targets and “entirely reject that there is an ‘anti-immigration rhetoric’ in its approach”.<sup>29</sup>

### **Maximising the UK’s Position in Shifting Power Networks**

The response highlighted work that was being undertaken to “maximise the UK’s position in shifting power networks”, for example in the “Emerging Powers Initiative” and through strengthening the UK’s diplomatic network.<sup>30</sup> The response noted “the Government disagrees with the Committee’s conclusion that it is neglectful of its relationship with the Commonwealth”,<sup>31</sup> and highlighted work underway “to give more support to intra-

<sup>22</sup> HM Government, [Government Response to the House of Lords Select Committee on Soft Power and the UK’s Influence: Persuasion and Power in the Modern World](#), June 2014, Cm 8879, p 6.

<sup>23</sup> *ibid*, p 7.

<sup>24</sup> *ibid*, p 11.

<sup>25</sup> *ibid*, p 11.

<sup>26</sup> *ibid*, p 9.

<sup>27</sup> *ibid*, pp 9–10.

<sup>28</sup> *ibid*, p 12.

<sup>29</sup> *ibid*, p 13.

<sup>30</sup> *ibid*, p 15.

<sup>31</sup> *ibid*, p 16.

Commonwealth trade” and “foster and encourage Commonwealth linkages”.<sup>32</sup> It rejected the Committee’s recommendation that the Minister of State responsible for the Commonwealth should have that as his or her main role.<sup>33</sup>

### **Government Resourcing of the UK’s Soft Power Assets and Instruments**

Outlining the Government’s approach to resourcing the UK’s soft power assets the response noted that “the Government is confident that the allocation of its resources is closely matched to the UK’s core foreign policy priorities”. It highlighted the additional funding for the Chevening Scholarship Programme as an example of the Government recognising the importance of long term funding for soft power projection.<sup>34</sup>

The Government noted the Committee’s recommendation to increase resources to the embassy network “and will consider this further in due course”; it outlined plans to deliver training through the Diplomatic Academy and welcomed the Committee’s interest in the FCO Language Centre and “notes the recommendation for an audit of language skills, which the FCO will discuss with other Government departments”.<sup>35</sup>

### **Cultural Assets and Institutions**

The Government agreed to the Committee’s recommendation to use resources to promote specific cultural activities that might increase inbound tourism, highlighting work, for example on the online cultural diary.<sup>36</sup> In relation to “cuts to publicly funded collections” the response noted “future levels of public investment will be considered at the appropriate time, but operational decisions on international activity will continue to be for the trustees and directors of individual institutions, not Government”.<sup>37</sup> The response noted the Committee’s conclusions on the creative industries and the UK’s regulatory environment, highlighting work to increase investment in the UK from technology and creative companies, and highlighted that Design and Technology is a compulsory subject in schools from key stage one to three.<sup>38</sup> The Government refuted the Committee’s conclusion that it was not doing enough to support the BBC World Service,<sup>39</sup> it also reiterated its support for work of the British Council, recognising its “significant contribution”.<sup>40</sup>

### **Education and Science**

The Government noted work being undertaken to “protect the UK education sector’s global position” and emphasised an increase in Chevening scholarships, noting that “the Cabinet Office will conduct a review of all government-funded scholarships (Chevening, Commonwealth and Marshall scholarships) later in 2014”;<sup>41</sup> it rejected Committee recommendations regarding the

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<sup>32</sup> HM Government, [Government Response to the House of Lords Select Committee on Soft Power and the UK’s Influence: Persuasion and Power in the Modern World](#), June 2014, Cm 8879, pp 17–18.

<sup>33</sup> *ibid*, p 17.

<sup>34</sup> *ibid*, p 20.

<sup>35</sup> *ibid*, p 22.

<sup>36</sup> *ibid*, p 24.

<sup>37</sup> *ibid*, p 24.

<sup>38</sup> *ibid*, p 25.

<sup>39</sup> *ibid*, pp 26–7.

<sup>40</sup> *ibid*, p 25.

<sup>41</sup> *ibid*, p 29.

establishment of university and school campuses overseas, emphasising work of DFID to support higher education initiatives.<sup>42</sup>

The response noted “the Committee’s concern over the decline in language learning in UK schools and universities”, and highlighted the inclusion of modern foreign languages in the English Baccalaureate, commenting “from September 2014 a foreign language will become statutory for maintained schools at key stage 2”.<sup>43</sup> It “agrees with the Committee’s recommendations on science and soft power”, highlighting a number of activities in this regard.<sup>44</sup>

### **Business and Exports**

The Government highlighted work being undertaken to promote the advantages of trading with the UK, noting “more can be done to support British SMEs”.<sup>45</sup> It stressed “the Government has taken major steps forward in transforming the culture and capabilities in commercial work in the FCO”, including ensuring that more FCO staff have either private sector or commercial experience.<sup>46</sup> The response outlined co-location work stating “wherever possible the Government is bringing together all parts of the UK Government under one roof”.<sup>47</sup>

### **Smart Power and the Role of the Military**

The Government rejected Committee calls to publish a review of cooperation between DFID, the MoD and the FCO in Afghanistan, it agreed that “the UK is the most effective as a global actor when it draws together all its instruments of national and international power: political; economic; military; and diplomatic”.<sup>48</sup> The Government agreed “that barriers should not be allowed to halt cooperation between military and civilian actors, where cooperation is necessary to provide humanitarian aid”,<sup>49</sup> and agreed “servicemen and servicewomen deserve greater recognition for the important work that they do in post conflict-reconstruction”.<sup>50</sup> The report noted that the scope of the Strategic Defence and Security Review had yet to be decided, given the imminent general election and agreed that military attachés should be fully integrated into mainstream embassy work.<sup>51</sup>

### **DFID and International Aid Programmes**

The response detailed development work being undertaken by DFID and other Government departments noting that “the Government has worked to improve recognition of the UK’s contribution to development of poorer countries”.<sup>52</sup> It noted the work being done by DFID to coordinate its work with other government departments, and highlighted work undertaken by

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<sup>42</sup> HM Government, [Government Response to the House of Lords Select Committee on Soft Power and the UK’s Influence: Persuasion and Power in the Modern World](#), June 2014, Cm 8879, p 29.

<sup>43</sup> *ibid*, p 30.

<sup>44</sup> *ibid*, p 31.

<sup>45</sup> *ibid* p 33.

<sup>46</sup> *ibid*, p 34.

<sup>47</sup> *ibid*, p 35.

<sup>48</sup> *ibid*, p 36.

<sup>49</sup> *ibid*, p 37.

<sup>50</sup> *ibid*, p 38.

<sup>51</sup> *ibid*, p 38.

<sup>52</sup> *ibid*, p 39.

DFID to allow greater transparency in its work, for example through the UK Development Tracker.<sup>53</sup>

### 3.4 Debate in the House of Lords

The House of Lords debated the report on 10 March 2015,<sup>54</sup> although the issue of soft power had been subject to several questions and debates in the Chamber prior to this, for example on ‘Soft Power and Conflict Prevention’ on 5 December 2014.<sup>55</sup>

Opening the wide-ranging debate the chair of the Committee, Lord Howell of Guildford (Conservative), identified four key messages of the Committee’s report. These were: the need to use both hard and soft power to safeguard “our national security and interests, and sustain our global influence”;<sup>56</sup> the need to use Britain’s assets of soft power and influence more effectively; the need to engage more effectively with networks of the future, rather than “clinging to the 20th century view of Atlantic hegemony, superpowers and trading blocs”;<sup>57</sup> and the need to widen Britain’s diplomacy, recognising there are empowered and e-enabled publics everywhere and in every country.<sup>58</sup>

Lord Bilimoria (Crossbench) was critical of the Government’s visa policy and the rhetoric regarding immigration,<sup>59</sup> points which were endorsed by Lord McConnell of Glenscorrodale (Labour).<sup>60</sup>

Lord Luce (Crossbench) emphasised the importance of the Commonwealth in projecting soft power, highlighting the value of Commonwealth institutions and the Commonwealth scholarships programme.<sup>61</sup> Baroness Morgan of Ely (Labour) stressed the need to work in “partnership with our EU colleagues” to influence the world, and highlighted the importance of the diplomatic service. In particular she highlighted the importance of diversity in the FCO staff.<sup>62</sup>

Committee member Lord Janvrin (Crossbench) described the United Kingdom as being “extraordinarily blessed” with regards to soft power,<sup>63</sup> and several members focused their remarks on the institutions which could be used to further promote soft power.

For example Committee member, Lord Forsyth of Drumlean (Conservative), highlighted the important role of the Commonwealth, BBC World Service and British Council in soft power,<sup>64</sup> while Viscount Colville of Culross (Crossbench) focussed his remarks on the BBC World Service,<sup>65</sup> and Lord Bach (Labour) commented on the British Council.<sup>66</sup> Lord Addington (Liberal

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<sup>53</sup> HM Government, [Government Response to the House of Lords Select Committee on Soft Power and the UK’s Influence: Persuasion and Power in the Modern World](#), June 2014, Cm 8879, p 42.

<sup>54</sup> [HL Hansard, 10 March 2015, cols 548–620](#).

<sup>55</sup> [HL Hansard, 5 December 2014, cols 1513–90](#). Further information is also provided in the House of Lords Library, [The Role of Soft Power and Non-Military Options in Conflict Prevention](#) (1 December 2014).

<sup>56</sup> [HL Hansard, 10 March 2015, col 549](#).

<sup>57</sup> [ibid, col 550](#).

<sup>58</sup> [ibid, col 551](#).

<sup>59</sup> [ibid, col 599](#).

<sup>60</sup> [ibid, col 601](#).

<sup>61</sup> [ibid, col 604](#).

<sup>62</sup> [ibid, col 613](#).

<sup>63</sup> [ibid, col 590](#).

<sup>64</sup> [ibid, col 566](#).

<sup>65</sup> [ibid, col 577](#).

Democrat) emphasised the importance of sport noting “the Olympics themselves have become something of a beacon”.<sup>67</sup>

Baroness Nicholson of Winterbourne (Liberal Democrat), another Committee member, stressed the importance of the Commonwealth, noting that a Government review of the subject of Commonwealth scholarships was due to report that month.<sup>68</sup> Baroness Hooper (Conservative) welcomed the increase in Chevening and Commonwealth scholarships.

Baroness Coussins (Crossbench) emphasised the importance of language skills to soft power and stressed the need for a long term strategy on language learning in schools and universities.<sup>69</sup> Baroness Suttie (Liberal Democrat) called on the Government “to redress the decline in language learning in UK schools and universities”.<sup>70</sup> Lord Crisp (Crossbench) stated the importance of the health sector in promoting the UK’s power and influence internationally,<sup>71</sup> sentiments echoed by Lord Kakkar (Crossbench).<sup>72</sup>

Lord Stirrup (Crossbench) noted the importance of military power, but noted the “military instrument, important though it is, depends in turn on other forms of power. It must rest on a bedrock of economic strength, clear political purpose and moral authority”.<sup>73</sup> Lord Hannay of Chiswick (Crossbench) also stressed the link between hard and soft power and noted “in debating Britain’s soft power today we must not lose sight of the crucial need for important decisions to be taken early in the next Parliament on Britain’s hard power resources [...] if we continue to shrink those resources, we shall as a country have less influence over events”.<sup>74</sup>

Viscount Eccles (Conservative) called on DFID to do more to grasp economic opportunities, stating, “it is not that I think what we are doing is not okay; it is just that I think we could be doing more”.<sup>75</sup>

Responding for the Government, the Lord Wallace of Saltaire noted the “very wide-ranging debate” and touched on several issues that members had raised, emphasising the importance of education, the creative industries, the BBC, and non-governmental organisations in promoting soft power.<sup>76</sup> He emphasised the importance of the European Union to “our global role”,<sup>77</sup> and noted the role of the Commonwealth stating that Commonwealth scholarships, though under review “will be continued”.<sup>78</sup> Acknowledging the issue of language skills in the civil service, and in particular to the recruitment of “Brits to international institutions”, Lord Wallace stressed “we all recognise that there is a long way to go”. Concluding, he stated:

Soft power grows out of both government and civil society. States in which Governments control most social and cultural institutions have little soft power. Government must nevertheless invest in the elements which constitute soft power, in

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<sup>66</sup> [HL Hansard, 10 March 2015, col 565.](#)

<sup>67</sup> [ibid, col 608.](#)

<sup>68</sup> [ibid, col 557.](#)

<sup>69</sup> [ibid, cols 557–8.](#)

<sup>70</sup> [ibid, col 571.](#)

<sup>71</sup> [ibid, col 574.](#)

<sup>72</sup> [ibid, col 609.](#)

<sup>73</sup> [ibid, col 552.](#)

<sup>74</sup> [ibid, col 561.](#)

<sup>75</sup> [ibid, col 574.](#)

<sup>76</sup> [ibid, cols 615–17.](#)

<sup>77</sup> [ibid, col 617.](#)

<sup>78</sup> [ibid, col 619.](#)

partnership with others [...] This Government—and, we hope, their successor—will continue to invest.<sup>79</sup>

Summing up, Lord Howell of Guildford, chair of the Committee noted “my final hope is that we do not just leave it here, so that this was a one-off debate on a one-off subject” and highlighted Committee suggestions for annual reports from the Government to Parliament, regular discussions in the National Security Council and annual debates in Parliament on the subject of soft power.<sup>80</sup>

### 3.5 Further Developments

On 9 June 2015, the then Chairman of Committees, Lord Sewel, wrote to the Cabinet Office requesting information about developments in a number of areas where the Committee had made recommendations. In particular, he requested information regarding the embassy network and its resourcing, the visa system, intra-Commonwealth trade, BBC funding and the outcome of a review of government-funded scholarships.

The Minister of State at the Foreign and Commonwealth Office, Hugo Swire, responded for the Government on 20 October 2015.<sup>81</sup> In relation to the resourcing of the embassy network he noted that “since 2010 the FCO has invested £300m to ensure we can project UK interests where we need to” and highlighted the opening or upgrading of 18 posts, such as a new embassy in Jakarta.<sup>82</sup> Describing the impact of changes modernising and streamlining corporate functions as “successful”, he emphasised the “highly-skilled workforce of local contracts” which had been developed who “perform policy, economic, consular and representational work overseas, as well as ensuring our platform for the whole of Government is well managed”.<sup>83</sup>

The Minister noted that the National Security Council “regularly discusses the use of the UK’s soft power”,<sup>84</sup> and highlighted work the Government had undertaken to promote intra-Commonwealth trade, such as the political and financial support provided for the establishment of the Commonwealth Enterprise and Investment Council in 2014. In relation to visas the Minister stated “there is always room for improvement here”, although he noted that “visa application processes in growth areas have been improved” and highlighted the achievement of the UK Visas and Immigration Customer Service Excellence accreditation. The letter also noted “we are confident we are communicating effectively” to international students about the “UK offer”.<sup>85</sup>

The letter highlighted the review of the BBC Royal Charter and outlined the funding arrangements between DFID and the BBC.<sup>86</sup> The Minister noted that DFID’s £90 million, five year global programme, which supported BBC Media Action’s development work would come to an end in October 2016 but “DFID is discussing with BBC Media Action the options for continuing and deepening its long term partnership through to 2021 [...] the Conflict, Stability

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<sup>79</sup> [HL Hansard, 10 March 2015, col 620.](#)

<sup>80</sup> [ibid, col 620.](#)

<sup>81</sup> House of Lords Liaison Committee, ‘[Letter from the Rt Hon Hugo Swire MP dated 20 October 2015 on follow - up to the Select Committee on Soft Power and the UK’s Influence](#)’, 28 October 2015.

<sup>82</sup> [ibid, p 1.](#)

<sup>83</sup> [ibid, p 1.](#)

<sup>84</sup> [ibid, p2.](#)

<sup>85</sup> [ibid, p 2.](#)

<sup>86</sup> [ibid, p 3.](#)

and Security Fund will continue to provide other funding opportunities for BBC Media Action’s global work”.<sup>87</sup>

Referring to the outcome of the review into government-funded scholarships, Mr Swire stated “the review recommended that the three unique schemes should continue, but should sit side by side in a single FCO sponsored Non-Departmental Public Body’, noting, “further work is required to look more closely at the detail of the governance options that would protect the brands and objectives of each scheme”.<sup>88</sup>

On 23 October 2014, the House of Commons Foreign Affairs Committee published its report, [The FCO and the 2015 Spending Review](#).<sup>89</sup> The report included analysis of the FCO’s scope for any future budget cuts, should these be announced in the November 2015 Spending Review. In particular, the report warned against cuts to the British Council’s budget arguing that this “would inevitably weaken the UK’s capacity to project soft power and culture in target countries”.<sup>90</sup> It welcomed FCO efforts to remedy the “shortfall in language skills while promoting and developing diplomatic skills through the new Diplomatic Academy” but noted that “there is still quite some way to go”.<sup>91</sup>

The report stated that foreign policy “underlies the priorities of other Government departments, notably the Ministry of Defence and Department for International Development”, and called for greater coherence in cross-departmental budgets noting “the blurring of distinctions between the roles of different departments”.<sup>92</sup> It recommended that the “Treasury protect the FCO budget for the period covered by the 2015 Spending Review, with a view to increasing rather than cutting the funds available to support the diplomatic work on which the country’s security and prosperity depend”.<sup>93</sup>

In a parliamentary question on 19 November 2015, Baroness Helic (Conservative) questioned whether the funding of the FCO was “sufficient for the department to fulfil its mission of promoting the United Kingdom’s interests overseas and supporting United Kingdom citizens and businesses globally”.<sup>94</sup> Responding for the Government, the Earl of Courtown, stated:

Since 2010, the FCO has cut its operating costs by more than £100 million while flexing its network to meet new opportunities and challenges. We have opened or upgraded 18 diplomatic missions, increasing our presence in the fastest-growing economies.<sup>95</sup>

Lord Howell of Guildford, chair of the Committee commented:

We are now actually spending less on the Foreign and Commonwealth Office, which is the spearhead of our overseas influence, than we are expending on, for instance, one individual experimental programme for reducing carbon—namely, the carbon capture

<sup>87</sup> House of Lords Liaison Committee, [‘Letter from the Rt Hon Hugo Swire MP dated 20 October 2015 on follow-up to the Select Committee on Soft Power and the UK’s Influence’](#), 28 October 2015, p 3.

<sup>88</sup> *ibid*, p 3.

<sup>89</sup> House of Commons Foreign Affairs Committee, [The FCO and the 2015 Spending Review](#), 23 October 2015, HC 467 of session 2015–16.

<sup>90</sup> *ibid*, p 3.

<sup>91</sup> *ibid*, p 10.

<sup>92</sup> *ibid*, p 11.

<sup>93</sup> *ibid*, p 14.

<sup>94</sup> [HL Hansard, 19 November 2015, col 258](#).

<sup>95</sup> [ibid, col 258](#).

and storage system at £1 billion—which so far has produced very few results? Is it not time for some rebalancing?<sup>96</sup>

Lord Wallace of Saltaire, the Principal Spokesperson on the Foreign and Commonwealth Office for the Liberal Democrats, noted:

When the Ukraine crisis broke out, the FCO really felt its lack of expertise on Russia. If the FCO's staff is cut further, expertise to analyse what is happening at the moment in countries in other very sensitive areas such as Central Asia, the North Caucasus and the Middle East will be in short supply.<sup>97</sup>

In response, the Earl of Courtown reiterated that the Government had upgraded 18 posts “under the network shift programme and strategic reprioritisation exercises” in addition to “deploying 300 extra front-line staff in more than 30 countries”, he also highlighted “the good work being done by UKTI. The Foreign and Commonwealth Office has helped to deliver some £37.6 billion-worth of business wins for UK industry”.<sup>98</sup>

On 25 November 2015, the Spending Review and Autumn Statement 2015 confirmed that the UK will continue to spend 0.7 percent of national income on aid, and outlined the Resource Departmental Expenditure Limits (DEL) for each department.<sup>99</sup> The detail of the settlement for the FCO was outlined in a Government press release:

For the Foreign and Commonwealth Office this means:

- Protecting the FCO's budget in real terms to promote British interests globally and maintain the network of diplomatic posts which host 26 different government departments and agencies around the world, and to coordinate the UK's presidency of the EU in 2017;
- Funding to open new embassy buildings in Abuja and Budapest and further investment across the FCO estate to keep people safe while they are working for the UK abroad;
- Funding for the British Council will also be protected in real terms, and in addition, it will be able to bid competitively for up to £700 million from a cross-government fund to improve links with emerging economies, help tackle extremism globally and support good governance,
- Efficiency savings of £53 million by 2019–20<sup>100</sup>

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<sup>96</sup> [HL Hansard, 19 November 2015, col 258col 259.](#)

<sup>97</sup> [ibid, col 259.](#)

<sup>98</sup> [ibid, col 260.](#)

<sup>99</sup> HM Treasury, [Spending Review and Autumn Statement 2015: Key Announcements](#), 25 November 2015.

<sup>100</sup> HM Treasury et al Press Release, ['Foreign Office's Settlement at the Spending Review 2015'](#), 25 November 2015.

On 23 November 2015, the Government published the [National Security Strategy and Strategic Defence and Security Review](#), which set out the Government’s approach to national security.<sup>101</sup> It included a reference to soft power, stating:

We will further enhance our position as the world’s leading soft power promoting our values and interests globally, with our world-class Diplomatic Service, commitment to overseas development, and institutions such as the BBC World Service and the British Council.<sup>102</sup>

On 3 December 2015, the House of Lords held a debate on the United Kingdom’s role in supporting international security and stability in the light of the strategic defence and security review, in which several members highlighted the importance of soft power. Lord Sterling of Plaistow (Conservative) called for the Armed Forces to have a greater role in encouraging soft power,<sup>103</sup> whilst the chair of the Committee, Lord Howell of Guildford, noted that the Government’s description of how soft power should work “hand-in-hand” with hard power “all sounds fine.” However, he added, “more important than that is whether the fine aspirations that the Prime Minister sets out are being followed up” and called for the MOD, FCO and DFID to work more closely together.<sup>104</sup>

Baroness Jolly, Principal Spokesperson for Defence for the Liberal Democrats, “welcomed the move to expand the presence in our embassies worldwide” noting “we should never underestimate their influence and ability not only to be the face of UK plc, but also to be our eyes, ears and voices in country”. She sought assurances regarding possible cuts in funding to the British Council and the BBC World Service.<sup>105</sup>

Lord Touhig, Shadow Spokesperson for Defence, welcomed the Government’s £85 million investment in the BBC World Service to support initiatives in Russia, North Korea, the Middle East and Africa as a sign that “Government have acknowledged the importance of soft power” but stressed, “it is essential that the Government begin to make soft power central to any foreign and defence policy thinking. I would be grateful for the Minister’s views on this. Perhaps he could tell us a little more about what might be done other than the planned investment in support of the BBC”.<sup>106</sup>

Responding for the Government, Earl Howe, the Minister of State at the Ministry of Defence, emphasised that the report was about both soft and hard power, noting “the integral importance of UK development assistance to long-term security and prosperity”.<sup>107</sup>

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<sup>101</sup> HM Government, [National Security Strategy and Strategic Defence and Security Review 2015](#), 23 November 2015, Cm 9161. For further information see House of Commons Library, [The 2015 Strategic Defence and Security Review](#) (12 January 2016) and [The 2015 UK National Security Strategy](#) (14 December 2015).

<sup>102</sup> HM Government, [National Security Strategy and Strategic Defence and Security Review 2015](#), 23 November 2015, Cm 9161, p 9.

<sup>103</sup> [HL Hansard, 3 December 2015, col 1263](#).

<sup>104</sup> [ibid, col 1257](#).

<sup>105</sup> [ibid, col 1288–9](#).

<sup>106</sup> [ibid, col 1291](#).

<sup>107</sup> [ibid, col 1295](#).

## 4. Select Committee on Olympic and Paralympic Legacy

Although the Committee noted that the Olympic and Paralympic Games were an “outstanding success”, it expressed concern regarding participation levels in sport, the regeneration of East London and the governance arrangements in place to deliver an Olympic and Paralympic legacy. Since the Committee report there have been several other reports on delivering the Olympic legacy. The most recent figures from the Active People Survey show a decline in participation in sport. There have also been several debates in the House of Lords on the topic, most recently in November 2015. On 17 December 2015 the Government published *Sporting Future: A New Strategy for an Active Nation*, which detailed plans to replace the Active People Survey and to base funding decisions on “the social good that sport and physical activity can deliver”.

### 4.1 Background

On 6 July 2005, the International Olympic Committee announced that London would hold the 2012 Summer Olympic and Paralympic Games. The London 2012 Olympic Games took place from 27 July to 12 August, and the Paralympic Games took place from 29 August to 9 September. A key theme of the UK’s bid for the Olympic Games was the pledge to “create and extraordinary legacy” for the UK and the world. The Select Committee on Olympic and Paralympic Legacy was appointed by the House of Lords to consider “the strategic issues for regeneration and sporting legacy from the Olympic and Paralympic Games, and to make recommendations”.<sup>108</sup>

The Committee was appointed on 16 May 2013 and was one of two shorter enquiries that was undertaken by ad hoc committees in the 2013–14 session.<sup>109</sup> The Committee issued a call for evidence in June and its report was published on 18 November 2013.<sup>110</sup>

### 4.2 Committee Report: Key Recommendations

The Committee’s report included 41 recommendations, with 26 recommendations identified as meriting further follow-up twelve months after the publication of the report. The Committee identified several different aspects of legacy. The report included recommendations for encouraging, funding and measuring participation in sports at schools, grassroots level and in high performance sports. In addition, recommendations to ensure a legacy in terms of the facilities available and in the regeneration of East London were identified.

#### Governance of the Olympic legacy

Overarching these recommendations were calls for a clearer governance structure with one minister, at Secretary of State level, responsible for co-ordinating the delivery of legacy, with the ownership of the legacy in East London falling to the Mayor of London.

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<sup>108</sup> [HL Hansard, 16 May 2013, cols 542–3.](#)

<sup>109</sup> The use of the shorter ad hoc committees was discussed in the House of Lords Liaison Committee report, [Review of Select Committee Activity and Proposals for New Committee Activity](#) (17 March 2014, HL Paper 145 of session 2013–14) which noted some of the difficulties in evidence gathering that the shorter inquiries faced. The Liaison Committee did not recommend the appointment of any short ad hoc committees during the 2014–15 session; there were no short investigative ad hoc committees in 2015–16.

<sup>110</sup> House of Lords Committee on Olympic and Paralympic Legacy, [Keeping the Flame Alive: The Olympic and Paralympic Legacy](#), 18 November 2013, HL Paper 78 of session 2013–14.

The Committee identified a “patchy infrastructure” for sports at grassroots level and recommended the production of action plans for individual sports which it felt could encourage participation and identify possible gaps between likely supply and demand.<sup>111</sup> It was recommended that the Government report annually to Parliament concerning the progress of the plans.

### Participation in Sport

In addition, the Committee expressed concern with the methodology for measuring participation in sport, the *Active People Survey* and the *Taking Part Survey*, and recommended changes, particularly to better capture the activity levels of young people. The Committee recommended a review of training for specialist PE teachers and a focus on sport in school from OFSTED inspections, both in terms of funding and the amount of time spent on physical education in the school day.

In terms of high performance sports, the Committee recommended changes to UK Sport’s “no compromise” funding formula, whereby funding is focused on sports seen to have the greatest chance of medal success, which it felt could lead to a “growing gap” between sports doing well and emerging sports. The Committee also discussed the fielding of Team GB football teams for both men and women and the need to establish athletes’ commissions to ensure that “athletes’ voices can be heard” by governing bodies.<sup>112</sup>

The Committee examined the legacy of sports facilities, with particular regard to the future uses of the Olympic Stadium, and recommended that the Government work to improve standards of access and facilities for disabled visitors to sports stadia. It called for the pricing structure at facilities such as the White Water facilities in Lee Valley Regional Park to be reviewed with a view to encouraging schools and clubs to utilise the facilities.

### Regeneration

A substantial number of recommendations related to the regeneration of East London.<sup>113</sup> The Committee recommended that the responsibility for coordinating the legacy in East London should fall to the Mayor of London, who would report annually to the London Assembly “setting out the extent to which partners are making progress in delivering the legacy for East London”.<sup>114</sup> Recommendations related to the provision of affordable housing and housing that “reflects the needs of local people”. It also called for the generation of new job opportunities and the provision of a coordinated response to meet skills shortages and support local residents in developing skills. The infrastructure of the Olympic Park, with particular regard to sustainability and transport was also discussed.

The Committee also discussed the economic and social legacy from the 2012 Olympics.<sup>115</sup> It recommended improvements to the Supplier Recognition Scheme and suggested rolling out the CompeteFor portal further. The Committee highlighted concerns with the reach of the

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<sup>111</sup> House of Lords Committee on Olympic and Paralympic Legacy, [Keeping the Flame Alive: The Olympic and Paralympic Legacy](#), 18 November 2013, HL Paper 78 of session 2013–14, p 8.

<sup>112</sup> *ibid*, p 10.

<sup>113</sup> Further details regarding the Olympic legacy and the regeneration of East London can be found in House of Lords Library, [Regeneration of East London since the 2012 Olympic and Paralympic Games](#), 30 October 2015.

<sup>114</sup> House of Lords Committee on Olympic and Paralympic Legacy, [Keeping the Flame Alive: The Olympic and Paralympic Legacy](#), 18 November 2013, HL Paper 78 of session 2013–14, p 13.

<sup>115</sup> *ibid*, pp 16–17.

economic and tourism benefits of the Olympic legacy outside of London; the volunteering legacy and cultural legacy of the Games were also discussed.

### 4.3 Government Response

The Government Response to the Committee's report was published in February 2014 and was issued jointly on behalf of the Government and the Mayor of London.<sup>116</sup> The response rejected recommendations relating to the 'no compromise' spending formula for high performance sports and highlighted a number of areas where it felt that recommendations made by the Committee were already being undertaken, for example in relation to action plans for individual sports.

#### Governance of the Olympic legacy

In response to the Committee's recommendations regarding the governance of the Olympic legacy, the Government and the Mayor of London stated that the Secretary of State for Culture, Media and Sport was the cabinet minister responsible and accountable to Parliament for co-ordinating delivery of the legacy, and that responsibility for the East London legacy rested with the office of the Mayor of London.<sup>117</sup> The Mayor undertook to report annual progress to the London Assembly on the East London legacy and emphasised work already being undertaken to ensure the provision of housing, infrastructure and skills training to meet the needs to the local population.<sup>118</sup>

#### Participation in Sport

Addressing recommendations concerning the methodology of surveys which measured participation in sport, the Government's response noted that Sport England was already consulting on the introduction of mobile phone data collection in the *Active People Survey*, but had concluded it was unnecessary and unsuitable for the *Taking Part Survey*.<sup>119</sup> The Government highlighted current investment in sport in schools and the way in which OFSTED inspected this, it confirmed that PE remained a compulsory subject in all four key stages of the national curriculum and noted work being undertaken to train specialist PE teachers.<sup>120</sup>

The Government highlighted work already undertaken in relation to improving the standards of access and facilities for disabled spectators at sports stadia, although stating "we recognise more can be done" it noted, "it would be better for football and other sports grounds to take action in partnership with the representative groups of disabled spectators to improve accessibility without there being a need for Government to consider the imposition of further prescriptive licensing requirements".<sup>121</sup>

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<sup>116</sup> HM Government, [Government and Mayor of London Response to the House of Lords Select Committee on Olympic and Paralympic Legacy Report of Session 2013–14: 'Keeping the Flame Alive: The Olympic and Paralympic Legacy'](#), February 2014, Cm 8814.

<sup>117</sup> *ibid*, p 29.

<sup>118</sup> *ibid*, p 13.

<sup>119</sup> *ibid*, p 2.

<sup>120</sup> *ibid*, pp 3–5.

<sup>121</sup> *ibid*, p 9.

## 4.4 Debate in the House of Lords

The Committee's report and the Government's response to it were debated in the House of Lords on 19 March 2014.<sup>122</sup> Opening the debate the chair of the Committee on the Olympic and Paralympic Legacy, Lord Harris of Haringey (Labour), praised the "outstanding success" of the Games, but voiced concern that "the envisaged post-Games step change in participation across the United Kingdom and across different sports simply did not materialise".<sup>123</sup> He also expressed disappointment about the Government response to the Committee recommendations regarding the 'no compromise' funding of high performance sports.

### Participation in Sport

Concerns regarding the 'no compromise' funding formula used by UK Sport were highlighted by several members. Committee member Lord Addington (Liberal Democrat) noted its potential impact on participation levels for other sports, while Baroness Billingham (Labour) felt that the Government "made the wrong decisions about elite sport over grassroots sport", and was also critical of changes to the school sports partnership.<sup>124</sup> Lord Moynihan (Conservative), former chairman of the British Olympic Association, emphasised the negative impact of the 'no compromise' funding approach on sports such as basketball, handball and water polo.<sup>125</sup>

Lord Moynihan also noted the importance of sport in schools, sentiments echoed by the Earl of Arran (Conservative) and several other speakers. While welcoming the Government's announcement that PE would remain a compulsory subject in all four key stages of the national curriculum, he described the Government's response regarding participation and physical education in schools as "pretty woolly".<sup>126</sup> The importance of participation both at school and for adults was also commented on by both Lord Stevenson of Balmacara (Labour) and Baroness King of Bow (Labour) who endorsed a report produced by Baroness Grey-Thompson (Crossbench) which had called on the Government to give PE greater priority in the school curriculum.<sup>127</sup>

Discussing the Paralympic Games, Baroness Grey-Thompson noted "The Paralympic Games were amazing. They exceeded every expectation that I could possibly have had" but noted "I am convinced that the Paralympic Games changed the attitude towards Paralympians, but I am not sure that it did much to change the attitude towards disabled people in general".<sup>128</sup> She welcomed new targets from Sport England regarding disabled participation rates, and raised the issue of disabled access at sports grounds noting: "The Government provided a detailed, self-explanatory response, so I do not expect the Minister to respond on this matter. But I would strongly support any work that the Government were going to do in that area".<sup>129</sup> Committee recommendations regarding disabled access to sports grounds were also raised by Lord Faulkner of Worcester (Labour) who welcomed the Government's response and encouraged it

<sup>122</sup> [HL Hansard, 19 March 2014, cols 216–68.](#)

<sup>123</sup> [ibid, cols 217–18.](#)

<sup>124</sup> [ibid, col 225.](#)

<sup>125</sup> [ibid, col 234.](#)

<sup>126</sup> [ibid, col 250.](#)

<sup>127</sup> [ibid, col 236.](#)

<sup>128</sup> [ibid, col 254.](#)

<sup>129</sup> [ibid, col 255.](#)

to “hold football’s feet to the fire and legislate if necessary to make it all happen”.<sup>130</sup> Lord Wigley (Plaid Cymru) also queried the timetable for any Government legislation on the issue.<sup>131</sup>

## Regeneration

Several members focussed their remarks on the Committee’s recommendations with regard to the regeneration legacy. Lord Best (Crossbench) praised the acceleration of regeneration that had happened with regard to transportation, housing and infrastructure, but expressed concern about the employment opportunities available to communities in East London.<sup>132</sup> Lord Mawson (Crossbench), director of the London Legacy Development Corporation, highlighted developments in facilities, housing and transport, and work being undertaken which sought to provide training and employment opportunities to local people.<sup>133</sup> The importance of a regeneration legacy which benefitted local people in East London was also emphasised by Lord Stoneham of Droxford (Liberal Democrat).<sup>134</sup>

Responding for the Government, Lord Bates pointed to statistics that showed an increase in volunteering and sporting participation since 2005, when the UK won the Olympic bid.<sup>135</sup> He praised the legacy of the Olympic facilities, noting that all eight venues at the Olympic park had a secured future and highlighted work being undertaken in schools and by OFSTED to increase sporting participation. Lord Bates emphasised the agreement of the Mayor of London to publish annual reports on progress on regeneration and legacy and reiterated the Government view that the Minister responsible for developing the Olympic legacy was the Secretary of State for Culture, Media and Sport.<sup>136</sup>

Concluding the debate Lord Harris of Haringey called for highest level of leadership to “make things happen” with regard to the legacy, noting “no one is suggesting that the Olympics were anything other than an enormous success and that we have delivered far more legacy than any previous Olympic Games. It is just that we could done it so much better and achieved so much more”.<sup>137</sup>

## 4.5 Further Developments

There have been several developments related to both the Olympic legacy and sports policy more widely since the House of Lords debated the Committee report in March 2014.<sup>138</sup>

In October 2014, UK Sport, the body responsible for funding high performance sport, and for the ‘no compromise’ funding policy, announced a public consultation on its funding priorities.<sup>139</sup>

In March 2015, the UK Sport Board announced the results of the consultation. It confirmed continued support for the focus on medal success as a key goal in funding policy.<sup>140</sup> In addition,

<sup>130</sup> [HL Hansard, 19 March 2014, col 254.](#)

<sup>131</sup> [ibid. col 242.](#)

<sup>132</sup> [ibid. col 203.](#)

<sup>133</sup> [ibid. cols 246–7.](#)

<sup>134</sup> [ibid. cols 239–41.](#)

<sup>135</sup> [ibid. col 264.](#)

<sup>136</sup> [ibid. col 263.](#)

<sup>137</sup> [ibid. col 268.](#)

<sup>138</sup> House of Commons Library, [London Olympics 2012: A Sporting Legacy?](#), 18 September 2015 and [School Sport](#), 10 September 2015.

<sup>139</sup> UK Sport, [‘Press release: UK Sport opens Consultation on Future Strategy Post Rio 2016’](#), 29 October 2014.

<sup>140</sup> UK Sport, [‘UK Sport Board sets Future Direction for High Performance Sport beyond Rio’](#), 19 March 2015.

it announced its intention to explore “wider impact factors”, such as number of medallists and participation level in its measures of success “if required to make investment decisions around sports of equal medal potential”. The Board also agreed the potential for greater flexibility in the length of performance pathways and to more collaboration with Home County Sports Councils.

The Department for Culture, Media and Sport published its report, [A Living Legacy: 2010–15 Sport Policy and Investment](#) in March 2015.<sup>141</sup> The report examined investment in sport and the impact that the 2012 Games had on a range of different areas, for example in inspiring young people and boosting women’s sport to improving sports facilities and providing new opportunities for disabled people.

On 11 June 2015, Sport England published the most recent findings of the [Active People Survey](#), which measures grassroots sports participation levels.<sup>142</sup> The statistics covered the period April 2014 to March 2015 and showed that 15.5 million people did some kind of sport once a week, every week. This represented an increase of 1.4 million compared with 2005/06 but a decrease of 222,000 compared with the October 2014 survey.<sup>143</sup> In addition, on 25 June the Department for Culture, Media and Sport released statistics from the [Taking Part Survey](#).<sup>144</sup>

On 24 June 2015, the House of Commons held a debate on the Olympic legacy.<sup>145</sup> During the debate the Sports Minister, Tracey Crouch, expressed concerns regarding participation rates in sport, identified by the *Active People Survey*. The Minister announced that the Department for Culture, Media and Sport was developing a new sports strategy, to replace the one in place since 2002.<sup>146</sup>

A consultation document on [A New Strategy for Sport](#) was published in August 2015, with the consultation closing on 2 October 2015. The House of Lords debated the government consultation paper on 15 October 2015.<sup>147</sup> In August 2015, the Government and Mayor of London published the third annual report on the Olympic legacy.<sup>148</sup>

On 9 June 2015, the then Chairman of Committees, Lord Sewel, wrote to the Secretary of State for Culture, Media and Sport, John Whittingdale, to request an update on several issues raised by the Committee. Included amongst these was a request for updated figures on sports participation and details of the Government’s plans to introduce legislation regarding access and facilities for disabled spectators at sports grounds. In addition, more details regarding sport in schools, the economic legacy and the regeneration of East London were requested, as well as information concerning the current status of governance arrangements for delivering a legacy.

The Secretary of State responded on 20 July 2015.<sup>149</sup> Stating that “the UK has benefitted from £14.2 billion in trade and investment off the back of the Games” the Secretary of State

<sup>141</sup> Department for Culture, Media and Sport, [A Living Legacy: 2010–15 Sport Policy and Investment](#), March 2015.

<sup>142</sup> Sport England, [‘Further Swimming Decline Dominates Latest Sports Figures’](#), 11 June 2015

<sup>143</sup> *ibid.*

<sup>144</sup> Department for Culture, Media and Sport, [‘National Statistics: Taking Part 2014/15 Quarter 4 Statistical Release’](#), 25 June 2015.

<sup>145</sup> [HC Hansard, 24 June 2015, cols 964–1003.](#)

<sup>146</sup> [ibid, col 1002.](#)

<sup>147</sup> [HL Hansard, 15 October 2015, cols 379–415.](#)

<sup>148</sup> HM Government and Mayor of London, [Inspired by 2012: The Legacy from the Olympic and Paralympic Games—Third Annual Report: Summer 2015](#), 10 August 2015.

<sup>149</sup> House of Lords Liaison Committee, [‘Letter from John Whittingdale MP dated 20 July 2015 on follow-up to the Olympic and Paralympic Legacy Committee’](#), 28 October 2015.

emphasised the “astonishing transformation” of East London.<sup>150</sup> However, he acknowledged that “in some areas there is more to do”, in particular he highlighted the importance of increasing the number of people participating in sports; he encouraged Members of the Committee to become involved in the consultation on a new sports strategy.

The response included detailed information relating to the Chairman of Committees’ enquiries, for example concerning the economic legacy and sport in schools. In addition, it included further information relating to all of the recommendations which the Committee had originally marked as meriting follow-up twelve months after its initial report. The information includes annualised data, as a percentage of total population, for sporting participation since 2005, to details of plans to change the methodology of the *Active People Survey*.

In reference to the question of disabled access and facilities at sports grounds the Government acknowledged Lord Faulkner of Worcester’s private member’s bill on the subject, stating “we are currently considering the measures put forward in the Bill and whether they will provide increased accessibility at sports grounds as it seeks to do”.<sup>151</sup> Regarding a timetable for government legislation the response stated that the Government continued “to consider the issue” but noted:

We remain of the view that it would be better for football and other sports clubs to take action in partnership with the representative groups of disabled spectators to improve accessibility without there being a need for Government to consider the imposition of further prescriptive licensing requirements or additional legislation.<sup>152</sup>

On 17 December 2015, the Government published *Sporting Future: A New Strategy for an Active Nation*.<sup>153</sup> Introducing the Sports Strategy in a written statement the Sports Minister, Tracey Crouch, announced “a significant shift in government policy on sport plans”, noting plans to “transform the way in which success is measured by replacing the Active People Survey with a new survey called Active Lives” and stating “in future, funding decisions will also be made on the basis of the social good that sport and physical activity can deliver”.<sup>154</sup> With regard to the Olympic legacy the strategy commented:

We are reaffirming our commitment to Olympic and Paralympic success but also extending that ambition to non-Olympic sports where government will support success through grassroots investment in those sports, and by sharing UK Sport’s knowledge and expertise.<sup>155</sup>

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<sup>150</sup> House of Lords Liaison Committee, ‘[Letter from John Whittingdale MP dated 20 July 2015 on follow-up to the Olympic and Paralympic Legacy Committee](#)’, 28 October 2015, p 1.

<sup>151</sup> Lord Faulkner of Worcester introduced the Accessible Sports Grounds Bill on 28 May 2015. It received its second reading on 17 July 2015 ([HL Hansard, 17 July 2015, cols 813–37](#)). For more information about the Bill see: House of Lords Library, [Accessible Sports Grounds Bill](#), 13 July 2015. The [Governance of Sport Bill](#), a private member’s bill introduced by Lord Moynihan on 11 June 2014, also included provisions regarding access for disabled people to sports grounds. The Bill did not receive a second reading, although the subject did receive discussion during Lord Moynihan’s debate on the governance of sport in December 2014 ([HL Hansard, 4 December 2014, cols 1455–86](#)).

<sup>152</sup> House of Lords Liaison Committee, ‘[Letter from John Whittingdale MP dated 20 July 2015 on follow-up to the Olympic and Paralympic Legacy Committee](#)’, 28 October 2015.

<sup>153</sup> HM Government, [Sporting Future: A New Strategy for an Active Nation](#), 17 December 2015.

<sup>154</sup> [House of Commons, Written Statement: Government Sports Strategy, 17 December 2015, HCWS415](#).

<sup>155</sup> HM Government, [Sporting Future: A New Strategy for an Active Nation](#), 17 December 2015, p 11.

The strategy included discussion about accessibility at sports ground and football matches noting:

It is wrong that many sports grounds across the country fall short of providing the reasonable adjustments for disabled access set out in the Equality Act 2010. We expect all sports, and all clubs, whose grounds do not make such reasonable adjustments, to take action to fulfil this legal obligation [...] Government will enable the Sports Grounds Safety Authority (SGSA) to take on a more formal role in helping sport grounds reach the required standards for accessibility [...]

We welcome the recent announcement by the Premier League that its clubs will meet the minimum standards set out in the Accessible Stadia guide by 2017, but we want to see this commitment built on to ensure all clubs are fulfilling their legal obligations towards disabled spectators. Government will work with the football authorities to ensure that all clubs meet their legal obligations under the Equality Act 2010 to provide reasonable adjustments to accommodate disabled spectators attending matches.<sup>156</sup>

On 5 November 2015, the House of Lords debated a motion, tabled by Lord Mawson (Crossbench), to take note of progress made in the regeneration of East London since the 2012 Olympic and Paralympic Games and the remaining challenges.<sup>157</sup> The House of Lords Library provided a briefing to support the debate, which examined the plans for regeneration in East London prior to the Games, the Committee's key findings and recommendations and the progress report published by the Government and the Mayor in August 2015.<sup>158</sup> The Note focused in particular on the legacy strategies for housing, employment and skills, transport, and the development of the Queen Elizabeth Olympic Park.

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<sup>156</sup> HM Government, *Sporting Future: A New Strategy for an Active Nation*, 17 December 2015, pp 40–1.

<sup>157</sup> [HL Hansard, 5 November 2015, cols 1811–40.](#)

<sup>158</sup> House of Lords Library, [Regeneration of East London since the 2012 Olympic and Paralympic Games](#), 30 October 2015.

## 5. Select Committee on Personal Service Companies

The Committee examined IR35 legislation, which the Government uses to ensure tax is collected from those using personal service companies. Following Committee recommendations HMRC has produced a further estimate regarding the costs of abolishing IR35 legislation and the administrative costs which taxpayers incur in dealing with IR35. A Committee recommendation that questions related to personal service company usage on tax return forms be either amended or removed has been accepted by the Government and the questions will be removed at the “earliest opportunity”. Following Committee recommendations Business Entity Tests have been withdrawn. Committee concerns regarding the use of personal service companies by lower paid workers, and a recommendation that the Low Pay Commission examine this area, have not been taken forward.

### 5.1 Background

On 4 November 2013, the House of Lords agreed a motion to appoint a Select Committee “to consider the consequences of the use of personal service companies for tax collection, and to make recommendations”.<sup>159</sup> The Committee membership was agreed by the House on 12 November 2013, with an instruction to report by 31 March 2014.<sup>160</sup> The Committee issued a ‘Call for Evidence’ on 20 November 2013, with a deadline for submissions of 31 December. By January, when the Committee ceased to hear oral evidence, it had heard from 28 witnesses and received 44 pieces of written evidence.<sup>161</sup> The Committee’s report was ordered to be published on 31 March 2014.<sup>162</sup>

### 5.2 Committee Report: Key Recommendations

The term ‘personal service company’ is not defined in law and is generally understood to mean a limited company, the sole or main shareholder of which is also its director, who, instead of working directly for clients, or taking up employment with other businesses, operates through his company.<sup>163</sup> The company contracts with clients, either directly or through an agency, to supply the services of its director. The Committee considered the increase in the use of personal service companies and also the legislation by which the Government sought to collect tax from those using such arrangements.<sup>164</sup>

The Committee’s report included 16 recommendations for both Her Majesty’s Revenue and Customs (HMRC) and the Treasury. The Committee expressed surprise at “the lack of co-operation from the Government” noting:

The Exchequer Secretary to the Treasury, who has responsibility for tax matters within Her Majesty’s Treasury (HMT), refused to attend an oral evidence session citing that our enquiry was concerned with HMRC’s application of the legislation. He also refused to allow Treasury officials to appear on the same grounds.

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<sup>159</sup> [HL Hansard, 4 November 2013, col 12.](#)

<sup>160</sup> [HL Hansard, 13 November 2013, cols 619–20.](#)

<sup>161</sup> House of Lords Committee on Personal Service Companies, [Personal Service Companies](#), 7 April 2014, HL Paper 160 of session 2013–14, p 5.

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid*, p 7.

<sup>164</sup> *ibid*, p 7.

The legal framework within which HMRC operates clearly affects the tax collection process and much of the evidence we received was concerned with the problems created by the IR35 legislation itself, not simply issues associated with its implementation. It was unfortunate that we were not able to discuss these issues with a Minister before making recommendations.<sup>165</sup>

### **IR35 Legislation: Complexity and Cost**

The legislation by which the Government seeks to collect tax from individuals using personal service companies is often referred to as IR35. The legislation was devised “to ensure that people working through personal service companies in a manner that could be considered ‘disguised employment’ would, in practice, pay the same tax and National Insurance as someone employed directly”.<sup>166</sup>

Details were provided in a March 1999 press notice issued at the time of the Budget, which was numbered ‘IR35’. The legislation which has developed subsequently is commonly known as the ‘IR35 legislation’, or ‘IR35 rules’.<sup>167</sup> The Committee identified a “general lack of understanding of how widespread the use of personal service companies was in the UK economy and the complexity of the associated legislation”.<sup>168</sup> This complexity was something which the Committee was critical of, noting “there appear to be particular problems in having to apply the rules on a contract-by-contract basis, which make them especially cumbersome”.<sup>169</sup> It concluded that this had driven the growth of a significant industry of professional advisers and accountants advising individuals seeking to use personal service companies.<sup>170</sup>

The Committee examined witness recommendations that IR35 legislation should be suspended or abolished. Her Majesty’s Revenue and Customs estimated that the suspension or abolition of the IR35 legislation would put £550 million of revenue at risk, however the Committee was unconvinced that this estimate could be directly substantiated by any publicly available information; it called upon HMRC to publish a detailed assessment to justify maintaining the IR35 legislation.<sup>171</sup>

### **Annual Tax Form Questions, Business Entity Tests and the Contract Review Service**

The Committee suggested several improvements to the IR35 legislation which could be carried out in the event that it was decided to maintain that legislation. The Committee highlighted issues with the questions asked concerning personal service company usage on annual tax returns noting “We did not understand HMRC’s rationale for asking questions on the tax returns but not considering their completion as important or insisting that taxpayers complete them”, it recommended that HMRC “look again at whether they require complete and accurate responses” and if HMRC “retain the questions, we recommend that they revise the guidance

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<sup>165</sup> House of Lords Committee on Personal Service Companies, [Personal Service Companies](#), 7 April 2014, HL Paper 160 of session 2013–14, p 8.

<sup>166</sup> *ibid*, p 14.

<sup>167</sup> Further background information about IR35 legislation can be found in House of Commons Library, [Personal Service Companies: Introduction of the IR35 Rules](#), 20 May 2011.

<sup>168</sup> House of Lords Committee on Personal Service Companies, [Personal Service Companies](#), 7 April 2014, HL Paper 160 of session 2013–14, p 8.

<sup>169</sup> *ibid*, p 20.

<sup>170</sup> *ibid*, p 5.

<sup>171</sup> *ibid*, p 5.

notes”. Alternatively “if HMRC decide that they do not need the information gained from the question, we recommend that the questions be removed”.<sup>172</sup>

The Committee also recommended improvements to HMRC’s Contract Review Service, a telephone helpline established to advise individuals of the likelihood of a particular contract falling within IR35. Recommendations related to raising awareness of the service and looking at ways “to encourage individuals to use the service and [...] bolster confidence in its independence and impartiality”.<sup>173</sup>

The Committee highlighted the “general consensus that there is insufficient guidance provided by HMRC for those who operate through personal service companies”,<sup>174</sup> noting that while the introduction of Business Entity Tests (BETs) and the establishment of the IR35 Forum had “generally been seen as positive steps [...] there is still more to be done”.<sup>175</sup> The Committee recommended HMRC undertake a full consultation on how Business Entity Tests could work better and review the membership of the IR35 Forum.<sup>176</sup>

### **Personal Service Companies and Workers on Low Pay**

The Committee voiced concerns that lower paid individuals were using personal service companies.<sup>177</sup> It argued that these workers might be unaware of the potential negative implications, such as the absence of employment rights, inadequate pension provision and exposure to potential HMRC compliance investigations, which such usage might entail. In some instances lower paid workers might be compelled to operate through a personal service company and some witnesses described the scope for exploitation as considerable.<sup>178</sup> The Committee suggested measures to build awareness amongst the groups affected who might be effected, for example through the publication of a short guide setting out the basic differences between employment and self-employment.<sup>179</sup> The Committee also recommended that the Low Pay Commission conduct a wider review of the use of companies by lower-paid workers, and the implications that this had for an individual’s pay, employment rights and statutory entitlements.

### **Personal Service Companies and Public Sector Appointments**

Finally, the Committee examined the use of personal service companies, and other ‘off-payroll’ arrangements, in the public sector. Rules regarding departmental practice in the use of ‘off-payroll’ arrangements are set out in Procurement Policy Note (PPN) 07/12.<sup>180</sup> The Committee concluded that the Government’s guidance in PPN 07/12 was being implemented inconsistently across departments. It recommended that the Treasury “take a leading role in ensuring consistency of application and it should go to greater lengths to monitor the implementation”

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<sup>172</sup>House of Lords Committee on Personal Service Companies, [Personal Service Companies](#), 7 April 2014, HL Paper 160 of session 2013–14, p 27.

<sup>173</sup> *ibid*, p 33.

<sup>174</sup> *ibid*, p 33.

<sup>175</sup> *ibid*, pp 33–4.

<sup>176</sup> *ibid*, pp 34–5.

<sup>177</sup> *ibid*, p 5.

<sup>178</sup> *ibid*, pp 40–1.

<sup>179</sup> *ibid*, p 42.

<sup>180</sup> HM Treasury, [Procurement Policy Note: Tax Arrangements of Public Appointees—Action Note 07/12](#), 24 August 2012.

of PPN 07/12 across Government departments.<sup>181</sup> While the Committee recognised that a blanket restriction on public sector use of personal service companies would not be beneficial, it recommended a more comprehensive review of public sector use of personal service companies.

### 5.3 Government Response

The Government Response,<sup>182</sup> published on 9 June 2014, distinguished between operational issues and policy areas noting:

The Committee’s report, published on 7 April 2014, makes sixteen recommendations to HMRC, HM Treasury and the Low Pay Commission, relating to the use of personal service companies, a number of other intermediary arrangements and structures, and wider labour market issues. The recommendations relate both to operational and policy areas. This document is the Government’s response to the report. Owing to HMRC’s operational independence, matters relating to HMRC operational and administrative areas fall to HMRC, not ministers. The Government is grateful to the Committee for its analysis of these issues and has given careful consideration to its findings and recommendations.<sup>183</sup>

#### IR35 Legislation: Complexity and Cost

The Government reiterated its confidence in the figure of £550 million for revenue protected by the IR35 legislation and included further analysis of this amount in Annex I of the response.<sup>184</sup> The response noted that an updated administrative impact assessment note setting out current administrative costs which taxpayers incurred in dealing with IR35 would be published by HMRC in autumn 2014.

Responding to recommendations regarding the longer term case for combining taxes on income and National Insurance (Recommendation 2 of the Committee’s report) the Government stated it would “wait for further progress on planned operational changes to the tax system before re-examining operational integration of income tax and National Insurance”.<sup>185</sup>

The response outlined changes to the HMRC compliance strategy stating “HMRC will continue to keep under review whether the resources deployed to IR35 compliance are appropriate and aligned with its overall compliance strategy”.<sup>186</sup> Regarding calls for further information about the costs incurred from IR35 compliance efforts and the overall yield gained from the legislation, the response stated that the way in which compliance work was undertaken meant “detailed administrative costing is not able to be provided”. The response stressed “in HMRC’s view, the effectiveness of its compliance activity cannot be measured solely by a comparison of compliance costs [...] to any directs yield recovered”.<sup>187</sup>

<sup>181</sup> HM Treasury, [Procurement Policy Note: Tax Arrangements of Public Appointees—Action Note 07/12](#), 24 August 2012, p 53.

<sup>182</sup> HM Government, [House of Lords Select Committee on Personal Service Companies: The Government’s Response](#), 9 June 2014, Cm 8878.

<sup>183</sup> *ibid*, p 2.

<sup>184</sup> *ibid*, pp 13–14.

<sup>185</sup> *ibid*, p 5.

<sup>186</sup> *ibid*, p 6.

<sup>187</sup> *ibid*, p 7.

## Annual Tax Form Questions, Business Entity Tests and the Contract Review Service

The Government also responded to Committee recommendations about the questions on annual tax returns which related to the use of personal service companies stating “HMRC will undertake a full review of these questions [...] their form, purpose and clarity, with a view to making any necessary changes at the earliest practicable date”.<sup>188</sup> The review would include whether the questions were necessary and, if so, a review of guidance notes accompanying the questions.

The Government outlined plans to review the Contract Review Service and Business Entity Tests. The Contract Review Service review would report to the IR35 Forum in 2014 and Committee recommendations on the subject “will be considered by HMRC as part of this review”.<sup>189</sup> The Business Entity Tests review “forms one strand of the wider review of IR35 administration” and HMRC “will report and make recommendations to the IR35 Forum during 2014”.<sup>190</sup>

## Personal Service Companies and Workers on Low Pay

The Government highlighted work being undertaken on the issue of lower paid workers using personal service companies and umbrella companies noting “HMRC currently works with colleagues across Government [...] to identify how labour is engaged and paid”.<sup>191</sup> The response highlighted guidance available to these workers such as the Pay and Work Rights Helpline and recently updated guidance available online regarding employment status.<sup>192</sup> The response did not commit to altering the remit of the Low Pay Commission to include consideration of the use of personal service companies and umbrella companies by lower paid workers, instead noting “the remit of the Low Pay Commission for 2015 will be published over the summer of 2014”.<sup>193</sup>

## Personal Service Companies and Public Sector Appointments

The Government underlined the scope of work undertaken by the Treasury to review off-payroll appointments in the public sector and highlighted work by the Department of Health, Department of Education and with local authorities and devolved administrations to ensure guidance on the issue was consistently applied.

## 5.4 Debate in the House of Lords

The House of Lords debated the Committee’s report and Government response on 17 June 2014.<sup>194</sup> Opening the debate the chair of the Committee, Baroness Noakes (Conservative), outlined the background to the Committee, the development of the IR35 legislation and

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<sup>188</sup> HM Government, [House of Lords Select Committee on Personal Service Companies: The Government’s Response](#), 9 June 2014, Cm 8878, p 5.

<sup>189</sup> *ibid*, p 7.

<sup>190</sup> *ibid*, p 8.

<sup>191</sup> *ibid*, p 9.

<sup>192</sup> *ibid*, p 9. The response noted “HMRC has recently updated its guidance on employment status, and provides an Employment Status Indicator tool, both of which are accessible online”.

<sup>193</sup> *ibid*, p 10.

<sup>194</sup> [HL Hansard, 17 June 2014, cols 764–90](#).

complexity of that legislation which meant “a whole industry has grown up around IR35. That indirectly supports the evidence we received of the burdens of compliance”.<sup>195</sup>

She welcomed the Government’s commitment to provide a more detailed administrative assessment of IR35 legislation in Autumn 2014 but noted that the Committee had been “disappointed” that the Treasury had refused to give evidence to the Committee.<sup>196</sup> Baroness Noakes reiterated concerns regarding compliance with IR35 legislation and the potential impacts of the use of personal service companies on lower paid workers and concluded:

The issues that arose during the course of our work have not been resolved by the Government’s reply, so this whole area of personal service companies must be regarded as unfinished business.<sup>197</sup>

Lord Myners (Non-Affiliated) described the Exchequer Secretary’s decision not to appear before the Committee as “quite frankly, not acceptable”,<sup>198</sup> while Lord Higgins (Conservative) described the decision as “quite absurd” and an “unsatisfactory situation”.<sup>199</sup>

### **IR35 Legislation: Complexity and Cost**

Concerns regarding compliance with IR35 legislation and the amount of revenue protected by IR35, said by HMRC to be £550 million, were raised by a number of Members. Lord Palmer of Childs Hill (Liberal Democrat) stated it was “shattering” to hear that only a small number of investigations were carried out by HMRC for non-compliance, concluding “we should abolish IR35s and let all the accountants, lawyers, contractors, organisations and politicians go and get a life”; he expressed concern at the use of personal service companies in the public sector.<sup>200</sup>

Lord Higgins noted that “the Committee did not take the view that it [IR35] should be abolished” but stated “clearly a great deal had to be done to improve the present situation”.<sup>201</sup> He was sceptical of the estimate of £550 million by HMRC, and felt the implementation of the IR35 legislation and in ensuring compliance to the legislation were all areas for improvement.

### **Annual Tax Form Questions, Business Entity Tests and the Contract Review Service**

Lord Hope of Craighead (Crossbench) welcomed the Government’s response to the issue of personal service company questions on tax return forms, and called for greater clarity on the issue of guidance and Contract Review Service.<sup>202</sup> Lord Higgins noted he was “astonished” to find out that non-completion of the questions had little effect. Regarding the Government response he stated “it would seem they are going to try and tighten this up”.<sup>203</sup>

Baroness Bakewell of Hardington Mandeville (Liberal Democrat) also welcomed Government moves to review questions on tax return forms. She called for more information regarding

<sup>195</sup> [HL Hansard, 17 June 2014, col 765.](#)

<sup>196</sup> [ibid, col 765.](#)

<sup>197</sup> [ibid, col 767.](#)

<sup>198</sup> [ibid, col 768.](#)

<sup>199</sup> [ibid, col 775.](#)

<sup>200</sup> [ibid, col 770.](#)

<sup>201</sup> [ibid, col 775.](#)

<sup>202</sup> [ibid, col 773.](#)

<sup>203</sup> [ibid, col 775.](#)

Business Entity Tests and the review of the Contract Review Service, noting “the IR35 Forum appears to be either undertaking this review or playing a very significant part in it [...] it is important that there is a level of independence in that review to maintain public confidence in its outcomes”.<sup>204</sup>

### Personal Service Companies and Workers on Low Pay

Emphasising the Commission’s recommendations regarding an increased role for the Low Pay Commission, Baroness Morgan of Huyton (Labour) stated she was “surprised and shocked” by the widespread use of personal service companies across a range of “poorly paid jobs, including healthcare workers and cleaners but many others too”.<sup>205</sup> Baroness Bakewell of Hardington Mandeville shared these concerns, while Lord Myners noted:

There is substantial tax leakage at the upper end through personal service companies, while at the lower end of payment there may well be social harm as a result of people forgoing, unknowingly or under duress, some of their employment rights<sup>206</sup>

### Government Response

Responding for the Government Lord Newby (Liberal Democrat) recognised concerns regarding the Treasury’s non-attendance at the Committee but reassured Members that “Treasury and the HMRC take this report and the issues raised in it very seriously”. He highlighted work being undertaken “as a result of the work of the Committee” to review, with stakeholders, the questions on tax returns regarding the use of personal service companies “making any necessary changes as soon as practicable”.<sup>207</sup>

He highlighted work that had been undertaken to tackle tax avoidance, and confirmed the £550 million estimate by HMRC as “robust” stating “hundreds of millions of pounds of revenue depends on keeping IR35 in place”.<sup>208</sup> Regarding the administration of IR35, and the public’s understanding of it he drew attention to a “comprehensive review” of guidance, which had recently concluded stating “we are confident that this will be an improvement”.<sup>209</sup>

Lord Newby drew attention to the review being undertaken by HMRC into IR35 legislation, which would include examining both the HMRC’s compliance strategy and the Contract Review Service and Business Entity Tests. Regarding the membership of the IR35 forum he stated “Its role has developed since its inception so that its external members now feel that they are driving forward its agenda”.<sup>210</sup> Addressing concerns regarding the use of personal service companies by lower paid workers, he noted work being undertaken to increase the national minimum wage and emphasised the work of HMRC in identifying low paid workers and in ensuring guidance on their rights was available to them; he did not address the role of the Low Pay Commission. Finally, he outlined action being undertaken by the Government to limit the use of personal service companies in the public sector.

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<sup>204</sup> [HL Hansard, 17 June 2014, col 779.](#)

<sup>205</sup> [ibid, col 777.](#)

<sup>206</sup> [ibid, col 768.](#)

<sup>207</sup> [ibid, col 785.](#)

<sup>208</sup> [ibid, col 786.](#)

<sup>209</sup> [ibid, col 787.](#)

<sup>210</sup> [ibid, col 787.](#)

Concluding the debate the chair of the Committee, Baroness Noakes, noted the “egregious example of discourtesy to the House in general” of the Treasury’s lack of co-operation with the Committee. She reiterated concerns about the use of personal service companies by the low paid, emphasising the Committee’s recommendations regarding the Low Pay Commission and noting:

The Minister gave us no response today, so we just have the very unsatisfactory answer that lies in the Government’s official response.<sup>211</sup>

## 5.5 Further Developments

On 9 June 2015, the then Chairman of Committees, Lord Sewel, wrote to the Exchequer Secretary to the Treasury to request information regarding development in relation to a number of the Committee’s recommendations. In particular his questions focused on the estimate by HMRC regarding the current Exchequer protection figure and costs to the taxpayer incurred by dealing with IR35 legislation. In addition, he requested details about the use of personal service company questions on tax return forms, the Contract Review Service and Business Entity Tests.

He also sought further information about the Committee’s recommendation to use the Low Pay Commission to examine the use of personal service companies by lower paid workers. Lord Sewel noted that the Low Pay Commission’s remit had not been extended for 2015 to this end. Finally, the application of guidance regarding the use of personal service companies in the public sector, particularly within the National Health Service, was also questioned.

### IR35 Legislation: Complexity and Cost

Responding for the Government in October 2015, David Gauke, the Financial Secretary to the Treasury, noted “HMRC estimates that only 1 in 10 Personal Service Companies are operating the [IR35] rules correctly” and highlighted work being undertaken to “improve the effectiveness” of IR35 legislation.<sup>212</sup>

He referenced announcements during the 2015 Budget speech of a “dialogue with business”, in particular an HMRC discussion document on the topic and HMRC run stakeholder events which were taking place over the summer to “look at the options”.<sup>213</sup>

He highlighted the HMRC estimate, published in March 2015, regarding the costs to business of IR35 which was produced at the request of the Committee, stating “HMRC will be looking closely at the costs to business as part of the discussion about options for reform”.<sup>214</sup>

<sup>211</sup> [HL Hansard, 17 June 2014, col 790.](#)

<sup>212</sup> House of Lords Liaison Committee, ‘[Letter from David Gauke MP, Financial Secretary to the Treasury on follow-up to the Personal Service Companies Committee](#)’, 28 October 2015.

<sup>213</sup> *ibid*, p 1. Further information concerning the HMRC, [Intermediaries Legislation \(IR35\): Discussion Document](#) (17 July 2015) can be found in House of Commons, [Personal Service Companies: Recent Debate](#) (18 August 2015, pp 52–4).

<sup>214</sup> House of Lords Liaison Committee, ‘[Letter from David Gauke MP, Financial Secretary to the Treasury on follow-up to the Personal Service Companies Committee](#)’, 28 October 2015, p 2. The detail of the HMRC estimate can be found at HM Revenue and Customs, ‘[IR35: Estimating the Administrative Burden](#)’, 12 March 2015.

## Annual Tax Form Questions, Business Entity Tests and the Contract Review Service

The Financial Secretary confirmed that HMRC would be removing the questions regarding personal service companies from the tax returns “at the earliest opportunity” and that Business Entity Tests had also been permanently withdrawn.<sup>215</sup> He highlighted the development of an online digital service, planned for release in 2016, which would help IR35 customers to work out whether the rules applied to them.

## Personal Service Companies and Public Sector Appointments

David Gauke said in his response that guidance to Government departments regarding the use of personal service company arrangements had also been revised and “HMRC and HMT have been working closely with Departments to support them to ensure compliance”.<sup>216</sup>

## Personal Service Companies and Workers on Low Pay

Noting concerns regarding the use of personal service companies by lower paid workers, and the potential role for the Low Pay Commission, he stated “both lower and high paid workers are being forced into Personal Company Structures by the engaging company. One motive for this is the lower tax for the engaging company. We are therefore looking to our discussion of IR35 reform to help generate options that could help to address the tax motives for this type of disguised employment”.<sup>217</sup>

## Further Developments

Speculation that the 2015 Autumn Statement would include proposals to reform IR35 legislation proved largely unfounded,<sup>218</sup> although commentators have suggested that further proposals for change are still likely to emerge in the future.<sup>219</sup> In answer to a recent parliamentary question regarding the plans and timetable for changes to IR35 the Commercial Secretary to the Treasury, Lord O'Neill of Gatley, stated:

Whilst the IR35 legislation protects in excess of £500 million each year, non-compliance is currently costing in excess of £400 million and is a growing problem.

At the Summer Budget, the Chancellor announced that HM Revenue and Customs would open a dialogue with stakeholders about improving the effectiveness of IR35.

A discussion document was published on 17 July 2015. The discussion period concluded on 30 September, following the receipt of over 160 responses and 14 roundtable meetings. The Government is now considering the responses.<sup>220</sup>

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<sup>215</sup> House of Lords Liaison Committee, [‘Letter from David Gauke MP, Financial Secretary to the Treasury on follow-up to the Personal Service Companies Committee’](#), 28 October 2015, p 3.

<sup>216</sup> *ibid.*

<sup>217</sup> *ibid.*

<sup>218</sup> For example: Nicholas Watt, [‘Crackdown on Personal Service Companies could raise £400m in Tax’](#), *Guardian*, 6 November 2015 and Nicole Blackmore, [‘How a ‘Personal Services Company’ \(PSC\) can cut your Income Tax Bill’](#), *Telegraph*, 20 November 2015.

<sup>219</sup> Contractor UK website, [‘Osborne Omits Plan to Payroll PSC Contractors’](#), 25 November 2015.

<sup>220</sup> [House of Lords, written question: Tax Avoidance: Self-employed, 1 December 2015, HL3662.](#)

## 6. Select Committee on the Mental Capacity Act 2005

The Committee concluded that the Mental Capacity Act “was a visionary piece of legislation”, but determined that the Act suffered from a lack of awareness and understanding, which prevented the Act from becoming widely embedded in health and social care. The Committee recommended the establishment of a single independent oversight body to monitor and drive forward implementation of the Act. In addition, the Committee was critical of the Deprivation of Liberty Safeguards (DoLS) which were described as “poorly drafted and overly complex”, and recommended that the Government conduct a comprehensive review of DoLS with a view to replacing them. The Government has asked the Law Commission to carry out a fundamental review of DoLS, which is due to report to the Government with draft legislation by the end of 2016. Furthermore, the Government has set up a National Forum on Mental Capacity; in October 2015 it was announced that Baroness Finlay of Llandaff would chair the Forum. Some concerns have been expressed about the timescales of the Law Commission review and the remit of the Forum.

### 6.1 Background

The Select Committee on the Mental Capacity Act 2005 was established on 16 May 2013 “to consider and report on the Mental Capacity Act 2005”.<sup>221</sup>

The Committee heard evidence from 61 witnesses at 15 public evidence hearings, and received over 200 written submissions; the combined written and oral evidence ran to over 1,800 pages.<sup>222</sup> The Committee’s report was published on 13 March 2014, it was accompanied by an EasyRead version of the report, [The Mental Capacity Act: How Well is it Working?](#), which outlined the Committee’s findings.<sup>223</sup>

### 6.2 Committee Report: Key Recommendations

The Committee report outlined the background to the Mental Capacity Act 2005, which began in 1989 with a Law Commission study into the law for decision-making on behalf of persons who may lack capacity.<sup>224</sup> The aims of the mental capacity legislation were summarised by a Joint Committee established to consider the draft Mental Capacity Bill, published in June 2003, which noted:

We endorse the draft Bill’s widely-supported aim of replacing common law uncertainties by a comprehensive statutory framework to define mental capacity, help those lacking it to make their own decisions where they can and enable sound decisions to be made for them when they can not.<sup>225</sup>

<sup>221</sup> [HL Hansard, 16 May 2013, col 543.](#)

<sup>222</sup> House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, p 21.

<sup>223</sup> *ibid* and House of Lords, [The Mental Health Capacity Act: How Well is it Working?—An EasyRead Report from the House of Lords](#), March 2014.

<sup>224</sup> House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, p 25.

<sup>225</sup> Joint Committee on the Draft Mental Incapacity Bill, [Draft Mental Incapacity Bill](#), 28 November 2003, HL Paper 189–I of session 2002–03, p 5.

The Mental Capacity Bill was introduced in the House of Commons on 17 June 2004 and received royal assent on the 7 April 2005.<sup>226</sup>

Alongside the original provisions of the Mental Capacity Act 2005, the Mental Health Act 2007 inserted the Deprivation of Liberty Safeguards (DoLS) into the Mental Capacity Act 2005.<sup>227</sup> DoLS were designed to provide protection in law for individuals who are deprived of their liberty for reasons of their own safety.

The report included 39 recommendations and noted “the positive impact an inquiry such as ours can have in shining a light on an area of policy which might otherwise be neglected”; the Committee highlighted the change in the Government’s position on implementation of the Act which took place during the course of the inquiry. At the outset of the Committee’s evidence-taking, officials assured Committee members that the Act had been a success; although a few months later the Government established the Mental Capacity Steering Group, whose main purpose was to oversee the implementation of the Act.<sup>228</sup>

The Committee concluded that the Act “was a visionary piece of legislation” and “a turning point in the statutory rights of people who may lack capacity—whether for reasons of learning disability, autism spectrum disorders, senile dementia, brain injury or temporary impairment”. Outlining the aims of the 2005 mental capacity legislation, the Committee noted:

The Mental Capacity Act placed the individual at the heart of decision-making. Capacity was to be presumed unless proven otherwise. Decision-making was to be supported to enable the individual as far as possible to take their own decisions. Unwise decisions were not to be used as indicators of a lack of capacity—like others, those with impairments were entitled to take risks and to make poor decisions. When a person was found to lack capacity for a specific decision, the ‘best interests’ process ensured that their wishes and feelings were central to the decision being made and, importantly, provided protection from harm to vulnerable adults. The Act signified a step change in the legal rights afforded to those who may lack capacity, with the potential to transform the lives of many.<sup>229</sup>

The Committee noted, however, that “it is disappointing therefore that the implementation of the Act has yet to receive the same acclaim”.<sup>230</sup> While the Act “continues to be held in high regard”, the Committee described its implementation as “patchy”, commenting, “the Act has suffered from a lack of awareness and lack of understanding”.<sup>231</sup> It concluded:

The empowering ethos of the Act has not been widely implemented. Our evidence suggests that capacity is not always assumed when it should be. Capacity assessments are not often carried out; when they are, the quality is often poor. Supported decision-making, and the adjustments required to enable it, are not well embedded. The concept of unwise decision-making faces institutional obstruction due to prevailing cultures of risk-aversion and paternalism. Best interests decision-making is often not undertaken in

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<sup>226</sup> [HL Hansard, 7 April 2005, col 950](#).

<sup>227</sup> The Mental Health Act 2007 inserted sections 4A, 4B and 16A and schedules A1 and 1A regarding the Deprivation of Liberty Safeguards into the Mental Capacity Act 2005.

<sup>228</sup> House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, p 22.

<sup>229</sup> *ibid*, p 6.

<sup>230</sup> *ibid* p 8.

<sup>231</sup> *ibid*, p 6.

the way set out in the Act: the wishes, thoughts and feelings of P are not routinely prioritised. Instead, clinical judgments or resource-led decision making predominate. The least restrictive option is not routinely or adequately considered. This lack of empowerment for those affected by the Act is underlined by the fact that many responsible for its implementation continue to consider it as part of the safeguarding agenda [...]

The general lack of awareness of the provisions of the Act has allowed prevailing professional practices to continue unchallenged, and allowed decision-making to be dominated by professionals, without the required input from families and carers about P's wishes and feelings. A fundamental change of attitudes among professionals is needed in order to move from protection and paternalism to enablement and empowerment. Professionals need to be aware of their responsibilities under the Act, just as families need to be aware of their rights under it [...]

Our findings on the implementation of the core principles concern the operation of the Act principally in health and social care settings. We have very little evidence on the use of the core principles in other sectors. However, given the poor levels of knowledge and understanding in the sectors on which the Government targeted its implementation programme, we have no reason to believe that the Act is operating well in other areas.<sup>232</sup>

### **Independent Oversight Body**

To address the widespread failure to embed the act in day to day health and social care practice, the Committee's principal recommendation was that a single independent body be set up with responsibility for oversight of the implementation of the Mental Capacity Act. The report included a "job description" for the independent oversight body, which would "oversee, monitor and drive forward implementation of the Act" noting "the independent oversight body would not remove ultimate responsibility for the Act from Ministers, but it would locate in one place ownership of the Act and thereby provide a form of accountability, and a focus for enhanced activity".<sup>233</sup>

### **Deprivation of Liberty Safeguards (DoLS)**

The second key recommendation was in relation to Deprivation of Liberty Safeguards, which the Committee described as "poorly drafted, overly complex and bear[ing] no relationship to the language and ethos of the Mental Capacity Act".<sup>234</sup> The Committee recommended that the Government "start again" with the safeguards and conduct "a comprehensive review of the Deprivation of Liberty Safeguards with a view to replacing them with provisions that are compatible in style and ethos to the rest of the Mental Capacity Act". Several recommendations focused on the content and implementation of any new legislation to replace DoLS.<sup>235</sup>

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<sup>232</sup> House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, pp 50–1.

<sup>233</sup> *ibid*, p 6.

<sup>234</sup> *ibid*, p 7.

<sup>235</sup> *ibid*, p 7.

Other recommendations related to these two key findings. A number of recommendations related to improving the implementation of the Act, and monitoring whether that improvement had occurred.

### **Awareness and Understanding of the Mental Capacity Act 2005**

The Committee recommended that the Government, as a matter of urgency, address the lack of awareness of the Mental Capacity Act amongst those affected and the wider public; the Government should also examine the usage of the Act's core principles across a range of decisions affecting people lacking capacity, such as banking and policing.<sup>236</sup> The Committee recommended that the Mental Capacity Act Steering Group should give consideration to how specific information needs of different audiences could be met, whilst in the longer term a regular review of information resources would be the responsibility of the independent oversight body.<sup>237</sup>

The report included recommendations to raise awareness amongst professionals; for example, inspections carried out by the Care Quality Commission should explicitly incorporate compliance with the Mental Capacity Act, whilst the medical Royal Colleges and professional regulators also had a role and their training should include more detail about the Mental Capacity Act.<sup>238</sup> The Committee also provided recommendations regarding the use of commissioning by the NHS and social services to ensure that the Mental Capacity Act was better understood and complied with.<sup>239</sup>

### **Independent Medical Capacity Advocates**

The importance of Independent Medical Capacity Advocates (IMCA) was noted, and the Committee recommended increased usage of IMCAs, and further professionalisation of the role. The Committee also recommended that the Government consider the establishment of a form of self-referral to IMCA service.<sup>240</sup>

### **Lasting Powers of Attorney and Advance Decisions to Refuse Treatment**

The Committee highlighted the importance of Lasting Powers of Attorney and Advance Decisions to Refuse Treatment and recommended ways of increasing awareness and access to these for the general public and amongst professionals.<sup>241</sup>

### **Legal Aid and the Court of Protection**

The role of the Court of Protection was also considered, with the Committee recommending that the Government consider updating the 'Rules of the Court' and increasing the staff complement of authorised officers at the Court. The report included recommendations regarding access to the Court of Protection and increasing usage of mediation, prior to initiating court proceedings.<sup>242</sup>

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<sup>236</sup>House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, pp 8–9.

<sup>237</sup> *ibid*, p 11.

<sup>238</sup> *ibid*, p 10.

<sup>239</sup> *ibid*, p 11.

<sup>240</sup> *ibid*, p 14.

<sup>241</sup> *ibid*, pp 14–15.

<sup>242</sup> *ibid*, pp 16–17.

The Committee considered the availability of legal aid. It recommended that the Government review the policy underlying the availability of legal aid to those who lack mental capacity to litigate and remedy, as a matter of urgency, the inconsistent provision of non-means tested legal aid for cases concerning a deprivation of liberty. The Committee argued that the Government should also reconsider the provision of resource to the Official Solicitor.<sup>243</sup>

The Committee recommended that the Government initiate a review of whether the offence in section 44 of the Act, which relates to ill treatment or neglect of a person who lacks mental capacity, meets the test of legal certainty, and if not, bring forward new legislative provisions.<sup>244</sup> The Committee concluded:

We recommend that, no more than twelve months after publication of this Report, the Liaison Committee seeks evidence from the Government on the actions they have taken in response to the two key recommendations made in the summary of this report.<sup>245</sup>

### 6.3 Government Response

The Government Response to the Committee’s report, entitled [Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act](#) was published in June 2014.<sup>246</sup> Welcoming the work of the Committee the response stated that the Government “share the Committee’s concern at the low levels of awareness and understanding of the Act”.<sup>247</sup>

#### Independent Oversight Body

While noting that the Mental Capacity Act (MCA) “is of fundamental importance”, the Government did not accept the Committee’s recommendation of giving a single independent body responsibility for the oversight of the Act’s implementation, arguing that the breadth of organisations affected by the MCA meant that designing such a body “would be a difficult task” and “would send out the wrong message”.<sup>248</sup>

Instead, the Government would “consider the case” for establishing a new national Mental Capacity Advisory Board, led by an independent chair and containing representation from all national bodies responsible for the Act and a range of stakeholders, including users of the MCA.<sup>249</sup> The Government stated that it was currently “working through” potential terms of reference and membership of the Board, with a final decision on the Board’s establishment due by Autumn 2014; the Board would report annually to Ministers. In addition, the Government outlined plans for a greater role for the MCA Steering Group.<sup>250</sup>

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<sup>243</sup> House of Lords Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, p 18.

<sup>244</sup> *ibid*, p 18.

<sup>245</sup> *ibid*, p 19.

<sup>246</sup> HM Government, [Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act](#), June 2014, Cm 8884.

<sup>247</sup> *ibid*, p 3.

<sup>248</sup> *ibid*, p 9.

<sup>249</sup> *ibid*, p 10.

<sup>250</sup> *ibid*, pp 10–11.

## Deprivation of Liberty Safeguards (DoLS)

In relation to the Committee's second key recommendation, regarding the Deprivation of Liberty Safeguards, the response noted "we do not believe that there is a fundamental flaw in the legislative framework underpinning the current deprivation of liberty system. However, in the light of recent developments, we need to make the current system work better in the short to medium term, whilst putting in place a sustainable, effective system in the long-term".<sup>251</sup>

The Government highlighted the recent judgment handed down by the Supreme Court in [2014] UKSC 19, known as the "Cheshire West" case.<sup>252</sup> The judgment was published on the 19 March 2014, a week after the Committee reported. The Supreme Court's summary of the judgment, explained:

These appeals concern the criteria for judging whether the living arrangements made for a mentally incapacitated person amount to a deprivation of liberty. If they do, the deprivation must be authorised by a court or by the procedures known as the deprivation of liberty safeguards (DoLS) in the Mental Capacity Act 2005 ('the Act') and subject to regular independent checks. [...] The Supreme Court, unanimously in the appeal of P, and by a majority of 4 to 3 in the appeal of MIG and MEG, allows the appeals. MIG, MEG and P have all been deprived of their liberty.<sup>253</sup>

*Community Care*, summarising the implications of the judgment noted:

All people who lack the capacity to make decisions about their care and residence and, under the responsibility of the state, are subject to continuous supervision and control and lack the option to leave their care setting are deprived of their liberty, ruled the court. The ruling—in the cases of *P v Cheshire West and Chester Council* and *P&Q v Surrey County Council*—threw out previous judgments that had defined deprivation of liberty more restrictively.

The person's compliance or lack of objection to their placement, the purpose of it or the extent to which it enables them to live a relatively normal life for someone with their level of disability were all irrelevant to whether they were deprived of their liberty, ruled the court. This means that many people are likely to have been deprived of their liberty unlawfully and without safeguards in settings including care homes and supported living placements.

This suggests that proper application of today's judgment would see a significant hike in DoLS case numbers regarding care home placements, and also applications to the Court of Protection to authorise deprivations of liberty in supported living.<sup>254</sup>

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<sup>251</sup> HM Government, [Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act](#), June 2014, Cm 8884, p 29.

<sup>252</sup> The full judgment can be found at [\[2014\] UKSC 19](#).

<sup>253</sup> Supreme Court, '[Press Summary: P \(by his litigation friend the Official Solicitor\) \(Appellant\) v Cheshire West and Chester Council and another \(Respondents\); P and Q \(by their litigation friend, the Official Solicitor\) \(Appellants\) v Surrey County Council \(Respondent\) \[2014\] UKSC 19](#)', 19 March 2014.

<sup>254</sup> Mithran Samuel, '[Supreme Court ruling heralds sharp rise in Deprivation of Liberty Safeguards Cases](#)', *Community Care*, 19 March 2014.

In its response, the Government noted:

The judgment could have a significant positive effect—both in raising awareness of DoLS and the need for deprivations of liberty to be authorised but also in empowering individuals and protecting their rights. As such, the judgment has been welcomed by many stakeholders and professionals.<sup>255</sup>

The response detailed a review, which it had asked the Law Commission to undertake, which would consult on and potentially draft a new legal framework to allow for the authorisation of a best interests deprivation of liberty in supported living arrangements. However, it stated that current legislation underpinning the DoLS was “a more complex area” with the scrapping of DoLS “not the simple solution some would suggest”, instead the Government had asked the Law Commission to “consider the learning points that can be applied to DoLS and any improvements that can be made in light of its work”.<sup>256</sup>

The Government response noted a project commissioned to review and redraft standard DoLS forms, the production of up-to-date guidance on deprivation of liberty case law and the drafting of a new chapter of the Mental Health Act Code of Practice to provide guidance on the interface between deprivation of liberty under the MCA and the Mental Health Act 1983.<sup>257</sup>

### **Awareness and Understanding of the Mental Capacity Act 2005**

The response highlighted work being undertaken to monitor the extent of the MCA’s implementation, including the development of a peer audit tool for local authorities and self-audit tools for NHS trusts and the enhanced inspection and regulatory regime for the MCA and DoLS being introduced by the Care Quality Commission.<sup>258</sup>

In addition, work to tackle low awareness of the MCA was detailed, including numerous activities for raising awareness and for improving training of professionals which were said to be underway. For example, the Government would ask the Social Care Institute of Excellence to conduct a rapid review of MCA guidance and assorted material for the health and care sector. The response also mentioned the development of a “credit-card sized” statement of rights under the MCA for both professionals and the public, something which had been proposed in evidence to the Committee.<sup>259</sup>

### **Independent Medical Capacity Advocates**

The Government endorsed the Committee’s support for IMCAs and agreed to ask the Mental Capacity Advisory Board to consider the issue of self-referral to IMCAs. The Government agreed with the Committee that the IMCA sector “would benefit from further professionalism”, highlighting work that had been undertaken to develop a revised Advocacy

<sup>255</sup> HM Government, [Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act](#), June 2014, Cm 8884, p 30.

<sup>256</sup> *ibid*, p 32.

<sup>257</sup> *ibid*, pp 30–1.

<sup>258</sup> *ibid*, pp 12–13.

<sup>259</sup> *ibid*, p 14. Mr Simon Cramp had suggested that the key areas of the Act that are used most should be a pocket book that is issued at government expense in hard copy. House of Lords Select Committee on the Mental Capacity Act 2005, [Mental Capacity Act 2005: Post-Legislative Scrutiny](#), 13 March 2014, HL Paper 139 of session 2013–14, p 63.

Quality Performance Mark and noting that it would meet with the main providers of IMCA services “to discuss how we might progress the issues identified”.<sup>260</sup>

### **Lasting Powers of Attorney and Advance Decisions to Refuse Treatment**

The Government highlighted work being undertaken by the Office of the Public Guardian to encourage greater take up and awareness of Lasting Powers of Attorney, for example by information sharing about where LPAs exist and guidance to professionals.<sup>261</sup>

In relation to Advance Decisions to Refuse Treatments (ADRTs) the Government response stated that it would “ask the Mental Capacity Advisory Board to include advance decision-making in its programme of work and we urge our system partners to use their networks to increase information on ADRTs so that more individuals may realise the right to assert their wishes in this manner”.<sup>262</sup>

### **Legal Aid and the Court of Protection**

The Government did not agree with the Committee’s recommendations concerning the provision of non-means tested legal aid for cases concerning a deprivation of liberty, arguing:

Civil legal aid is available to anyone who meets a means and merits test, provided that the case is within the scope of the scheme. Each application is considered on an individual basis and is subject to statutory tests of the applicant’s means and the merits of the case. [...] We do not agree that proceedings which broadly relate to the deprivation of liberty should by themselves not be subject to the means test. However, there are a number of very specific exemptions to the means test.<sup>263</sup>

The response outlined circumstances in which legal aid may be provided without a determination as to financial eligibility but noted “we do not take the same view however, regarding other kinds of proceedings described in the Committee’s report”.<sup>264</sup>

Regarding the Court of Protection, the response noted that the Government was committed to taking forward the revision of the Court of Protection Rules and that HM Courts and Tribunals Service had committed to increasing the staff complement of the Court.<sup>265</sup>

In relation to the Committee’s recommendations regarding the offence of ill treatment or neglect of an individuals who lack mental capacity, the Government announced a review to be completed by the end of 2014, to assess the potential under use of section 44 of the Act and to “consider other factors which affect charging decisions”.<sup>266</sup>

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<sup>260</sup> HM Government, [Valuing Every Voice, Respecting Every Right: Making the Case for the Mental Capacity Act](#), June 2014, Cm 8884, p 25.

<sup>261</sup> *ibid*, p 34.

<sup>262</sup> *ibid*, p 23.

<sup>263</sup> *ibid*, pp 39–40.

<sup>264</sup> *ibid*, p 40.

<sup>265</sup> *ibid*, p 37.

<sup>266</sup> *ibid*, p 40.

## 6.4 Debate in the House of Lords

The Committee's report was debated in the House of Lords on 10 March 2015, almost twelve months after its initial publication.<sup>267</sup> On 9 March 2015, Lord Faulks, Minister of State for Justice, wrote to Members, with an update on progress in relation to the two key recommendations of the Committee.<sup>268</sup>

Noting that the resource demands resulting from Supreme Court judgment “Cheshire West” had “unavoidably resulted in there being less time to dedicate to the implementation of the recommendations”, Lord Faulks stated “nonetheless, we have made good progress”. The letter highlighted the Government's intention to create a new National Forum on Mental Capacity, with an independent chair, which would “oversee and coordinate actions to drive up awareness of the Act”. Recruitment for the post of chair was due to commence imminently.<sup>269</sup>

In relation to the Deprivation of Liberty Safeguards (DoLS), the Government had initiated a “fundamental review of the DoLS by the Law Commission”. The Law Commission would complete its work in summer 2017, when the Government would be presented with draft legislation. The scope of the Law Commission's review was wider than that announced in the Government's initial response to the Committee's report, the change to the review had been announced in September 2014.<sup>270</sup>

A table accompanying the letter included further details of progress on all of the Committee's other recommendations.<sup>271</sup>

### Independent Oversight Body

Opening the debate in the House of Lords on 10 March 2015, the chair of the Committee, Lord Hardie (Crossbench) reiterated the Committee's two key recommendations; a single independent body with responsibility for oversight and coordinating the implementation of the Act; and issues with the Deprivation of Liberty Safeguards which were “overly complex, poorly drafted and having no relationship with to the language or ethos of the rest of the Act”.<sup>272</sup>

While Lord Hardie welcomed the Government proposal for a forum to bring together stakeholders he expressed concern that the forum would be a “talking shop with no power or responsibility to drive forward the implementation of the Act”,<sup>273</sup> he was also concerned with “the lack of urgency” in setting up the forum stating “the process appears to be very slow and to lack transparency”.

Committee member Baroness Barker (Liberal Democrat) shared “the widespread reservations about the mental capacity forum” arguing that it would lack power to challenge reservations

<sup>267</sup> [HL Hansard, 10 March 2015, cols 620–50.](#)

<sup>268</sup> Ministry of Justice, [Mental Capacity Act 2005: Update on the House of Lords Select Committee Inquiry 2014 Recommendations](#), 9 March 2015.

<sup>269</sup> *ibid.* The intention to create a forum was first announced by Simon Hughes, then Minister of State at the Ministry of Justice, on 27 November 2014, in a [speech at the Compassion in Dying conference](#).

<sup>270</sup> Andy McNicoll, ‘[Government orders review of Deprivation of Liberty Safeguards](#)’, *Community Care*, 8 September 2014.

<sup>271</sup> [Government Response to Report Recommendations on the Mental Capacity Act](#), 9 March 2015.

<sup>272</sup> [HL Hansard, 10 March 2015, col 624.](#)

<sup>273</sup> [ibid, col 623.](#)

about implementation of the Act.<sup>274</sup> While Baroness McIntosh of Hudnall (Labour), who had also been a member of the Committee, challenged the Government to think again about introducing a single independent body to oversee the implementation of the Act, as recommended by the Committee.<sup>275</sup>

### Deprivation of Liberty Safeguards (DoLS)

Lord Hardie stated he was “delighted” that the Government had initiated a fundamental review of the DoLS legislation by the Law Commission. Noting concerns about the timetable of the review he stressed the importance of allowing wide consultation and adequate parliamentary scrutiny of the legislation stating “good legislation takes time”, but noted “I urge the next Government to give this matter a fair wind”.<sup>276</sup>

Several members commented on the subject of DoLS legislation, including the timetable for the Law Commission’s review and report. Lord Brown of Eaton-under-Heywood (Crossbench) explained the background to the Supreme Court ruling stating that “the most pressing problem now appears to be community care arrangements, including supported living”. Noting the judgment of the Justice of the Supreme Court, Baroness Hale of Richmond, in the “Cheshire West” case he supported the simplification of DoLS and their extension to placements outside hospitals and care homes, stating “I urge the Minster to address these urgent questions”.<sup>277</sup>

Focussing her remarks on DoLS legislation Committee member Baroness Browning (Conservative) stated “this has gone on far too long” and queried whether “a parallel system running between now and when the Law Commission report comes in” could be set up “for existing patients who need appropriate packages of care”.<sup>278</sup>

Baroness Finlay of Llandaff (Crossbench) highlighted a question for short debate that she had tabled on the subject of the DoLS safeguards, which was due to be debated the following week.<sup>279</sup> In addition, she highlighted the issues the Committee had identified with advance decisions to refuse treatment and best interest decisions, noting “we need to roll out clear straightforward messages across health and social care” to increase understanding and awareness of the 2005 legislation.<sup>280</sup> This sentiment was echoed by Baroness Warnock (Crossbench) who felt that further training was necessary to improve understanding of the notion of the ‘best interests’ and to raise awareness of advance decisions to refuse treatment, including a register of who had made such a decision.<sup>281</sup>

Responding for the Government, the Minister of State for Justice, Lord Faulks, noted concerns about the proposed national mental capacity forum stating “the Government are painfully aware that a talking shop is not enough”.<sup>282</sup> He highlighted work which would be undertaken by the Mental Capacity Act implementation Group, of which the chair of the forum would be a member, to take forward information provided by the forum. Lord Faulks anticipated that the

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<sup>274</sup> [HL Hansard, 10 March 2015, col 630.](#)

<sup>275</sup> [ibid. col 638.](#)

<sup>276</sup> [ibid. cols 624–5.](#)

<sup>277</sup> [ibid. cols 633–4.](#)

<sup>278</sup> [ibid. col 627.](#)

<sup>279</sup> Baroness Finlay of Llandaff tabled a question for short debate regarding the impact the Supreme Court’s March 2014 judgment on Deprivation of Liberty Safeguards ([HL Hansard, 16 March 2014, cols 975–92](#)).

<sup>280</sup> [HL Hansard, 10 March 2015, col 627.](#)

<sup>281</sup> [ibid. cols 634–5.](#)

<sup>282</sup> [ibid. col 646.](#)

recruitment of the chair of the forum would commence in “the next few weeks” with the chair in place by the summer. He highlighted work being undertaken in several areas to raise awareness, for example in relation to legal powers of attorney and in providing information to service users in the Mental Capacity Act Directory, a directory of MCA resources produced by the Social Care Institute for Excellence.

Lord Faulks highlighted the fundamental review of DoLS being undertaken by the Law Commission, due to report with draft legislation to the Government by summer 2017. He noted “that may seem too slow for some people’s entirely understandable aspiration for there to be clarity in this area” but that “this must be got right”,<sup>283</sup> and stating that “in the short term, we have taken steps to simplify the process as much as possible”.<sup>284</sup>

## 6.5 Further Developments

On 9 June 2015, the then Chairman of Committees, Lord Sewel, wrote to the Ministry of Justice to request follow up information regarding the Committee’s recommendations.

In his letter, Lord Sewel requested further information regarding the proposed timescale for the work by the Law Commission to review the legislation underpinning the DoLS. In addition, he requested an update on the national forum to promote best practice and raise awareness of the Mental Capacity Act, with particular regard to the outcome of recruitment of an independent chair of the forum and the timetable for its future work programme. He also sought further clarity of the Government’s plans to drive forward the implementation of the Mental Capacity Act.

On 20 July 2015, the Minister of State for Justice, Lord Faulks, responded for the Government. In his letter he outlined the timeframe for work by the Law Commission on DoLS, which had commenced on 7 July 2015 with the publication of the Commission’s consultation on the future of DoLS. The Minister urged “all those involved in and affected by DoLS [to] contribute their views” and announced an acceleration of the timescales for the DoLS review, agreed with the Law Commission, which would see a detailed policy proposal and draft Bill finalised by the end of 2016.<sup>285</sup>

Lord Faulks stated that the recruitment of the chair of the national forum was “underway and we hope for the successful candidate to be appointed shortly after the summer recess. The chair will work with officials to agree the membership and composition of the forum, which we propose will meet for the first time in the autumn”. Lord Faulks also outlined the proposed “new governance regime” which would include both the forum and an MCA implementation group which “will provide Government departments and its arm length bodies the medium for co-ordinating the delivery of objectives”.<sup>286</sup>

The letter included a table detailing recent developments in relation to Committee recommendations. This included information concerning awareness raising activities, the steps taken by the CQC to raise the profile of the MCA in its inspection regime and measures by Health Education England and the Academy of Medical Royal Colleges to make the MCA part of

<sup>283</sup> [HL Hansard, 10 March 2015, col 647.](#)

<sup>284</sup> [ibid, col 648.](#)

<sup>285</sup> House of Lords Select Committee, [Follow up work on Ad Hoc Committees: Select Committee on Mental Capacity Act 2005](#), 28 October 2015.

<sup>286</sup> [ibid.](#)

the Foundation Programme Curriculum for doctors. Whilst most of the Committee's recommendations were accepted, the Government did not fully accept recommendations relating to legal aid, for example in relation to non-means tested legal aid in deprivation of liberty cases, or that a “new Bournemouth gap” had been created.<sup>287</sup>

In September 2015, the Health and Social Care Information Centre publication, [Mental Capacity Act 2005, Deprivation of Liberty Safeguards \(England\), Annual Report 2014–15](#), provided the first annual official statistics report since the March 2014 “Cheshire West” Supreme Court judgment gave new guidance on the use of the Deprivation of Liberty Safeguards (DoLS). It showed:

- There were 137,540 DoLS applications received by councils between 1 April 2014 and 31 March 2015, the most since the safeguards were introduced in 2009; a tenfold increase from 2013–14 (13,700).
- 62,645 applications were completed by councils during the year, almost five times as many as the previous highest volume—13,040 in 2013–14. The number of completed applications has increased every year since DoLS were introduced in 2009.
- In 2014–15, there were 147 completed applications per 100,000 adults in England. Application rates varied considerably by region, with a rate of 389 applications per 100,000 adults in the North East, whereas the other eight regions had between 110 (East Midlands) and 150 applications per 100,000.
- There were 52,125 granted applications in 2014–15, 83 percent of all applications completed by councils. This the highest percentage granted since DoLS were introduced. Between 2010 and 2014 between 55 and 60 percent of applications were granted.<sup>288</sup>

The increase in the number of DoLS applications has led some commentators to call for greater government support for local authorities in dealing with their growing caseloads.<sup>289</sup>

On 8 October 2015, the Government announced that Baroness Finlay of Llandaff had been appointed as the chair of the new National Mental Capacity Forum. Baroness Finlay took up her three year post on 7 September 2015.<sup>290</sup>

In December 2015, it emerged that the Queen Elizabeth the Queen Mother hospital in Margate, Kent had listed a patient's learning disability among reasons for putting a “do not resuscitate” order on his medical file. Responding to a parliamentary question about the

<sup>287</sup> House of Lords Select Committee, [Follow up work on Ad Hoc Committees: Select Committee on Mental Capacity Act 2005](#), 28 October 2015.

<sup>288</sup> Health and Social Care Information Centre, [Mental Capacity Act 2005, Deprivation of Liberty Safeguards \(England\), Annual Report 2014–15](#), p 5.

<sup>289</sup> Mithran Samuel, [‘Deprivation of Liberty Safeguards Caseloads Reach Record Level’](#), *Community Care*, 4 August 2015.

<sup>290</sup> Ministry of Justice and Department of Health, [‘Appointment of the Chair of the National Mental Capacity Forum’](#), 8 October 2015.

incident Lord Prior of Brampton, the Parliamentary Under-Secretary of State at the Department of Health, stated:

The department expects trusts to have local policies on resuscitation, based on expert professional guidance. Such guidance has been published jointly by the British Medical Association, the Resuscitation Council and the Royal College of Nursing. All resuscitation decisions must be tailored to the individual circumstances of the patient. For patients who lack capacity, the Mental Capacity Act requires a decision in their best interests, taking account of their known wishes, beliefs and values.<sup>291</sup>

Baroness McIntosh of Hudnall (Labour), a Mental Capacity Act Committee member, noted:

My Lords, in his original Answer the Minister referred to the Mental Capacity Act, which is widely admired as legislation that is on the whole benign. However, he will be aware that a Select Committee of your Lordships' House met last year and produced a report that pointed out that the implementation of the Act is not always as effective as it should be, which has a lot to do with the way health professionals understand their duty under the Act in situations such as this. What progress is being made in improving the training of health professionals under the Act?<sup>292</sup>

In response, Lord Prior of Brampton stated:

My Lords, the noble Baroness will be aware that the noble Baroness, Lady Finlay, has become chairman of the National Mental Capacity Forum, which was established in September. She will be looking at all these issues and reporting back in March next year. I entirely agree with the noble Baroness, Lady McIntosh, that the principles in the Act are generally accepted as being the right ones, but their application has not been as consistent as we would like.<sup>293</sup>

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<sup>291</sup> [HL Hansard, 15 December 2015, col 1867.](#)

<sup>292</sup> [ibid, col 1968.](#)

<sup>293</sup> [ibid, col 1968.](#)

## 7. Select Committee on the Inquiries Act 2005

The key Committee recommendation was for the Government to establish a central inquiries unit within Her Majesty's Courts and Tribunals Service. This has not been accepted, with the Government aiming to improve the current system of support available through the Cabinet Office. Recommended changes to the 2005 Act and the Inquiry Rules 2006, with particular regard to the use of warning letters by inquiries, have not yet been implemented. The Government recently described these changes as “in hand” and has undertaken to review the relevant rules “as we take forward work to amend the Inquiry Rules 2006”.

### 7.1 Background

On 16 May 2013, the House of Lords agreed a motion to appoint a Select Committee “to consider and report on the law and practice relating to inquiries into matters of public concern, in particular the Inquiries Act 2005”; with an instruction to report by 28 February 2014.<sup>294</sup> The Committee issued a call for evidence on 13 June 2013 with a deadline for written evidence to be submitted by 31 July 2013.<sup>295</sup> The Committee's report was ordered to be published on 26 February 2014.<sup>296</sup>

### 7.2 Committee Report: Key Recommendations

The Inquiries Act 2005 replaced the large variety of statutory bases for inquiries with a single system for the setting up and conduct of public inquiries. Section 41 of the Inquiries Act allows the Lord Chancellor to make rules governing evidence, procedure and other matters in relation to inquiries for which a United Kingdom Minister is responsible, and Scottish Ministers to make similar rules for inquiries for which they are responsible. The Lord Chancellor made the Inquiry Rules 2006 (SI 2006 No 1838) on 11 July 2006; they came into force on 1 August 2006.<sup>297</sup>

Examining the operation of the Inquiries Act 2005 the Committee concluded that “by and large” the Act had worked well. It recommended that all inquiries into issues of public concern should normally be held under the Act and that Ministers should give reasons where this was not to be the case.<sup>298</sup> The report included 33 recommendations which addressed issues from the setting up of inquiries and their terms of reference, to recommendations regarding the independence of inquiries and the use of inquisitorial rather than adversarial procedures.

#### A Central Inquiries Unit

Several recommendations focused on the need to ensure that the purposes of the inquiries were achieved without excessive length or expense; the report included a comprehensive review of inquiries established under the Act and prior to the Act, and provided details of the

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<sup>294</sup> [HL Hansard, 13 May 2013, col 543.](#)

<sup>295</sup> Full copies of the written and oral evidence submitted to the enquiry can be found on the Committee's website, [Select Committee on the Inquiries Act 2005: Written and Corrected Oral Evidence](#), 11 March 2014.

<sup>296</sup> House of Lords Committee of the Inquiries Act 2005, [The Inquiries Act 2005: Post-Legislative Scrutiny](#), 11 March 2014, HL Paper 143 of session 2013–14.

<sup>297</sup> *ibid*, p 7.

<sup>298</sup> *ibid*, p 95.

length of inquiry and, where available, its cost.<sup>299</sup> In particular, the Committee highlighted recommendations 12–16, the establishment of a central inquiries unit in Her Majesty’s Courts and Tribunals Service, as being worthy of attention from the Liaison Committee when it followed up the Committee’s report. The Committee envisaged that the central inquiries unit would provide practical details and guidance for setting up and running an inquiry, ensure that a ‘lessons learned’ paper was produced at the conclusion of each inquiry, retain contact details of previous inquiry secretaries and solicitors and collect procedures protocols; the Committee also recommended that the a central inquiries unit should review and update Cabinet Office guidance on inquiries which it described as “wholly inadequate”.<sup>300</sup>

### Changes to the Inquiry Rules 2006

The Committee’s report made eleven recommendations for amendments to the Inquiries Act itself and four recommendations for amendment of the Inquiry Rules 2006, commenting:

The power to make Rules to amend the Inquiry Rules 2006 is already on the statute book, and we see no reason why, with the right approach by the Ministry of Justice, these amendments should not be made within three months. We recommend eleven minor but significant amendments of the Act itself. These will require primary legislation, but they could be included as a Schedule to the next suitable Bill introduced by the Ministry of Justice.<sup>301</sup>

Of particular concern to the Committee were rules 13–15 of the Inquiry Rules 2006 which relate to warning letters sent to those who will or may be criticised in the inquiry’s interim or final report. The Committee heard evidence from a number of former chairmen of inquiries that the process of issuing warning letters, and of those criticised responding to them (a process sometimes referred to as ‘Maxwellisation’) could add to the length and cost of an inquiry.<sup>302</sup> The Committee felt that fixed rules regarding the use of these warning letters were unhelpful and “the provisions of the Inquiry Rules on warning letters are highly detailed and go far beyond what is necessary”.<sup>303</sup> The Committee recommended that rules 13–15 of the Inquiry Rules should be revoked; the report provided suggested wording for a single new rule.

Other recommendations for changes to the Inquiry Rules 2006 related to rules for awarding costs, taking written statements from witnesses and archiving documents for permanently archived inquiry records.<sup>304</sup> Proposed changes to primary legislation related to, amongst other things, a greater role for the inquiry chair in constituting an inquiry, particularly with regard to the terms of reference and appointment of panel members, assessors and counsel, and in deciding whether to allow the public to attend inquiries and when to withhold material from publication in the inquiry report.<sup>305</sup>

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<sup>299</sup> Appendix 4 of the report provided a list of inquiries established under the Act, or established prior to the passing of the Act but converted to inquiries under the Act; while Appendix 5 listed inquiries since 1990 set up under other legislation, or with no statutory basis—non-statutory inquiries.

<sup>300</sup> House of Lords Committee of the Inquiries Act 2005, [The Inquiries Act 2005: Post-Legislative Scrutiny](#), 11 March 2014, HL Paper 143 of session 2013–14, p 52.

<sup>301</sup> *ibid*, p 11.

<sup>302</sup> *ibid*, pp 74–5.

<sup>303</sup> *ibid*, p 74.

<sup>304</sup> *ibid*, p 76.

<sup>305</sup> *ibid*, pp 91–3.

### 7.3 Government Response

The Government Response was published in June 2014.<sup>306</sup> In his foreword, the then Minister of State for Justice and Civil Liberties, Simon Hughes, stated:

The Government has given careful consideration to the Select Committee's 33 recommendations, agreeing with the majority of them. We will implement changes as soon as practicable and, where primary legislation is needed, when parliamentary time allows.<sup>307</sup>

The Committee had recommended that inquiries into issues of public concern should normally be held under the Act and that ministers should give reasons where this was not the case; though the Committee agreed that there might be overriding reasons of security or sensitivity for doing otherwise [Recommendations 1 and 33]. The Government replied that “it takes the view that whilst ministers will always want to consider the suitability of the 2005 Act, they may also want to consider whether another option is preferable”,<sup>308</sup> adding that “there may be a variety of reasons why an alternative approach is preferable to holding an inquiry under the Act”.<sup>309</sup>

#### Central Inquiries Unit

Regarding the Committee's recommendations for a central inquiries unit, recommendations 12–16, the Government agreed “with the spirit of this recommendation” but felt that “it is not appropriate or necessary to have such a standing unit” arguing that given the relative infrequency of inquiries it would be more productive “to build on and improve the current system of support”.<sup>310</sup> Recommendation 12 was rejected, while recommendations 13–16 were accepted in part, for example while the Government agreed that a lessons learned paper should be produced “we do not agree that an inquiries unit should be responsible for ensuring that these documents are produced”, instead the Cabinet Office's Propriety and Ethics Team was identified as being a more suitable source of guidance and support.<sup>311</sup>

#### Changes to the Inquiry Rules 2006

The Government response agreed to some changes to primary legislation (recommendations 3, 4, 5 and 22) and three changes to the Inquiry Rules 2006 (recommendations 26, 27 and 28). Recommendation 25, the suggested changes to rules 13–15 regarding warning letters or ‘Maxwellisation’, was rejected; the response stated that the power to send warning letters was discretionary and “the Treasury Solicitor's Department has advised that the drafting of rule 13 is not defective”.<sup>312</sup>

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<sup>306</sup> Ministry of Justice, [Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005](#), June 2014, Cm 8903.

<sup>307</sup> *ibid*, p 3.

<sup>308</sup> *ibid*, p 6.

<sup>309</sup> *ibid*, p 16.

<sup>310</sup> *ibid*, p 7.

<sup>311</sup> *ibid*, pp 12–13.

<sup>312</sup> *ibid*, p 15.

Several recommendations were largely accepted;<sup>313</sup> for example, in the case of recommendation 31 the Government accepted that relevant public bodies should respond to inquiry recommendations within a specified timeframe, but stated that a statutory duty recommended by the Committee was not necessary. The Government response rejected recommendations 6, 8, 9, 10, 12, 19, 20, 21, 23, 24 and 29; these recommendations principally dealt with a ministers power in relation to an inquiry, for example: in setting terms of reference for an inquiry, consulting the chair of an inquiry before a new panel member or assessor was appointed or terminating the appointment of a panel member, giving the chair sole authority to stop members of the public attending the inquiry or to decide on withholding material for publication.

## 7.4 Debate in the House of Lords

Opening the debate the chair of the Inquiries Act 2005 Committee, Lord Shutt of Greetland (Liberal Democrat), provided background to the work of the Committee and emphasised some of its key findings, namely that the Act was a good one which should be used more by ministers when setting up inquiries, that a central inquiries unit should be established to provide guidance and support to inquiries and that the Inquiry Rules 2006 should be altered with respect to warning letters.<sup>314</sup>

Several members of the Committee spoke during the course of the debate. Lord Richard (Labour) described the Government's response to the report as "contemptuous and peremptory" stating "the Government response to our report [...] was extraordinarily negative and unhelpful".<sup>315</sup> Baroness Buscombe (Conservative) detailed correspondence which she had undertaken with the Ministry of Justice regarding the use of warning letters, which underlined the Government's view that "Rule 13 strikes the right balance".<sup>316</sup>

Former Lord Chief Justice, Lord Woolf (Crossbench) reiterated concerns about warning letters and emphasised the importance of having a central inquiries unit, a theme also taken up by Lord Morris of Aberavon (Labour) and Lord Pannick (Crossbench). Lord Brown of Eaton-under-Heywood (Crossbench), former Justice of the Supreme Court, stated "the recommendation [proposing changing rules 13–15] makes obvious good sense and should be accepted and implemented without further delay",<sup>317</sup> while Lord Cullen of Whitekirk (Crossbench) concluded:

I urge the Minister the noble Lord, Lord Faulks, and his colleagues to think again and to give serious consideration to introduction of flexibility and proportionality to the rules so that fairness can be achieved without loss of common sense.<sup>318</sup>

Responding to the debate for the Government, the Minister of State at the Ministry of Justice, Lord Faulks, thanked the Committee for its report, noting "I assure the noble Lord, Lord Shutt, and his committee that their report was well received across government and that careful consideration was given to the recommendations".<sup>319</sup> The Minister observed that while the 2005 Act would "always be the starting point" when ministers established inquiries, ministers

<sup>313</sup> Recommendations 2, 7, 11, 17, 18, 30, 31 and 32.

<sup>314</sup> [HL Hansard, 19 March 2015, col 1135–6.](#)

<sup>315</sup> [ibid, col 1139.](#)

<sup>316</sup> [ibid, col 1156.](#)

<sup>317</sup> [ibid, col 1159.](#)

<sup>318</sup> [ibid, col 1147.](#)

<sup>319</sup> [ibid, col 1172.](#)

would also want to consider if another vehicle would be more appropriate. Lord Faulks outlined the Government's plans, in place of a central inquiries unit, to improve the service offered by the Cabinet Office to provide guidance for those running inquiries. The Cabinet Office would revisit draft guidance, set up a network of former inquiry secretaries and establishing a cross-Whitehall group on inquiries for officials.

Referring to the “much more controversial” issue of changes to rules 13–15 of the Inquiry Rules 2006, Lord Faulks noted that the “very helpful debate” with “useful observations” suggested “it may well be necessary to reconsider these particular rules to give greater clarity to chairmen so as to avoid some of those undesirable features”.<sup>320</sup> Lord Shutt welcomed the remarks questioning “whether there will be what we might call a supplementary government response to the report”. Lord Faulks refused to commit to a supplementary government response, but stated “I will look through Hansard to see whether there are any particular matters that I did not deal with in the course of the debate”.<sup>321</sup>

## 7.5 Further Developments

Since the initial government response in June 2014 several inquiries have been prominent in the media and public arena. The Iraq Inquiry, announced in June 2009 and chaired by Sir John Chilcot, has attracted criticism for delays in the publication of the Inquiry's report.<sup>322</sup> Some of these delays were arguably due to the Inquiry's use of warning letters to inform those that were likely to be criticised in the Inquiry's report.<sup>323</sup> Rebecca Lowe for the International Bar Association provided the following commentary:

Because the inquiry was not established under the 2005 Inquiries Act, Maxwellisation is not a statutory obligation. Chilcot chose to engage the process nonetheless, he told the Foreign Affairs Committee, as he felt it was “essential in the interests of natural justice and fairness”. However, there is a growing body of thought that Maxwellisation is unnecessary if witnesses have already been questioned effectively. A report by a House of Lords Select Committee tasked with reviewing the Inquiries Act, published in March 2014, recommends leaving the issue to the discretion of the chairperson. Jones [head of Eversheds' Inquiries and Investigations practice, and who led a team of lawyers acting for the Mid Staffordshire NHS Foundation Trust Public Inquiry] agrees. “Many practitioners in the field, myself included, feel that it is a completely wasteful and pointless exercise if the witness has already been notified of potential criticisms during the hearings,” he says. “It is a re-run of something that should already have been done”.<sup>324</sup>

The issue has also been raised in the House of Lords. Responding to an oral question on the Chilcot Inquiry on 28 January 2015, and prior to the debate on the Committee's report, the then Lords spokesman for the Cabinet Office, Lord Wallace of Saltaire, noted:

The Maxwellisation process is unavoidably a lengthy one. Noble Lords who served on the post-legislative scrutiny committee on the Inquiries Act last year—a particular special committee—raised the question of the length of time it took to carry through

<sup>320</sup> [HL Hansard, 19 March 2015, col 1176.](#)

<sup>321</sup> [ibid, col 1178.](#)

<sup>322</sup> For example see: Donald McIntyre, ‘[It May Come as No Surprise that All Is Not Well in the Complicated Land of the Chilcot Inquiry](#)’, *Independent*, 19 August 2015.

<sup>323</sup> House of Commons Library, [Chilcot Inquiry and Delays to Publication](#), 3 June 2015, p 7.

<sup>324</sup> Rebecca Lowe, ‘[Poor Questioning Delayed Chilcot Inquiry, say Top Lawyers](#)’, *International Bar Association*, 24 February 2015.

this process. There are issues of fairness and equity in making sure that those who may well be sharply criticised by a report should have the right to see those criticisms and comment on them before publication. That is the process that is now under way and, unfortunately, it does take some time.<sup>325</sup>

While on 1 July 2015 a former member of the Committee, Lord Richard (Labour), commented:

Is not the real problem here that, under the present rules for inquiries, the Maxwellisation process is mandatory? It is not discretionary or left to the chairman of the inquiry to decide who ought to be given the opportunity to respond; it is mandatory and it takes an awfully long time. A committee of this House recently considered the operation of the Inquiries Act and one of its main recommendations was that a Maxwellisation process should cease to be mandatory and should be left to the discretion of the chairman. So far, the Government have refused to take that on board.<sup>326</sup>

The Independent Inquiry into Child Sexual Abuse was set up by the Home Secretary on 12 March 2015 under the Inquiries Act.<sup>327</sup> On 27 November 2015, Justice Goddard stated:

It is impossible to put a timescale on the completion of all of this work, but it is reasonable to assume that while some of the investigations may be completed within 18 months, others may take several years to conclude. In some cases, overlapping criminal proceedings may cause substantial delay to the progress of individual investigations. Nonetheless, in my Opening Statement I committed to completing the work of the Inquiry within five years and my current assessment is that that timeframe, whilst ambitious, is achievable.<sup>328</sup>

Several members of the Lords have queried the effect that Maxwellisation process may have upon the inquiry. Responding to a statement, on 4 February 2015, announcing that the Inquiry into Child Sexual Abuse would be a statutory one, Baroness McIntosh of Hudnall (Labour) commented:

Reflecting on the disappointment that everybody feels about how the Chilcot report has evolved, can the Minister say what effect the so-called Maxwellisation process is likely to have on the progress of this inquiry? I assume—although I may be wrong—that people who give evidence and are subsequently criticised by the report will have to be consulted about how that criticism is made public.<sup>329</sup>

While Lord Stoddart of Swindon (Independent Labour) asked:

Can the Minister clarify, for the avoidance of all doubt, that this inquiry will not be delayed when it is ready for publication by having to consult those who might be named critically, ensuring that they have the opportunity to see what is said about them?<sup>330</sup>

<sup>325</sup> [HL Hansard, 28 January 2015, col 201.](#)

<sup>326</sup> [HL Hansard, 1 July 2015, col 2060.](#)

<sup>327</sup> [HC Hansard, 12 March 2015, col 40WS.](#)

<sup>328</sup> Independent Inquiry into Child Sexual Abuse, '[Independent Inquiry into Child Sexual Abuse announces first investigations](#)', 27 November 2015.

<sup>329</sup> [HL Hansard, 4 February 2015, col 665.](#)

<sup>330</sup> [ibid, col 665.](#)

Responding for the Government, the Parliamentary Under-Secretary of State at the Home Office, Lord Bates, stated:

In many ways, this highlights one of the difficulties that we have had to wrestle with. Because of the way in which the independent panel was set up before, the Home Secretary had a degree of control over it, but that was felt not to give confidence to the survivors. Then it was set up under the Inquiries Act 2005, and that degree of control was lost. There are no easy solutions to the problems that we are having. That is why the appointment of the chairman is so critical; she is somebody who is very focused on getting to the heart of the truth and doing so expeditiously.<sup>331</sup>

In June 2015, Peter Watkin Jones and Nicholas Griffin QC assessed the impact of the Inquiries Act 2005 in the *Law Society Gazette*. Describing the “lively and informed Lords debate on the issue, which took place on 19 March this year” the article provided an overview of the history of the Inquiries Act 2005, detailing the Committee’s 33 recommendations and the Government’s response, it concluded:

The 2014 Report commended many aspects of the IA 2005 as “working well in practice” but commented that “the fixed (2006) rules are unnecessary and unhelpful”. The Report went on to suggest that necessary rule amendments could be implemented within three months. Practitioners tasked with working with IA 2005 and IR 2006 largely welcomed the report as a step forward in recognising and remedying the practical difficulties.

There is obvious concern in light of the government’s refusal to adopt many of the 2014 Report’s suggestions. While recognising that the Act, with suitable amendment, is fit for purpose, its associated rules militate against the fair and efficient conduct of proceedings. IR 2006 were intended ‘to provide assistance to an inquiry particularly where it has wide ranging terms of reference’ and to ‘help the chairman focus the inquiry’. They may continue to have the opposite effect. Given the number of inquiries that are likely to be convened under IA 2005 in the near future, the opportunity for rules reformed to buttress a functioning act may be considered an opportunity lost.<sup>332</sup>

On 9 June 2015, the then Chairman of Committees, Lord Sewel, wrote to Lord Faulks, the Minister of State at the Ministry of Justice, to request an update on progress in relation to the Committee’s recommendations. Referring to the June 2014 Government Response to Committee recommendations 12–16, on the setting up of a central inquiries unit within HM Courts and Tribunals Service, and to making the process of warning letters optional, Lord Sewel sought further detail on the way in which support and guidance to those setting up inquiries had been improved. In addition, the Government’s position on the Committee conclusion that evidence given to an inquiry, and findings based upon such evidence, could be used as evidence in subsequent inquiries, was sought. Further clarity was also sought on whether a supplementary Government response, as suggested by Lord Shutt of Greetland during the House of Lords debate in March 2015, was to be provided.

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<sup>331</sup> [HL Hansard, 4 February 2015, col 665.](#)

<sup>332</sup> Peter Watkin Jones and Nicholas Griffin QC, ‘[Public Inquiries: Getting at the Truth](#)’, *Law Society Gazette*, 22 June 2015.

On 21 July 2015, the Parliamentary Under-Secretary of State for Women, Equalities and Family Justice, Caroline Dinenage, responded to the Chairman of Committees.<sup>333</sup> She reiterated the Government view “that there is neither the resource nor is it necessary to have a standing central unit to support inquiries” and instead highlighted work being done to strengthen processes within the Cabinet Office’s Propriety and Ethics Team; she noted that work being carried out to strengthen draft inquiries guidance was “in hand”.

Mentioning the strength of argument during the 19 March 2015 debate, particularly regarding warning letters, the Government accepted the need to review rules 13–15 as part of work to amend the Inquiry Rules 2006, noting “the changes to the Rules are in hand and other recommendations that require primary legislation will be made when a suitable legislative vehicle becomes available”.<sup>334</sup> Regarding the use of evidence given to an inquiry, and findings based on such evidence, in a subsequent inquiries, the response stated “This was not one of the Committee’s recommendations [...] we would be happy to look into this proposal but I hope you understand we would need to look through the detail before coming to a position”. In reference to Lord Shutt’s request for a supplementary response to the Committee, the letter clarified that no further response would be forthcoming.

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<sup>333</sup> House of Lords Liaison Committee, ‘[Letter from Caroline Dinenage MP dated 21 July 2015 on follow-up to the Select Committee on the Inquiries Act 2005](#)’, 28 October 2015.

<sup>334</sup> *ibid*, p 2.