HOUSE OF LORDS

Library Briefing

Impact of the House of Lords: Analysis of Parliamentary Session 2016–17

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Summary

Understanding the impact of the House of Lords requires a nuanced approach. Some academic studies conclude that not only is the UK Parliament "weak" in international comparison, but the House of Lords is not an influential second chamber. Other scholars find that Parliament, and specifically the Lords, have a genuine effect on public policy, though much of the influence is behind-the-scenes and hard to measure. A multifaceted approach is therefore needed to describe this impact.

In this briefing, the impact of the House of Lords is explored through analysis of the most recent full parliamentary session, 2016–17, focusing on the chamber's legislative role. After a discussion of the academic literature, the briefing analyses how government legislation was amended. This is the first quantitative analysis of the amendments from a whole session since the 1980s. Government bills in the 2016–17 session were substantially amended, with an average of a quarter of the lines of legislative text being altered by amendment, and in some cases up to 80 percent. Although almost all agreed amendments were proposed by ministers, the Government suffered defeats in the Lords on eleven bills, and offered concessions in regard to more than half of the defeats.

The quantitative analysis is followed by two case studies which explore interactions between the Government and legislators. The first outlines the response of Parliament in April 2017 to the unexpected announcement of a general election. The ensuing 'wash-up' period was characterised by a high degree of cooperation and coordination between the two chambers, while maintaining critical scrutiny of the Government's remaining legislation. The second analyses the parliamentary scrutiny of part of the Children and Social Work Act 2017: clauses that were intended to allow local authorities to apply to be exempted from statutory provisions in children's social care. Cross-party opposition to these provisions in both chambers resulted in their eventual removal.

Professor Meg Russell of University College London identified three ways in which the House of Lords influences policy, namely through "defeat", "negotiation" and "anticipated reactions". This study concludes that these types of impact can all be identified in the 2016–17 session. The Lords, however, used its veto powers relatively sparingly, overturning Government proposals that were opposed by a strong cross-party consensus. They were most vocal on constitutional issues, arguing that there are dangers of ceding wider powers to ministers. Cooperation between the chambers was required to secure the—sometimes unwilling—agreement of ministers to make the changes 'stick'. Thus the impact of the Lords cannot be seen in isolation, and this briefing illustrates how each chamber responds to, and influences, the other.

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Ruth M Dixon
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1. Role of the House of Lords in Legislation

1.1 How Influential is the UK Parliament?

An assessment of the role of the House of Lords in legislation should first consider the influence of Parliament as a whole, and how this might be measured. The UK legislature ('Westminster') is seen by many academic commentators as "weaker" than comparable legislatures worldwide.[1] Whereas, for example, the US Congress is regarded as "transformative", Westminster is placed at the "reactive" end of the scale.[2] The UK Parliament is portrayed as weak relative to the executive and rarely able to affect the content of legislation.[3] Such assessments are based on, for example, Westminster's strong party discipline, a generally single-party majoritarian government, and the ad hoc nature of legislative scrutiny committees, all of which are considered to strengthen the executive relative to the legislature. Nevertheless, some studies reflect a more nuanced perspective, concluding that the influence of Westminster cannot be dismissed so readily.[4] For one thing, measuring parliamentary strength is not straightforward, whether by qualitative or quantitative means. Any assessment will be incomplete as power and influence are manifest in more or less visible ways.[5] In their recent book, *Legislation at Westminster*, Meg Russell and Daniel Gover identify six faces of parliamentary power, and emphasise the importance of "anticipated reactions" whereby the executive takes account of potential objections even before a bill enters Parliament.[6] This type of influence is hard to demonstrate and may even be unconscious ("internalised") on the part of the executive, thus eluding most research methodologies. Nevertheless, there are ways in which influence can be assessed, as Russell and Gover showed through their detailed study of twelve government bills. Their book explores the roles of various parliamentary and extra-parliamentary groups such as backbenchers, select committees and pressure groups in shaping the legislation.

1.2 Distinctive Role of the House of Lords

Not only is the Westminster parliament judged "weak" relative to the

[1] Lanny Martin and Georg Vanberg, *Parliaments and Coalitions: The Role of Legislative Institutions in Multiparty Governance*, 2011.
[2] Michael Mezey, *Comparative Legislatures*, 1979.
[3] Michael Gallagher, Michael Laver and Peter Mair, *Representative Government in Modern Europe*, 2011, 5th edition; and Arend Lijphart, *Patterns of Democracy*, 2012.
[4] For example: Matthew Flinders and Alexandra Kelso, 'Mind the Gap: Political Analysis, Public Expectations and the Parliamentary Decline Thesis', *British Journal of Politics and International Relations*, 2011, vol 13, pp 249–68; Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence', *Governance*, 2016, vol 29, pp 121–137; and Louise Thompson, *Making British Law: Committees in Action*, 2015.
[5] Steven Lukes, *Power: A Radical View*, 2005, 2nd edition.
[6] Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law*, 2017, pp 266–273.

executive in international comparison, the upper chamber is also viewed as weak relative to the elected chamber. In Arend Lijphart's comparison of 36 countries, the UK is classed as "moderate to weak" on the index of bicameralism, based on factors such as differences in constitutional power, and the election (or appointment) processes of the two chambers.[7] Other scholars differ. Meg Russell, for example, notes that such comparative classifications do not fully take into account the reforms in 1999 when the majority of hereditary peers were removed. Russell finds evidence that this change not only appears to have increased the willingness of the Lords to use its powers but may also have increased the attention paid to the chamber by the Government through procedural measures to avoid confrontation (such as handling strategies)[8] and a greater responsiveness to government defeats.[9] Lord Norton of Louth (Conservative) writes "the House, as both [Donald] Shell and [Emma] Crewe have observed, can be too self-congratulatory about its work and hence resistant to change, but what this masks is the impact that it does have, which is not confined to carrying backbench amendments against the wishes of government". Lord Norton also notes the role of anticipated reactions:

> The House is important both in terms of its unseen and its seen impact. The most significant unseen impact in respect of legislation is acting as a deterrent. Ministers and officials anticipate reaction in the House and shape their behaviour accordingly. When ministers fail to anticipate accurately, they can encounter serious difficulties in the House.[10]

He remarks that the procedural differences between the chambers allow the Lords more time for the detailed scrutiny of bills, and that while the Lords recognises the primacy of the elected chamber, Members can and do raise issues for the other chamber to consider. Others too have described how Members bring expertise from a wide range of professional backgrounds, as well as experience as former MPs and ministers.[11] Since the removal of most of the hereditary peers from the House in 1999, no party has held a majority, and about a quarter of Members have no formal party affiliation.[12]

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[7] Arend Lijphart, *Patterns of Democracy*, 2012. Lijphart also notes that the House of Lords is unique among the countries analysed in having a much larger membership than the elected chamber and is the only legislature in which most members hold office for life.

[8] Cabinet Office, *Guide to Making Legislation*, 14 July 2017, pp 154–5.

[9] Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived*, 2013.

[10] Philip Norton, 'Legislative Scrutiny in the House of Lords', in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability*, 2016, pp 117–36.

[11] Peter Dorey and Matthew Purvis, 'Representation in the Lords', in Cristina Leston-Bandeira and Louise Thompson (eds), *Exploring Parliament*, 2018, pp 238–50; and Emma Crewe, *Lords of Parliament: Manners, Rituals and Politics*, 2005.

[12] House of Lords Library, *Statistics on the Size and Composition of the House of Lords*, 2 November 2017

1.3 How the Houses Work Together

What is often lacking in academic studies is a thorough investigation of how the two Houses work together as a single legislature. From the earliest large-scale studies of the legislative process, one or other chamber is generally the main focus.[13] Comprehensive studies, such as of all the government legislation in one or more parliamentary sessions, tend to be limited to one House or parliamentary stage, either because of the sheer volume of data or because comparable information from the two chambers is unavailable. A few studies, such as that by Russell and Gover described above, and a study by Alex Brazier and colleagues from the Hansard Society,[14] synthesise the legislative contributions of both Houses through a case-study approach (though this too requires analysis of very large amounts of information). Such analyses demonstrate that the contribution of each chamber cannot be viewed in isolation. Each House responds to and anticipates the actions and reactions of the other.

The following sections of this briefing illustrates ways in which the House of Lords influenced legislation in the 2016–17 session. Section 2 shows how computer-assisted methods allow us to measure legislative activity across both Houses. Section 3 illustrates how cooperation (and sometimes conflict) between the chambers works in practice through two case studies. The first describes Parliament's response to an unexpected event (the announcement of the 2017 general election) and the second shows how significant changes were made to the Children and Social Work Act 2017. Finally, section 4 draws some conclusions and sets the influence of the Lords in the context of Parliament as a whole.

2. Analysis of the 2016–17 Parliamentary Session

2.1 Amendment Analysis

One important way in which the legislature influences policy is through the scrutiny and amendment of legislation. Accordingly, a number of studies have analysed how legislation is amended.[15] As noted above, however, the strength of Parliament vis-a-vis the executive cannot simply be measured by counting non-government amendments passed or government amendments

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[13] JAG Griffith focused on the Commons in his study (*Parliamentary Scrutiny of Government Bills*, 1974) while Gavin Drewy and Jenny Brock analysed the 1988–89 session in the Lords in Donald Shell and David Beamish (eds), *The House of Lords at Work*, 1993.

[14] Alex Brazier, Susanna Kalitowski and Gemma Rosenblatt with Matt Korris, *Law in the Making: Influence and Change in the Legislative Process*, 2008.

[15] For example: JAG Griffith, *Parliamentary Scrutiny of Government Bills*, 1974; Donald Shell and David Beamish (eds), *The House of Lords at Work*, 1993; Amie Kreppel, 'What Affects the European Parliament's Legislative Influence?', *Journal of Common Market Studies*, 1999, vol 37, pp 521–38; Mark Shephard and Paul Cairney, 'The Impact of the Scottish Parliament in Amending Executive Legislation', *Political Studies*, 2005, vol 53, pp 303–19; Louise Thompson, *Making British Law: Committees in Action*, 2015; and Meg Russell and Daniel Gover, *Legislation at Westminster*, 2017.

defeated. This is because a government with a working majority can normally resist amendments proposed by opposition or back-bench Members and pass its own. But the large number of agreed government amendments poses a theoretical puzzle. Do such amendments arise because the Government changed its mind during the interval since drafting the legislation? Alternatively, were errors identified, or were concessions made in response to pressure? Research suggests that all of these reasons can play a part, but pressure is indeed an important factor.[16]

Several studies have found that substantive government amendments (ie those producing policy change) are often made in response to pressures from inside and outside Parliament. In his well-known study of three parliamentary sessions in the 1960s and 1970s, JAG Griffith described how government amendments frequently reflected amendments proposed or points made earlier in the process.[17] More recently, in an extensive study of Commons public bill committees from 2000 to 2012, Louise Thompson showed that ministers often undertook to consider changes at a later stage.[18] In their detailed study of twelve government bills from 2005 to 2012, Meg Russell and Daniel Gover demonstrated via an innovative "legislative strands" approach that many agreed amendments originated in earlier proposed amendments. They found that over 40 percent of government amendments (and 60 percent of amendments classified as 'substantive') could be traced to some form of parliamentary pressure.[19]

In this analysis I measure the proportion of lines of legislative text altered by amendment. This measure has a number of advantages over simple counts of amendments. First, it reports directly how much of the text was changed, which is related to (though not, of course, a precise measure of) the change in policy purpose or legal effect of the bill, and may reflect the amount of pressure that the Government was under. The degree of change also reflects the cognitive load experienced by legislators in their scrutiny of up to six versions of the same bill. Further, it shows how much the final act of parliament differs from the bill as introduced—normally the version that receives most public scrutiny and consultation.

Although amenable to automated analysis, the amount of amendment has not previously been measured in this way.[20] Accordingly, Jonathan Jones and I developed a semi-automated method to measure and visualise the amount of amendment in successive bill versions. We demonstrated the utility of this method by measuring the overall amount of amendment to all government

[16] Meg Russell and Daniel Gover, *Legislation at Westminster*, 2017, pp 69–80.
[17] JAG Griffith, *Parliamentary Scrutiny of Government Bills*, 1974, pp 167–82.
[18] Louise Thompson, *Making British Law: Committees in Action*, 2015, table 5.2.
[19] Meg Russell and Daniel Gover, *Legislation at Westminster*, 2017, pp 75 and 77.
[20] See the La Fabrique de la Loi website for an online exploration of French legislation, and John Wilkerson et al, 'Tracing the Flow of Policy Ideas in Legislatures: A Text Reuse Approach', *American Journal of Political Science*, 2015, vol 59 issue 4, pp 943–56.

bills in three parliamentary sessions between 2008 and 2016.[21] We found that while bills in all three sessions received considerable amendment, the session with the smallest government majority had the most. Combining this methodology with content analysis, Matthew Williams and I demonstrated the differential effect of government and non-government amendments on the language of the European Union (Withdrawal) Act 2018.[22] The analysis described below uses similar methodology to analyse government legislation in the 2016–17 session, making use of the modern electronic bill versions available since 2016.[23]

2.2 Overview of the 2016–17 Session

The 2016–17 parliamentary session began on 18 May 2016. David Cameron was Prime Minister, leading a Conservative government with an absolute majority of about twelve. Mr Cameron resigned in June 2016 following the 'leave' majority vote in the European Union referendum. Theresa May became party leader and Prime Minister in July 2016. The formal EU withdrawal process was started by the passage of the European Union (Notification of Withdrawal) Act in March 2017. Soon afterwards, the Prime Minister announced her intention to seek a general election, which was voted for by a large majority of MPs. This resulted in the early prorogation (suspension) of Parliament on 27 April 2017. During the session, 25 government bills and eight private member's bills received royal assent.[24] Three government bills were introduced but did not complete their parliamentary process.

2.3 Quantitative Analysis of Amendments in the 2016–17 Session

The following analysis includes all government bills that received royal assent during this session, apart from four finance and supply and appropriation bills (which are, by convention, not amended in the Lords), and one hybrid bill.[25] This analysis therefore includes 20 government bills, of which six were introduced in the Lords, and 14 in the Commons. Two of the Commons bills (Policing and Crime, Investigatory Powers) were carried over from the previous session. The Government suffered a total of 36 defeats in the Lords on eleven bills.[26] Although almost all amendments made following a defeat

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[21] Ruth Dixon and Jonathan Jones, 'Mapping Mutations in Legislation: A Bioinformatics Approach', *Parliamentary Affairs*, 2019, vol 72, pp 21–41.
[22] Ruth Dixon and Matthew Williams, in *Parliamentary Monitor*, Institute for Government, 3 September 2018, pp 39–41.
[23] XML files of most bill versions published since 2016 are available on the parliamentary website. I am very grateful to officials in the Lords Legislation Office and the Printing and Publishing Offices for helping me to obtain missing files and for generously providing the text of the final Acts in the same format.
[24] UK Parliament website, 'Public Bill Sessional Statistics for Session 2016–17', accessed July 2019.
[25] High Speed Rail (London–West Midlands) Act 2017.
[26] UK Parliament website, 'Public Bill Sessional Statistics for Session 2016–17', accessed July 2019, table 9.

were reversed in the Commons, the Government offered amendments in lieu in more than half of the cases.[27]

This is the first comprehensive analysis of amendments at each stage of an entire parliamentary session across both chambers since the classic work of JAG Griffith in 1974. It is the first to assess the percentage of legislative text altered. The average amount of amendment at each stage and overall is shown in table 1.[28]

Table 1: Levels of Amendment at each Parliamentary Stage in the 2016–17 Session

Bill stage	**Percentage of lines altered by amendment [a]**			
Starting in Lords (6 bills)	**mean**	**median**	**minimum**	**maximum**
Lords Committee	6.6	3.0	0.0	21.8
Lords Report	15.5	8.7	0.2	56.3
Lords Third Reading	2.2	0.3	0.0	8.5
Commons Committee	5.0	2.9	0.0	19.6
Commons Report	4.1	0.0	0.0	24.4
Ping-pong	0.0	0.0	0.0	0.0
Overall [b]	24.0	18.3	0.2	79.6
Starting in Commons (14 bills)	**mean**	**median**	**minimum**	**maximum**
Commons Committee	10.7	1.9	0.0	53.4
Commons Report	4.9	4.6	0.0	13.8
Lords Committee	7.7	9.1	0.0	17.9
Lords Report	10.3	9.8	0.0	29.4
Lords Third Reading	0.8	0.3	0.0	3.6
Ping-pong	4.1	1.0	0.0	35.3
Overall [b]	25.2	28.5	0.0	65.0

[a] Calculated as (lines deleted + lines added) / (lines deleted + lines added + lines unchanged) x 100 percent.

[b] 'Overall' compares the bill as originally introduced with the final Act.

The 20 bills contained between 10 and 5,384 lines of legislative text when

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[27] UK Parliament website, '[Public Bill Sessional Statistics for Session 2016–17]', accessed July 2019, table 9.

[28] By the method described in: Ruth Dixon and Jonathan Jones, 'Mapping Mutations in Legislation: A Bioinformatics Approach', *Parliamentary Affairs*, 2019, vol 72, pp 21–41. This method compares the legislative text of successive bill versions (ignoring front and end-matter, page headers, etc). The resulting 'comparison file' is edited by hand to remove alterations that do not result from amendments, such as typographical corrections and changes to formatting, punctuation and section titles. The addition and removal of a formal financial privilege amendment, when it occurs, is not counted.

introduced.[29] On average, bills grew in length by 26 percent through amendment, though some grew by much more. For example, the Children and Social Work Bill more than doubled in length, and the Policing and Crime Bill grew by 85 percent. The four shortest bills (10 to 124 lines) were the only bills not amended (although in the European Union (Notification of Withdrawal) Bill, amendments made by the Lords were reversed by the Commons). For the remaining bills, an average of 31 percent of the lines of text were altered during the parliamentary process, up to a maximum of almost 80 percent. This proportion was similar to that found in previous sessions and was not significantly different to that in the immediately preceding session.[30]

On average, bills received the most amendment in Lords report and Commons committee stages, and the least in Lords third reading (of course, third reading is not an amending stage in the Commons). Bills that were heavily amended in one chamber tended also to be amended in the other, though this was in some cases due to reversals of Lords amendments. For bills starting in the Lords, no further amendments were made when the bill returned to the Lords at ping-pong, whereas for bills starting in the Commons, consideration of Lords amendments led to further changes in eight of the 15 bills.

Committee stages in both Houses can take alternative forms, but no systematic differences in the amount of amendment were detected based on those alternatives. For example, there was no difference between the average amount of amendment made in Lords grand committee (five bills) where, by convention, no votes are held, and committee of the whole House (15 bills). Three bills were considered by a Commons committee of the whole House (rather than a public bill committee), and of those, only the Wales Bill was amended at that stage.

3. Case Studies

The case studies illustrate how the Lords and Commons work as a single legislature, albeit with different characteristics and traditions. The first describes how the Houses reacted to an unexpected event (the announcement of the 2017 general election) and the second explores the scrutiny of a particular piece of legislation, the so-called ‘innovation’ or ‘exemption’ clauses in the Children and Social Work Bill.

[29] Here, ‘lines’ derived from XML bill versions correspond to ‘legislative elements’ (such as paragraphs, sub-paragraphs, and items in tables or lists). Thus the ‘lines’ reported in this analysis ignore the within-paragraph line breaks found in typeset or PDF versions of bills.
[30] Comparisons with our earlier analysis (Dixon and Jones 2019) are approximate, as PDF files were used in that analysis, and the current analysis uses XML files. Analysis of PDF and XML files of the same bill suggests that systematic differences are small.

3.1 Case Study I: Wash-up before the 2017 General Election

The 2017 general election was unexpected both because Prime Minister Theresa May was understood to have ruled this out and because the Fixed-term Parliaments Act 2011 was meant to make snap elections less likely.[31] Nevertheless, the intention to hold an election was announced on 18 April and MPs voted on the following day to allow it by a majority that far exceeded the two-thirds of the Commons required by the Act.

How organisations react to unexpected events can reveal their strengths and weaknesses. Research suggests that successful responses require effective decision-making, accurate communication, cooperation, and a degree of 'resilience' or forward-planning. A successful response is often mediated by trust between individuals, organisations or departments, and is facilitated by sufficient resources and a clear shared purpose.[32] In some cases, an initially inadequate response can be turned around by a 'culture-switch'—a change in organisational self-image that results in altered behaviour.[33] Ending the parliamentary session in an orderly way required a cross-chamber response, and how Parliament reacted reveals its institutional features.

The period between the election announcement and the prorogation of Parliament is known as 'wash-up'. This period (19 to 27 April 2017) amounted to five sitting days in the Commons and four in the Lords, during which nine government bills were debated. All received royal assent on 27 April (along with five government bills which had already completed all their parliamentary stages, eight private member's bills and one private bill). The three government bills that were already subject to carry-over motions, and so not expected to be completed in the session, made no further progress. Parliament was formally dissolved on 3 May 2017.

Despite the rushed timescale, and whatever may have been occurring behind the scenes, the *Hansard* record shows that this period was most characterised by cooperation, consensus, and even courtesy. Nevertheless, there was still time for critical scrutiny, with a total of 28 hours devoted to debate across the two chambers.

Coordination

Evidence emerges from the *Hansard* record of rapid and efficient coordination within Parliament and in government departments to allow the remaining legislation to complete its parliamentary stages. Parliamentary

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[31] House of Commons Library, *Fixed-term Parliaments Act 2011*, 27 April 2017.
[32] Sandra L Resodihardjo, et al, 'A Theoretical Exploration of Resilience and Effectiveness Requirements', *Safety Science*, 2018, vol 101, pp 164–72; and Aneil K Mishra, 'Organizational Responses to Crisis: The Centrality of Trust', in Roderick Kramer and Tom Tyler (eds), *Trust in Organizations*, 1996.
[33] Donald P Moynihan, 'A Theory of Culture-Switching: Leadership and Red-tape During Hurricane Katrina', *Public Administration*, 2012, vol 90, pp 851–68.

officials and whips rapidly revised the timetable and arranged for the publication of new bill versions and lists of amendments. A Lords Library briefing was published which described the wash-up process and listed all of the bills to be debated.[34] Procedural motions were agreed in each chamber to suspend standing orders that prevented more than one parliamentary stage taking place on the same day, and to give priority to consideration of amendments made in the other chamber. Ministers held cross-party meetings to agree which parts of the legislation would survive. Whitehall bill teams coordinated with ministers and parliamentary counsel to prepare new legislation and amendments, including 'amendments in lieu' for the bills completing their ping-pong stages.

Cooperation and Consensus

Two bills were particularly urgent. The Northern Ireland (Ministerial Appointments and Regional Rates) Bill, published on 20 April 2017, allowed local taxes to be collected in the absence of a Northern Ireland Executive while Parliament was dissolved. It also extended the period during which an Executive could be formed (ie ministers appointed) until after the election. The bill was passed without amendment, although not without some heated debate in both chambers, though this was more about Northern Irish politics than the substance of the bill.

The Finance (No. 2) Bill had already been published in March. At 776 pages, it was said to be the longest finance bill ever introduced,[35] and was due to proceed through its parliamentary stages as usual. The election curtailed this schedule, and during the second reading debate on 18 April, Jane Ellison, then Financial Secretary to the Treasury, referred to the discussions that urgently needed to be held:

> We hope to hold constructive discussions with the Opposition, through the usual channels, on how this Bill will proceed.[36]

As a result, when the bill was debated by a committee of the whole House on 25 April, MPs agreed amendments that removed 620 of the original 776 pages, leaving only the sections on which there was a cross-party consensus.

Critical Scrutiny

While a few bills passed by consensus, others received considerable critical scrutiny. The Criminal Finances Bill, for example, had its Lords report and third reading stages on 25 April. Several opposition amendments were debated. For example, amendment 14, which required greater transparency

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[34] House of Lords Library, *Wash-up*, 21 April 2017.
[35] HC *Hansard*, 18 April 2017, col 578.
[36] ibid, col 570.

in overseas territories, was debated alongside government amendment 8, which was intended to achieve similar ends. Some Members argued that amendment 8 did not go far enough. In the end, however, Members recognised that time was against them, and all non-government amendments were withdrawn. Baroness Kramer (Liberal Democrat) observed:

> But this is a day when we recognise the pressures and needs delivered by wash-up, so I very much accept the need to support government amendment 8 and recognise with regret that we are very unlikely to have an opportunity to push on amendment 14.[37]

For bills that had reached the ping-pong stage, the pressure of time during wash-up might have been expected to lead to fewer or shorter debates. In fact, bills that were caught in wash-up received between one and four ping-pong stages, comparable to the number received by other bills in the same session. Ping-pong stages during wash-up were somewhat shorter than earlier in the session, averaging just under an hour rather than 90 minutes, but the range of durations was similar (16–132 minutes during wash-up versus 18–161 minutes).

The Technical and Further Education Bill returned to the Commons on 19 April for consideration of Lords amendments. Almost an hour was spent on this debate, including one division. Two Lords amendments were disagreed with, and one amendment was agreed in lieu. On returning to the Lords on 25 April, the Lords did not insist on their amendments and welcomed the amendment in lieu. As Lord Watson of Invergowrie (Labour) remarked:

> On amendment 6, initially I was dismayed that the Government were unwilling to accept the will of your Lordships' House on careers advice in further education colleges […] However, the Government's amendment in lieu actually appears to be stronger than the original amendment.[38]

The Higher Education and Research Bill received the longest ping-pong debate during wash-up. On 26 April, the Commons disagreed with 13 Lords amendments, agreeing several in lieu. One of the most contentious was amendment 156, to exclude international students from migration statistics. This received considerable support in the Commons, but the then Minister for Universities, Jo Johnson, argued that "amendment 156 could do real damage" and could not be accepted by the Government.[39]

The following day—the last sitting day of the Parliament—the Lords devoted over two hours to this bill. Despite expressing their regret and frustration,

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[37] HL *Hansard*, 25 April 2017, col 1330.
[38] ibid, col 1275.
[39] HC *Hansard*, 26 April 2017, col 1166.

the Lords accepted the Commons amendments. Lord Hannay of Chiswick (Crossbench) said:

> […] This is not a statistical matter. […] It is about the public policy purposes we take with regard to overseas students. Therefore, even the suggested improved ways of statistically analysing overseas students do not address what my amendment [156] was meant to address. […] That amendment was carried in this House last month by a majority of 94 drawn from all groups in this House. Therefore, I am afraid that I speak with deep regret, tinged with some bitterness, at the summary rejection of that amendment.
>
> If the Bill before us had followed a normal course, I believe, although of course I cannot prove it, that a reasonable compromise would have been reached either in the other place, where there was substantial support for the amendment, or through a negotiation between the two Houses. The wash-up process, which we are busy completing, brought to a premature end any such possibilities. The fact that the Government felt it necessary to state that if this amendment was not dropped they would kill the whole Bill, sheds a pretty odd light on their priorities and their intransigence. Altogether, this is a rather shabby business.[40]

These final sentences apparently refer to statements made at a confidential meeting to discuss the passage of the bill through wash-up. The Opposition spokesperson, Lord Stevenson of Balmacara, made his frustration clear:

> It would probably be wrong of me to give too much detail about what happens in a wash-up session. Very few people are privileged to attend them, and I was there only for a small part of it […] In fact, I understand that it was made clear at the very start that the Minister concerned was unable to discuss any concessions in this area: it was ruled off the table from the beginning. In that sense, it plays a little into the conversation that we had earlier: that there is something dysfunctional about Whitehall on cross-cutting issues.[41]

The Health Service Medical Supplies (Costs) Bill returned to the Commons on 25 April for consideration of Lords message—the third iteration of the ping-pong process for that bill. The Commons disagreed with Lords amendment 3B (an earlier version of which was disagreed with in the first ping-pong session) and agreed two amendments in lieu. The disagreement was about how to ensure support of the life-sciences sector while limiting the costs of new medicines to the NHS. On returning to the Lords on 26 April, it was noted that the Government had made a significant concession with its proposed amendment in lieu, and wash-up was credited

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[40] HL *Hansard*, 27 April 2017, col 1477.

[41] ibid, col 1484.

for this progress. Lord Hunt of Kings Heath (Labour) said:

> From the opposition benches, I very much welcome the agreed amendment that has come forward from the Government today. It is good to see how wash-up can concentrate minds no end, and we have reached a very satisfactory outcome.[42]

The Digital Economy Bill re-entered the Commons on 26 April for consideration of Lords amendments. In an hour and a half of debate, eight Lords amendments were disagreed with and several amendments in lieu were agreed. The then Minister of State for Digital, Matt Hancock, responded to Lords' amendments with a government proposal:

> We agree with the spirit of Lords amendment 40 and the proposed code of practice for social media platform providers on online abuse. […] We offer an alternative provision that we think will achieve the intended outcome.[43]

Then Shadow Digital Economy Minister, Louise Haigh, also noted the value of amendments made in the Lords:

> On Lords amendment 2, it is fantastic that the Government have now accepted the case that we put forward on mobile bill capping. Government amendment (a) in lieu of the Lords amendment will allow consumers to set a financial cap on their monthly bill when they enter a contract with their telecoms provider.[44]

Damian Collins (Conservative MP for Folkestone and Hythe and then chair of the House of Commons Digital, Culture, Media and Sport Committee) also credited the Lords as well as ministers' engagement:

> The Minister said that the Government would consider the representations made, including amendments in the Lords. That has taken place. I congratulate him, the Secretary of State and the Department on the interest they have shown in the subject, on the important roundtables they hosted and on the decisive action that was taken, with the support of the Lords, to amend the Bill.[45]

The Lords agreed the amendments in lieu when it met to consider the Commons message on 27 April. Nevertheless, the House devoted over an hour to that debate—the final debate on primary legislation in the parliamentary session. Lord Fox (Liberal Democrat) noted that the bill

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42 HL *Hansard*, 26 April 2017, col 1396.
43 HC *Hansard*, 26 April 2017, col 1124.
44 ibid, col 1129.
45 ibid, col 1133.

remained unsatisfactory in some ways:

> We are closing the door on a fresh, shiny new bill which still smells of new paint, but, just as with my house, I cannot help thinking that we will be raising the floorboards on this issue time and again in parliaments to come.[46]

Courtesy

Time was also made during the final sitting days of the parliament for considerable cross-party acknowledgement in both Houses, showing that traditions continue to be followed even during periods of unexpected activity. Tributes were paid to victims of the Westminster Bridge attack which took place the previous month, and to the MP Jo Cox, murdered in 2016. Long-serving MPs who would be stepping down at the forthcoming election were acknowledged, such as the Shadow Northern Ireland Secretary, David Anderson, who spoke on the Northern Ireland (Ministerial Appointments and Regional Rates) Bill, and Andrew Smith, Labour MP for Oxford East, who made his final speech during the Finance (No. 2) Bill's committee stage. Trudy Harrison, who had recently won the Copeland by-election, made her maiden speech on the same bill. The Chairman of Ways and Means reminded Members "of the courtesy that we do not intervene on a maiden speech". In the Lords, tributes were paid to the retiring Clerk of the Parliaments during a debate on the motion:

> That this House has received with sincere regret the announcement of the retirement of Sir David Beamish KCB from the office of Clerk of the Parliaments and thinks it right to record the just sense which it entertains of the zeal, ability, diligence, and integrity with which the said Sir David Beamish has executed the important duties of his office.[47]

Summary

Overall, the public record of the 2017 wash-up period was characterised more by cooperation and coordination than by conflict or chaos. Parliament exhibited the characteristics of a well-functioning organisation in its response to this unexpected event. Evidence emerges of much behind-the-scenes activity and of some impatience with the short timescale, but there were few signs that either chamber felt that legislative scrutiny was inadequate during this period. Considerable time was devoted to the critical scrutiny of nine bills, with concessions being made both by Government and by legislators to enable their passage.

[46] HL *Hansard*, 27 April 2017, col 1488.
[47] HL *Hansard*, 24 April 2017, cols 1197–8.

Some evidence of 'rushed' legislation emerges. As noted above, Members remained unhappy with aspects of the Higher Education and Research Bill. Other examples include the single day allowed to debate the Northern Ireland (Ministerial Appointments and Regional Rates) Bill in each chamber, and the severe cutting of the Finance (No. 2) Bill. Nevertheless, rapid agreement of urgent legislation was not unique to the wash-up period. The following parliamentary session saw five further pieces of Northern Ireland legislation passed very quickly, with three bills being passed after a total of two days in the Commons and one day in the Lords.

Such cooperation is not inevitable. The wash-up period of 2010 was far more contentious, and the Hansard Society made several recommendations for improvement.[48] Some lessons may have been learned by 2017, and circumstances were somewhat different. The bills had reached later stages and were not so controversial as those caught in the 2010 wash-up. Also, the Government expected that it would return after the election to complete its legislative programme. Nevertheless, the 2017 wash-up demonstrates that Parliament can react effectively to a 'non-routine' event, achieving its purpose of maintaining critical scrutiny of legislation. There is some evidence of a 'culture switch'—a change to a more confident attitude by Parliament where Members were aware of their veto power. Under some circumstances that could lead to chaos, but in this case a more orderly mood prevailed.

3.2 Case Study 2: Children and Social Work Act 2017

The second case study focuses on some controversial clauses in one of the bills in the 2016–17 session, and illustrates ways in which the two chambers can shape the eventual legislation.[49] The Children and Social Work Bill was introduced into the Lords at the start of the session and completed all of its stages before the election was announced.[50] The amount of amendment at each stage is shown in figure 1—overall this was one of the most heavily amended bills of the session. A briefing for the Lords stages was published by the House of Lords Library and the stages as far as Commons committee were covered in a House of Commons Library briefing.[51] The bill had three main purposes, according to the explanatory notes:

- Improving decision making and support for looked after and

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[48] Ruth Fox and Matt Korris, 'Reform of the Wash-up: Managing the Legislative Tidal Wave at the End of a Parliament,' *Parliamentary Affairs*, 2010, vol 63 no 3, pp 558–69.

[49] See also Jane Tunstill and Carolyne Willow's article describing these events from the perspective of the social work profession: 'Professional Social Work and the Defence of Children's and their Families' Rights in a Period of Austerity', *Social Work and Social Sciences Review*, 2017, vol 19, pp 40–65.

[50] UK Parliament website, 'Bills Before Parliament: Children and Social Work Act 2017', accessed 20 May 2019.

[51] House of Lords Library, *Children and Social Work Bill [HL]*, 9 June 2016; and House of Commons Library, *Children and Social Work [HL] Bill 121: Analysis for Commons Report Stage*, 8 February 2017.

previously looked after children in England and Wales.

- Enabling better learning about effective approaches to child protection and the wider provision of children's social care in England.
- Enabling the establishment of a new regulatory regime specifically for the social work profession in England.[52]

The contentious provisions were named "power to test different ways of working" and were described in the Queen's Speech debate as "new ways to drive innovation in local authorities". They allowed a local authority to apply to the Secretary of State to be exempted from requirements imposed by children's social care legislation with the purpose of "achieving better outcomes under children's social care legislation or achieving the same outcomes more efficiently".[53] The exemption would apply for up to three years and could be extended for a further three years. The bill did not specify which legislation might be exempted, but said:

> The Secretary of State may by regulations, for that purpose—
>
> (a) exempt a local authority in England from a requirement imposed by children's social care legislation;
>
> (b) modify the way in which a requirement imposed by children's social care legislation applies in relation to a local authority in England.[54]

These provisions originated in earlier initiatives of the Department for Education. In 2014, the department launched the £200 million children's social care innovation programme to enable local authorities to test new ways of supporting vulnerable children and young people. In January 2016, a departmental policy paper used examples from the programme to argue that "we need the future shape of children's social care in England to be defined not by Whitehall, but by the very best professionals and leaders using the very best evidence". [55] The paper cited a review by Professor Eileen Munro[56] to argue for a reduction of regulations for social workers:

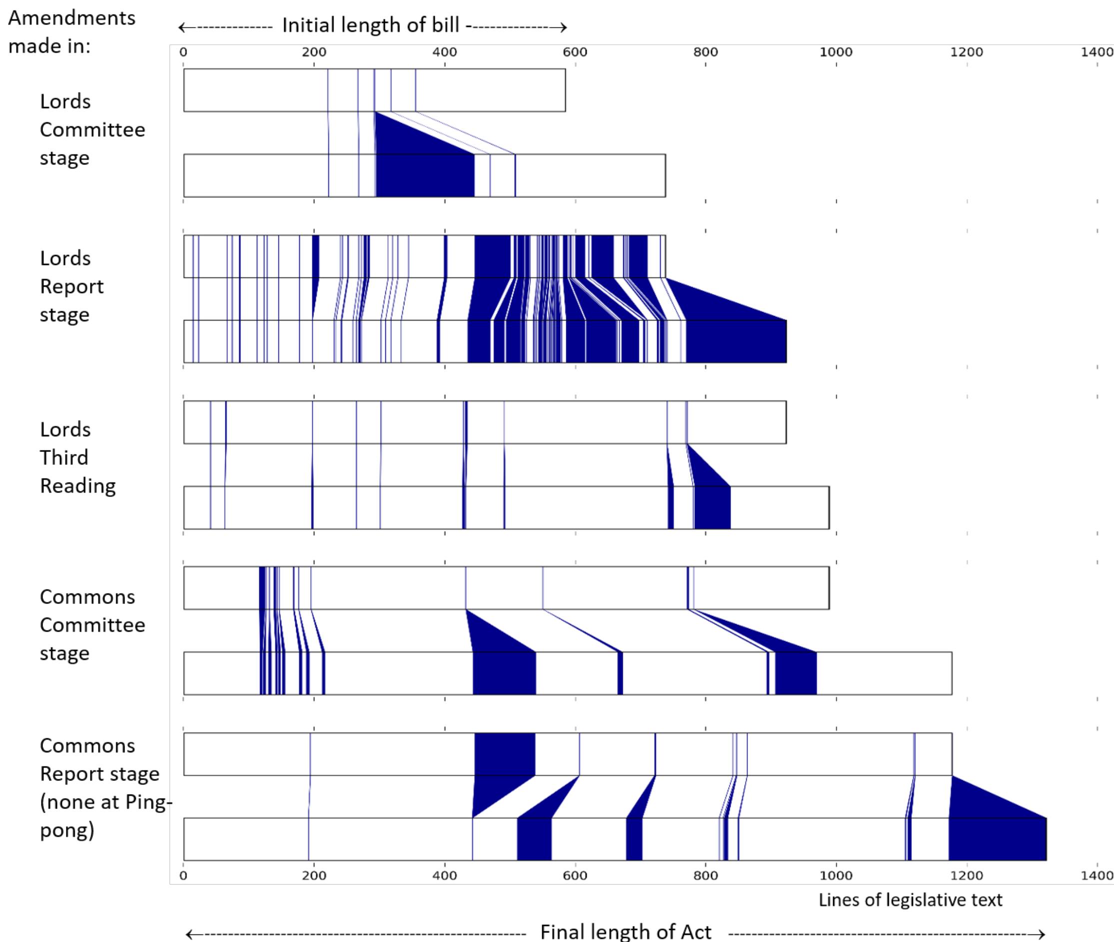
> Professor Munro's review (2011) described a system in which the actions of social workers had become driven by a pressure to comply with process. This burden of process accumulated over many years and was generally well intended, often responding to specific child protection failings. But by the time Professor Munro began her work, she found a system which was "doing things right rather than doing the

[52] Explanatory Notes to the Children and Social Work Bill [HL], 19 May 2016.
[53] Children and Social Work Bill, HL Bill 1 56/2, clause 15, subsection (1).
[54] ibid, clause 15, subsection (2).
[55] Department for Education, *Children's Social Care Reform: A Vision for Change*, January 2016, p 6.
[56] Eileen Munro, *The Munro Review of Child Protection*, 10 May 2011, Cm 8062.

right thing”.[57]

Figure 1: Amendments made to the Children and Social Work Act 2017

Amendments made at each stage are shown in dark blue. Unchanged text is shown in white.



Queen’s Speech and First Reading in the Lords

The legislation was mentioned in the Queen’s Speech on 18 May 2016, and the associated government briefing stated that it would give “frontline services more freedom to work together to safeguard children and trial innovative approaches”.[58] The bill received its first reading in the Lords on 19 May 2016, and was published alongside explanatory notes, an impact assessment, and a memorandum on delegated powers. According to the memorandum:

> The power has been framed to support bottom-up innovation […] It

[57] Department for Education, *Children’s Social Care Reform: A Vision for Change*, January 2016, p 6.

[58] Cabinet Office, *Queen’s Speech 2016: Background Briefing Notes*, 18 May 2016, p 32.

> allows for the trialling and evaluation of deregulatory measures in a controlled way, which could then lead to future changes in legislation.[59]

The impact assessment said of these provisions only "the bill itself simply enables the making of secondary legislation and does not in itself have any regulatory impact".[60]

Early Responses from Outside Parliament

The Lords Library Note described an article published on 26 May by a charity named Article 39 (named after an article in the UN Convention on the Rights of the Child).[61] The charity opposed "the radical removal of children's social care rights" and described clause 15 as "the greatest threat to children's rights in the bill". The note also mentioned a more positive response from an anonymous social worker.

Lords Second Reading

In the second reading debate on 14 June 2016, the then Parliamentary Under Secretary of State for the School System, Lord Nash, introduced the exemption clauses as follows:

> There is a consensus stemming back to the landmark *Munro Review of Child Protection* that over-regulation gets in the way of good social work practice. Addressing this is central to our strategy to reform children's social care and this new power to innovate will enable us to carefully pilot and evaluate deregulatory measures. It mirrors a similar existing power for schools.[62]

Members across the House voiced their concerns about the wide range of delegated powers represented in the bill (which were the subject of a regret motion by Lord Watson of Invergowrie) and about the exemption clauses in particular. Members asked why these clauses were necessary, and pointed out that innovation was possible under the current legislation. For example, Baroness Pinnock (Liberal Democrat) said:

> Innovation is vital but there is surely a need to tread with some caution where changes to working practice with vulnerable children are involved […] The regulations proposed in this clause are vagueness itself, which raises many questions as to the intent, save that of enabling, "better outcomes … or … the same outcomes more efficiently". That statement, in our opinion, has all the hallmarks of a Government bent on permitting the outsourcing of children's

[59] Department for Education *Memorandum to the Delegated Powers and Regulatory Reform Committee*, 19 May 2016.
[60] Department for Education, *Impact Assessments*, 19 May 2016.
[61] House of Lords Library, *Children and Social Work Bill [HL]*, 9 June 2016, p 14.
[62] HL *Hansard*, 14 June 2016, col 1115.

> services.[63]

In her contribution, Baroness Meacher (Crossbench) said:

> I would be grateful if the Minister, in summing up the debate, could explain to the House why there is a need to weaken the entitlements of children and families in order to facilitate service innovation.[64]

A few Conservative Members spoke in favour of the clauses, which had parallels with powers previously granted to schools. Lord O'Shaughnessy said he would "encourage the Government to be bold here" and Lord Suri noted:

> Both the Prime Minister and the Secretary of State for Education have spoken about giving the higher-performing children's services academy-style powers. I am glad to see that there was a wide-ranging consultation with eight high-achieving "partners in practice" to write the bill.[65]

In summing up, Lord Nash gave three examples of where the exemptions might be useful:

> Exemption [from normal approval procedures for prospective carers] could allow local authorities to trial making placements for children that put the child at the centre of the decision, prioritising their needs and their attachment to family and friends, without unduly sacrificing the safeguards in place for the child. […Secondly…] in low-risk cases the role of the independent reviewing officer [IRO] brings no additional benefit. Exemptions will allow local authorities to trial redirecting IRO resource differently—for example, to more complex cases […] Thirdly, there is criticism that adoption and fostering panels which are only advisory add little value and can often delay the process of approving prospective carers.[66]

Select Committees

A few days after the second reading debate, the Lords Delegated Powers and Regulatory Reform Committee (DPRRC) published its assessment. The committee recommended that the Secretary of State should be required to lay a report before Parliament explaining "how the local authority will ensure that any affected children continue to receive the protections, rights or benefits conferred under the legislation which is being removed or modified". The committee also recommended that the parliamentary

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[63] HL *Hansard*, 14 June 2016, col 1124.
[64] ibid, col 1145.
[65] ibid, col 1177.
[66] ibid, col 1203.

approval procedure be strengthened.[67] The Lords Constitution Committee published a brief report at about the same time.[68] The committee regretted that "the Government continues to introduce legislation that depends so heavily on an array of broad delegated powers" but did not mention the innovation clauses specifically. A report by the Commons Education Committee published in early July generally welcomed the focus on innovation.[69] A strategy document was also published in July, setting out the Government's vision for innovation in children's social care, and endorsed by the Chief Social Worker for Children and Families, Isabelle Trowler.[70]

Lords Grand Committee

No substantive amendments were made to the exemption clauses in Lords grand committee (where by convention no votes are held). Nevertheless, the clauses were debated at some length. In the third sitting, Lord Ramsbotham (Crossbench), a former Chief Inspector of Prisons, tabled amendment 92A to put into primary legislation the existing regulatory ban on profit-making from provision of children's social services. The minister, Lord Nash, gave no assurances, saying "We are not seeking in this bill to revisit the established position on profit-making" although he offered to reflect further on the matter. In the fourth sitting, on 11 July 2016, the Government introduced 14 new clauses on safeguarding, after which the exemption clauses (15 to 19) were debated. Lord Watson of Invergowrie referred to the "huge controversy surrounding clause 15" and said:

> It is not appropriate for clauses 15 and 18 to stand part of the bill unless and until the Government can offer persuasive evidence of their necessity and significantly improve on their transparency and safeguards.

Lord Warner (Non-affiliated) questioned the Government's interpretation of the Munro review:

> But my understanding is that in her review of child protection, Professor Munro was not arguing for changes in primary or even secondary legislation, but for amendments to statutory guidance.[71]

The minister gave a robust defence of the clauses:

> […] the push to remove procedural barriers to better ways of

[67] Delegated Powers and Regulatory Reform Committee, *1st Report of Session 2016–17*, 17 June 2016, HL Paper 13 of session 2016–17.
[68] House of Lords Constitution Committee , *Children and Social Work Bill [HL]*, 13 June 2016, HL Paper 10 of session 2016–17.
[69] House of Commons Education Committee, *Social Work Reform*, 6 July 2016, HC 201 of session 2016–17, pp 38–9.
[70] Department for Education, *Putting Children First*, 4 July 2016.
[71] HL *Hansard*, 11 July 2016, col 43GC.

> working is in direct response to what local authorities are telling us young people are saying to them. They want things done differently.[72]

Amendments were tabled to strengthen safeguards and scrutiny, although the proposers said that they would prefer clauses 15 to 19 to be removed altogether from the bill. Amendment 130 required that an independent review panel should be established to advise the Secretary of State in each case and 131B strengthened the parliamentary scrutiny of the exemptions. Amendment 132 sought to prevent local authorities from using the exemptions to avoid their corporate parenting responsibilities. The minister offered no concessions on amendment 130:

> We do not propose to put an independent review panel in place. However, there will be a variety of safeguards in place to ensure that the power is not misused.[73]

Although he did not accept amendment 131B, Lord Nash promised to bring forward an amendment following the recommendations of the DPRRC "to ensure that all regulations will be accompanied by a report setting out anticipated benefits and the protections to be put in place by local authorities to mitigate risks". Amendment 132 was also rejected. The minister argued that the corporate parenting principle should not be singled out, and that protecting other duties would make the clause too complex. He thought it unlikely that the provision could be used in that way:

> Having said that, a request from a local authority for exemption from the corporate parenting principles would seem likely to run counter to the core purpose of the power—securing better outcomes—in any case.[74]

Clause 15 was agreed, but Lord Watson of Invergowrie warned that "unless something in clause 15 changes, [the minister] will be riding for a fall on report". The rest of the exemption clauses (16 to 19) were agreed unchanged apart from two consequential amendments.

Lords Report Stage

The Lords report stage took place after the summer recess. The exemption clauses (now numbered 29 to 33) were discussed on 8 November 2016. Lord Nash introduced this part of the bill with a further explanation of why, in the Government's view, the new powers were needed:

> The power to test different ways of working is about putting those on the front line in the driving seat and empowering them to find better

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[72] HL *Hansard*, 11 July 2016, col 49GC.
[73] ibid, col 51GC.
[74] ibid, col 55GC.

> ways of working to protect the children in their care. This is not about local authorities opting out of their legal duties towards children or being allowed to remove services. It is about empowering them to try something different.[75]

Nevertheless, the minister recognised Members' concerns, and proposed a number of amendments intended to increase safeguards. Amendment 54 prevented local authorities using the exemptions to set aside the prohibition on for-profit provision of children's services. Further amendments resulted in a new clause that strengthened the parliamentary procedure, specifying that the affirmative procedure should be used for exemptions from either primary legislation or from secondary legislation that itself was subject to the affirmative procedure. The new clause also required that a report should be laid before Parliament at the same time as the regulations, as promised by the minister in grand committee. And, despite the minister's earlier refusal to countenance an independent review panel, amendment 61 now required that the Secretary of State should:

> invite an expert panel to give advice about—
>
> (a) the likely impact of the regulations on children, and
>
> (b) the adequacy of any measures that will be in place to monitor their impact on children.[76]

This expert panel would consist of the Children's Commissioner, the Chief Inspector of Education, Children's Services and Skills and "one or more other persons appointed by the Secretary of State".

Amendments to leave out clauses 29 to 32 were tabled by Lord Ramsbotham, Lord Watson of Invergowrie, Lord Warner and Lord Low of Dalston (Crossbench). Lord Ramsbotham acknowledged that the Government had made some concessions, but argued that the amendments failed to meet their fundamental concerns:

> I suggest that the mechanism for innovation set out in the clauses amounts to nothing less than the usurpation of the proper parliamentary process and subversion of the rule of law. I am not alone in believing that it is entirely inappropriate for primary legislation to be amended by regulations made by a Secretary of State at the request of, and applicable to, a single local authority.[77]

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[75] HL *Hansard*, 8 November 2016, col 1053.

[76] Marshalled List of Amendments to be Moved on Report, 56/2, Children and Social Work HL Bill 57-1, 14 October 2016.

[77] HL *Hansard*, 8 November 2016, col 1056.

Lord Ramsbotham mentioned the growing opposition to the clauses:

> I have been struck by the united opposition to the clauses of so many practitioners, some of whom I shall cite. […] Together for Children has more than 104,000 signatures to a campaign for their removal. Article 39, representing 43 involved voluntary organisations, sees them as a smokescreen for deregulation which poses profound risks for children.[78]

Lord Watson of Invergowrie noted that some of the Government's concessions were open to question. Although in principle the affirmative procedure gave additional safeguards, in practice it was extremely rare for a statutory instrument to be rejected. He also remarked on the terminology in amendment 61:

> It is perhaps instructive that the panel is described as an expert panel, rather than an independent panel as we seek in amendment 60. The reason is clear, though, because in no way could the people mentioned in amendment 61 be regarded as independent. Two of them are there ex officio, having been appointed to those offices by the Secretary of State. The two "other persons" to join the panel would be chosen by—that is right—the Secretary of State.[79]

Lord Watson also expressed concerns about clause 32, which gave the Secretary of State power to apply for exemptions in cases where a local authority was 'in intervention', that is, with responsibilities removed owing to poor performance. Lord Warner gave three reasons why, in his view, the clauses should be omitted:

> First, the examples that the Government have cited in support of the clauses do not justify the kind of draconian powers that the Secretary of State has sought. […] The Government have simply not shown why such wide powers are needed, or the scale of innovation that cannot be attempted because of primary legislation. […]
>
> Secondly, the Government have singularly failed to convince all the major children's charities, Liberty and the majority of social workers that what they are proposing in clauses 29 to 33, even with the proposed safeguards, will benefit outcomes for vulnerable children […]
>
> Finally […] when Parliament puts legislation in place, Parliament should amend it and not allow a Secretary of State to take wide powers to amend what he thinks fit. That is a particularly important consideration when the rights of vulnerable children are involved.[80]

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[78] HL *Hansard*, 8 November 2016, col 1057.
[79] ibid, col 1060.
[80] ibid, cols 1061–2.

Lord Low of Dalston argued that many of the existing safeguards had been hard-won over many years, often in response to serious failures of child protection. He listed some of the statutory duties that this legislation would allow a Secretary of State to overturn:

> For example, it would permit her to exempt a council from having a duty to safeguard and protect children in need, under section 17 of the Children Act 1989; to undertake an investigation where the authority suspects a child in its area is suffering significant harm, under section 47 of the 1989 Act; to accommodate a child in its area who is lost or abandoned, under section 20 of the 1989 Act; and to provide essential welfare support for a disabled child, under section 2 of the Chronically Sick and Disabled Persons Act 1970.[81]

Baroness Eaton (Conservative) spoke in support of the clauses, while expressing some concerns about clause 32. She also noted the support of the Local Government Association (of which she was a vice-president) and other organisations:

> I do not believe clauses 29 to 31 are signs of a Government recklessly putting our most vulnerable children out on a limb. Rather, they reveal a reforming courage, a willingness to address long-standing inflexibilities that substitute true safeguarding with bureaucratic formality.[82]

Lord True (Conservative), founder of the social enterprise Achieving for Children, was also among those who spoke in favour of the clauses:

> However, having listened to the debate, I find that some remarks were astonishingly apocalyptic […] here is a small, limited proposal that asks us in Parliament to trust local authorities and the advice of professionals who wish to innovate.[83]

In summing up, Lord Nash offered to reconsider clause 32. He said that he did not wish the question of who might request exemptions if a local authority was in intervention to block the acceptance of the other clauses. Finally, Lord Ramsbotham asked to test the opinion of the House regarding clauses 29 to 33. Amendment 57 (to leave out clause 29) was agreed after a division (content: 245, not content: 213). The amendments to leave out the other clauses were agreed without a division.

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[81] HL *Hansard*, 8 November 2016, col 1063.
[82] ibid, col 1064.
[83] ibid, col 1067.

Lords Third Reading

The bill returned to the Lords on 23 November 2016 without the exemption clauses. They were not referred to in the debate, and the bill was read for the third time and sent to the Commons.

Commons Second Reading

The bill received its second reading in the Commons on 5 December 2016. In his introduction, Nick Gibb, Minister for School Standards, emphasised the need for innovation and the support for the provisions by Eileen Munro and others. He said that despite the concerns of the Lords "the provisions are too important just to let them drop". He said that significant changes had been made:

> Local government overwhelmingly supports these measures, and the national associations and individual authorities have made it clear that they do not want us to lose this opportunity to allow them to test new ways of working. We have, therefore, reviewed and substantially revised the clauses to make sure that they avoid the issues raised in the other place, and there are several notable new features. [84]

Tim Loughton (Conservative), a former Parliamentary Under Secretary of State for Children and Families, questioned the Government's reliance on the Munro review:

> I was slightly surprised that the Minister prayed in aid Professor Munro so explicitly. I appointed Professor Munro and worked closely with her, but the problem is that many of her 15 pertinent recommendations are still to be implemented, and they do not involve the removal of a local authority's basic duty to protect vulnerable young children. [85]

Shadow Education Minister (Children and Families), Emma Lewell-Buck, also criticised the intention to reintroduce the clauses:

> It is scandalous that these clauses are soon to reappear at Committee stage. The Government's proposals will allow local authorities, under the guise of innovation, to opt out of protective primary legislation. That legislation, which has taken decades to achieve, has led to us having one of the safest child protection systems in the world. […] The Government have invented a solution to an invented problem, because the bill will not solve any of the problems in social work. What I know from my time in social work practice is that the things that social workers find restrictive, such as case recording, derive from

[84] HC *Hansard*, 5 December 2016, cols 41–2.
[85] ibid, col 49.

> secondary legislation, guidance, or the custom and practice in their particular local authority—all of which can be changed without primary legislation. [86]

Edward Timpson, then Minister for Vulnerable Children and Families, sought to reassure Members that the bill would not remove fundamental rights and protections from children, nor would it result in the privatisation of children's social care. He said that the powers were requested by local authorities:

> As Professor Eileen Munro's landmark review of child protection told us, over-regulation can get in the way of social workers' ability to put children first. The power will address that challenge, and it is being called for by local authorities around the country. It will give councils the ability to test new ways of working that are designed to improve outcomes for children in a safe and controlled environment, where the impact of removing a specific requirement can be measured and evaluated carefully. […] I will bring back a power with significant changes and additional safeguards that will, I hope, provide the reassurances that have been requested. [87]

Commons Committee Stage

When the bill was debated in public bill committee in December 2016 and January 2017, the Government proposed eight new clauses to replace those removed by the Lords. The new clauses differed somewhat from the originals, but their intent was the same, to allow local authorities to apply for exemption "from a requirement imposed by children's social care legislation" or to "modify the way in which a requirement imposed by children's social care legislation applies". [88]

The purposes no longer mentioned "better outcomes" or "the same outcomes more efficiently" but listed aims such as "promoting the physical and mental health and well-being of children and young people", "promoting high aspirations" and "preparing children or young people for adulthood and independent living". Several duties in the Children Acts of 1989 and 2004 were protected, some of which were on the list previously put forward by Lord Low. The new clauses had most of the provisions proposed by government amendments at Lords report stage, such as the ban on for-profit providers, the requirement for an expert panel and the strengthened parliamentary procedure. There was no proposal to reinstate the clause allowing others to apply on behalf of local authorities in intervention.

The minister, Edward Timpson, noted that several more organisations such

[86] HC *Hansard*, 5 December 2016, cols 74–5.
[87] ibid, cols 82–3.
[88] Public Bill Committee, *Children And Social Work Bill [HL]*, Amendments as at 13 December 2016, NC2,

as the Children's Society and Barnardo's now supported the proposals, and emphasised the potential of these clauses to pave the way for wider changes:

> The evidence from each pilot will allow us to assess the need for changes to legislation across the country.[89]

Emma Lewell-Buck replied that the Government's proposed changes did not meet the concerns expressed by the Lords and by professional organisations and described their deletion in the Lords as "a red-flag warning that the proposals are dangerous". She noted that future legislation, even the provisions of the bill itself, would become uncertain:

> Let us also remember that part of this bill will also be under threat of exemption once—and if—it receives royal assent. In fact, every single future children's social services function that this House introduces will have a fragile and uncertain existence if we allow these new clauses to go ahead.[90]

She referred to the body of written evidence that opposed the provisions and urged the committee to reject the clauses.[91] Simon Hoare (Conservative MP for North Dorset) argued that Emma Lewell-Buck had not taken enough account of the safeguards introduced by the Government, such as the role of the expert panel:

> The Secretary of State does not take his or her own view; the proposal has to go to the experts to test the robustness of the ability to deliver and make sure that there are sound arguments. [92]

Steve McCabe (Labour MP for Birmingham, Selly Oak) noted that there had been no public consultation about these clauses, and that although the minister spoke about pilots, the bill did not mention the term:

> When a Government embark on a radical change of this nature, we normally have some kind of preparation for that change. There might be a green paper or a white paper, or extensive consultation to allow us to shape what will happen. What seems to be happening—I do not know whether this is what the minister intends—is that we are legislating without any real sense of what the pilots are designed to do and without any real description of them. In fact, the bill does not refer to pilots at all, and for all anyone knows, they could be an exercise in exempting local authorities from long-standing primary legislation. [93]

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[89] HC *Hansard*, 10 January 2017, col 140.
[90] ibid, col 147.
[91] Of 73 written submissions, 46 mentioned the exemption clauses and, of those, 44 were unequivocally opposed to them.
[92] HC *Hansard*, 10 January 2017, col 155.
[93] ibid, col 156.

Edward Timpson remained adamant about the principle:

> I am absolutely sure that the approach we are taking will do what local authorities want and what Eileen Munro set out in her report almost six years ago. [94]

The committee voted 10 to 5 in favour of the first three new clauses. The remaining new clauses were added to the bill without a division. No amendments were tabled to the new clauses.

Commons Report Stage

Commons report stage took place on 7 March 2017, with the exemption clauses now numbered 32 to 39. By this date, however, amendments to leave out these clauses appeared under the name of the then Secretary of State for Education, Justine Greening. These amendments were agreed without debate, and the clauses finally disappeared from the bill.

What caused the about-face? No explanation was offered by ministers in either chamber, so it is only possible to speculate. The amendments were first published on 28 February under the names of Emma Lewell-Buck and Tim Loughton. But in the revised list published on 3 March, they also carried Justine Greening's name and that of Angela Rayner (Shadow Secretary of State for Education). Kelly Tolhurst (Conservative MP for Rochester and Strood) was added in the final version. An article in *Children and Young People Now* (*CYP Now*) suggests that the decision was made after a meeting at the end of February:

> A source told *CYP Now* that the government climbdown follows a summit meeting last week between Education Secretary Justine Greening, children's minister Edward Timpson, and chief children's social worker Isabelle Trowler, with a delegation of opponents to the proposals including child protection expert Lord Laming, former children's minister Tim Loughton and Conservative MP Kelly Tolhurst. [95]

One reason may have been that Eileen Munro no longer supported the proposals. Another *CYP Now* article quoted her email to ministers:

> I have been reading the debates in Hansard and the submissions […] I've also been meeting with some of those who oppose the bill and I have reached the conclusion that the power to have exemption from primary and secondary legislation creates more dangers than the

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[94] HC *Hansard*, 10 January 2017, col 173.

[95] Neil Puffett, 'Exclusive: Government Set to Drop Controversial "Exemption Clause"', *Children & Young People Now*, 2 March 2017.

> benefits it might produce.[96]

Commons Third Reading

Commons third reading followed the report stage on 7 March 2017. The clauses were not mentioned again by the minister, Edward Timpson, but Angela Rayner said:

> I want to mention clauses 32 to 39, the so-called innovation clauses. There was huge resistance to those measures from care leavers, adult survivors of abuse, social workers, academics, children's rights campaigners and charities. […] I therefore commend the minister and the Secretary of State for accepting those arguments and removing the relevant chapters from the bill.[97]

Tim Loughton remarked:

> […] at no point did [the Munro Review] require us, or was it required of us, to remove any of the duties that make up the safety net of primary and secondary legislation. Professor Munro never asked for it; we never considered it; and it was never done. It would have been absolutely inappropriate to do it now, so it was completely appropriate that Professor Munro did not give her support to the Government's previous proposals. I am pleased that they have listened, I am grateful to Lord Laming and Lord Mackay in the other place, and to my hon. Friend the Member for Rochester and Strood (Kelly Tolhurst) today, for putting that message across to ministers.[98]

Lords Consideration of Commons Amendments

The bill returned to the Lords on 4 April 2017. As the innovation clauses were both re-inserted and removed in the Commons, there were no associated amendments for the Lords to consider. Nevertheless, brief references were made to their removal. Lord Watson of Invergowrie asked the minister "what had changed?" (though he received no reply), and Lord Hunt of Kings Heath said:

> I also welcome the Government's decision to accept that the innovation clauses which the Lords took out would not be reinserted in the other place. Essentially, they involved giving local authorities the ability to override primary legislation, so we have maintained an important principle.[99]

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[96] Neil Puffett, 'Eileen Munro "Deserts" Controversial Exemption Clause', *Children & Young People Now*, 10 February 2017.
[97] HC *Hansard*, 7 March 2017, col 748.
[98] ibid, col 752.
[99] HL *Hansard*, 4 April 2017, col 958.

Summary

This case has parallels with that of the Legislative and Regulatory Reform Act 2006 described by Alex Brazier and colleagues.[100] That legislation was introduced by a Labour government with the aim of reducing the regulatory burden on businesses. It proposed to widen the existing powers of ministers to alter primary legislation by means of regulatory reform orders. Very similar arguments were made in Parliament and elsewhere about the risks of bypassing Parliament's role in this way, indeed the bill was nicknamed the "abolition of Parliament bill".[101] The bill was amended in Commons report stage to narrow the scope of the powers. When the bill entered the Lords, the Government accepted several opposition amendments, notably the removal of one of the most controversial clauses. At Lords report stage, a government amendment prevented the law being used to amend legislation of "constitutional significance". Together, these amendments represented a significant climb-down by the Government.

The case of the Children and Social Work Act 2017 demonstrates how the chambers worked together to achieve similar substantial alterations to legislation. There seems to have been limited anticipation of controversy on the part of the Government in this case. The introduction of the bill into the Lords suggests that it was not considered particularly controversial, and (unlike the Legislative and Regulatory Reform Act) the relevant select committees expressed few reservations. The removal of the clauses in the Lords was achieved with support from Members of all parties and Crossbenchers. The Government attempted to address Members' concerns when the bill returned to the Commons, reflecting the language of Lords' amendments in its own proposals. However, MPs opposing the provisions drew on arguments from the Lords, from their own expertise, and from the growing pressure from outside Parliament, and the clauses were eventually excised from the bill. The anticipation of a further rebellion when the bill returned to the Lords may have played a part in this climb-down on the part of the Government, but the decisive event appears to have been when the academic cited as supporting the provisions—Professor Eileen Munro—argued that the dangers of the exemption powers outweighed the benefits.

4. Conclusions

The 2016–17 session can be regarded as a relatively 'normal' session of the UK Parliament. As it turned out, Theresa May's decision to seek an election in 2017 resulted in the Conservatives losing seats and returning as a minority government with the support of the Democratic Unionist Party on confidence and supply issues. Since then, the UK's vote to leave the European Union ('Brexit') has occupied British politics—and Parliament—to an overwhelming extent. It is not clear how long it will be before 'normal'

[100] Alex Brazier et al, *Law in the Making*, 2008, pp 99–123.
[101] ibid p 100.

conditions resume.

What made the 2016–17 session so orderly despite the decision to fundamentally alter Britain's relationship with the EU being taken during this time? The Government in 2016 had a small but workable majority, and generally good poll ratings. Ministers presented—and passed—major policy bills. Having campaigned for 'Remain' in the EU referendum in June 2016, David Cameron resigned as Prime Minister when 'Leave' won a majority. He was rapidly succeeded by Theresa May, an experienced cabinet minister, so the parliamentary session was able to proceed much as planned. Two new Whitehall departments were set up, but the European Union (Notification of Withdrawal) Act 2017 was the only primary legislation that directly related to the referendum result.

In assessing the impact of the Lords, we find that the features identified by Meg Russell in her analysis of the Lords from 1999 to 2012 continued to operate in the 2016–17 session. Russell concluded that the balance of evidence suggests that reforms such as the removal of most of the hereditary peers, and with them the long-standing Conservative majority, strengthened rather than weakened the House of Lords. This, Russell argued, has not been at the expense of the Commons but, alongside better resourcing of MPs and reform of the select committee system, served to strengthen the Commons by allowing both chambers to present a united front on important policy issues.[102]

The Lords' most measurable 'impact' is the number of defeats that it inflicts on the Government. Numbers of defeats on primary legislation suffered by the Conservative Government in 2015–16 (53 defeats) and 2016–17 (36) are somewhat higher than the numbers under the preceding Coalition Government (apart from the long 2010–12 session) and are comparable to numbers in the early 2000s during Tony Blair's Labour administration.[103] Of course, the impact of the Lords cannot be assessed solely from government defeats. Russell identified two other ways through which policy is influenced: "negotiated outcomes" and "anticipated reactions".[104] We can detect both of these operating in the 2016–17 session.

For the session as a whole, negotiation was apparent in the responses of the Government to defeats on legislation. Rather than provoke further confrontation, the Government offered amendments in lieu after more than half of the defeats. And while no defeats occurred during 'wash-up' in April 2017, the Government appears to have made concessions to allow bills to pass in the limited time available, for example in response to the Lords' insistence on an amendment to the Health Service Medical Supplies (Costs)

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[102] Meg Russell, *The Contemporary House of Lords*, 2013, p 293.
[103] Constitution Unit, 'Government Defeats in the House of Lords', University College London, accessed July 2019; and House of Lords Library, 'Government defeats in the House of Lords', both accessed 28 May 2019.
[104] Meg Russell, *The Contemporary House of Lords*, 2013, p 197.

Bill and in the Technical and Further Education Bill.

Negotiation was also apparent in the case of the exemption clauses in the Children and Social Work Bill which, the Lords argued, ceded unacceptably wide powers to ministers. Here the Government twice attempted to allay Members' concerns by substantially amending the clauses. Nevertheless, the concessions did not lead to agreement and the clauses were eventually excised from the bill.

This outcome suggests some degree of failure by the Government to anticipate the reactions of both chambers. In this case, neither select committees nor consultations with local authorities raised significant concerns in advance. Opposition to the clauses in the Lords appears to have both reflected the growing disquiet within and outside Parliament and to have stimulated opposing voices when the bill entered the Commons. As Russell puts it, "the policy pressure generated by each chamber is inextricably linked to the other".[105]

With a Commons majority, the Government can overturn Lords' amendments, which ultimately limits the ability of the Lords to influence legislation in any direct way. As we have seen, however, Lords' amendments often survive. This indicates that:

- The House of Lords must not only choose when to exercise its powers, it must also gain substantial support in the Commons if its proposals are to persist. If such agreement is obtained, alterations to legislation can be significant.
- The House works by bringing a distinctive 'alternative voice' to policy debates. It achieves impact mainly by cooperation and persuasion, though these are backed up by its ability to exercise veto power.

[105] Meg Russell, 'A Stronger Second Chamber?', *Political Studies*, 2010, vol 58, pp 866–85.