



Post-Legislative Scrutiny

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This note provides a brief examination of the major reports into post-legislative scrutiny in the United Kingdom since 2004. It describes the main recommendations from the reports by the Constitution Committee and Law Commission and the Government's response to each. The Constitution Committee reported in October 2004 and found there was a significant room for greater post-legislative scrutiny. The Committee recommended that Government departments should be responsible for producing a Memorandum of the post-legislative review of an Act, which a select committee could then conduct an inquiry into.

Acknowledging the Constitution Committee's findings, the Government then asked the Law Commission to conduct its own inquiry into post-legislative scrutiny. The Law Commission reported back in October 2006 proposing a Joint Committee for Post-Legislative Scrutiny.

On 20 March 2008, the Leader of the House of Commons announced that she was publishing *Post-legislative scrutiny – The Government's Approach*, the Government's response to the Law Commission's report. The report's conclusions were similar to those in the Constitution Committee original report. The Government was not persuaded by the case for a new Joint Committee.

The note outlines the Government's approach to post-legislative scrutiny. By January 2013, 58 memorandums on post-legislative assessments had been published. The note also gives details of the individual inquiries held by Select Committees in response to the publication of several Memorandums, as well as some detail on post-legislative scrutiny in the House of Lords.

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1 Constitution Committee Report 2004

In October 2004, the House of Lords Constitution Committee reported on the legislative process. It began a section on post-legislative scrutiny with the following observation:

Post-legislative scrutiny appears to be similar to motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence.¹

The report's main conclusions were that Parliament frequently ended its legislative scrutiny at the point of Royal Assent with little or no evaluation of whether the legislation had achieved its aims:

167. We have stressed the importance of looking at the legislative process in its totality. As Sir Michael Wheeler-Booth and Professor Vernon Bogdanor put it, "all too often, Parliament forgets about legislation once it has reached the statute book" (Vol. II, p.187, para.10). There are occasions when some post-legislative scrutiny occurs but, as Peter Riddell told us, it is "patchy at best" (Vol. II, p.27, para.9). It tends to occur only because of a realisation that something has gone wrong. An obvious and much cited example is that of the Child Support Act 1990 setting up the Child Support Agency. Alan Beith also drew attention to a more recent example with the Constitutional Affairs Committee in the Commons:

"In our case it was the legislation which set up CAF/CASS, the Children's and Family Court Advisory and Support Service, which clearly was working very badly; indeed, we published an extremely critical report which led in the end to the

¹ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 165

dismissal of the entire board and a fresh start—quite a painful process, but undoubtedly a form of post-legislative scrutiny” (Q 146).

168. This example shows the potential of post-legislative scrutiny but also points to a flaw in its current usage: that is, its employment only when problems become apparent. There is rarely an attempt, and certainly no practice, of Parliament regularly reviewing legislation to ensure that it has achieved what was intended.²

The Constitution Committee argued that greater post-legislative scrutiny might encourage the Government to reframe its definition of success from getting “their big bill on the statute book” to “measuring the effect it had”.³ The Committee also warned that leaving any post-legislative scrutiny exclusively to the Government or solely to select committees might encourage selective scrutiny. With the Government accountable to itself, it could be open to the charge of scrutinising some measures more or less than others. Time and resource constraints on select committees might force them to focus disproportionately on high-profile Acts.

While acknowledging the already heavy workloads of select committees, the Constitution Committee’s solution was to recommend that most Acts (other than Finance Acts) should normally be subject to review within a maximum of three years of their commencement, or six years following their enactment, whichever was the sooner.⁴ The Committee further recommended that to relieve pressures on select committees, Government departments should be responsible for conducting any post-legislative review and should then submit a report or memorandum to the appropriate select committee. Select committees could then be granted a budget to conduct research projects into the effects of the Act under scrutiny.⁵

The report also suggested that Explanatory Notes to bills could incorporate criteria by which, once enacted, a bill could be judged to have met its purpose.⁶ After a suggested time period had elapsed, Government departments could use these criteria to judge the effects of the Act. At the same time the Constitution Committee suggested there was room for a form of post-legislative consultation similar to that at the pre-legislative stage.⁷

2 Government Response to the Constitution Committee

In April 2005 the Government responded to the Constitution Committee’s recommendations. The response, receptive to the case for greater legislative scrutiny, stated that:

31. Departments already engage in post-legislative scrutiny: policy evaluation is a constant activity, and it is frequently linked to legislation, which is just one means of implementing policy aims. Nevertheless, the Government believes that strengthening post-legislative scrutiny further could help to ensure that the Government’s aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect.

² Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 167-168

³ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 171

⁴ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 180

⁵ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 189

⁶ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 87

⁷ Constitution Committee, *Parliament and the Legislative Process*, 29 October 2004, HL 173-I 2003-04, para 285

32. The Government has recently been giving close consideration to how post-legislative scrutiny can best be achieved. What is meant by “post-legislative scrutiny” is often ill-defined. It could range from a wide-ranging policy review to a quite limited and technical evaluation of the effectiveness of the drafting. We have asked the Law Commission to undertake a study of the options, and to identify, in each case, who would most appropriately take on the role. We are conscious that the resources of the Law Commission are not used to best effect, and believe that they may have a role to play in post-legislative scrutiny. We are also, separately, exploring how to increase take-up of their proposals for law reform.⁸

The Government, however, was not convinced by the case for criteria measuring the success of a bill being set out in the Explanatory Notes:

35. The Government is not persuaded that it would be appropriate to include in the explanatory notes the criteria by which the bill, once enacted, can be judged to have met its purpose. A more appropriate place to outline such criteria might be preceding policy documents, or in debates during parliamentary proceedings on a bill, such as Second Reading debates. The Government will consider ways in which it might be possible to provide a statement of success criteria as part of its wider consideration of the options for strengthening post-legislative scrutiny.⁹

3 Report by the Law Commission

In the Government’s response to the Lords Constitution Committee, it announced that it would be requesting the Law Commission¹⁰ to conduct an inquiry into post-legislative scrutiny. The Law Commission published its report in October 2006. Finding that there was widespread support for greater post-legislative scrutiny, the Law Commission recommended:

- (1) that the approach should be evolutionary (consistent with the way in which the system of government has developed),
- (2) that it should build upon what is already in place, and
- (3) that more systematic post-legislative scrutiny may take different forms.

We consider in turn how methods of post-legislative scrutiny might be developed involving Government, Parliament and independent reviewers. These are not mutually dependent.¹¹

The responses to the Law Commission’s consultation highlighted different opinions about who should be broadly responsible for post-legislative scrutiny, the Government or Parliament. While acknowledging there was room for Government departments in any post-legislative review process, the Commission found a majority of their respondents disliked the idea of government being the primary reviewer; David Laverick, the Pensions Ombudsman, said:

⁸ Constitution Committee, *Parliament and the Legislative Process: The Government’s Response*, 20 April 2005, HL 114 2004-05, paras 31-32

⁹ Constitution Committee, *Parliament and the Legislative Process: The Government’s Response*, 20 April 2005, HL 114 2004-05, para 35

¹⁰ The Law Commission’s key aims are:

To ensure that the law is as fair, modern, simple and as cost-effective as possible;

To conduct research and consultations in order to make systematic recommendations for consideration by Parliament;

To codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes

¹¹ Law Commission, *Post-Legislative Scrutiny*, October 2006, Law Com 302, Cm 6945, para 3.19

If post-legislative scrutiny is to be effective ... it should be owned by, and directed by Parliament. The Government will of course be a major contributor to that review but should not be in charge of the process or be in a position unduly to influence that process.¹²

The Law Commission concluded that a Parliament-based review process was popular, seeing it as an extension of the Legislature's existing remit to scrutinise and consider legislation wisely. It found that there was significant support, most obviously from Lord Norton of Louth, for "a new Joint Committee on Post-Legislative Scrutiny"¹³ assisted by the Scrutiny Unit. The collaboration of both Members and Peers was seen as a particular strength for ensuring independence as well as bringing specific expertise to the review process. Consultation respondents saw the Joint Committee on Human Rights as being a particularly valuable model. A new Joint Committee on Post-Legislative Scrutiny could commission specialist research from University departments; Government agencies; and the National Audit Office who already have a role in post-legislative scrutiny. The Law Commission recommended that:

... consideration be given to the setting up of a new Parliamentary joint committee on post-legislative scrutiny. Select committees would retain the power to undertake post-legislative review, but, if they decided not to exercise that power, the potential for review would then pass to a dedicated committee. The committee, supported by the Scrutiny Unit, could be involved at pre-legislative as well as post-legislative stages in considering what should be reviewed, could undertake the review work itself or commission others to do so and would develop organically within its broad terms of reference.¹⁴

As well as greater parliamentary scrutiny, the Law Commission also stressed that there was scope for Government departments to enhance the role of Impact Assessments (formally Regulatory Impact Assessments or RIAs):

We consider that the clarification of policy objectives is critical. RIAs provide a good place for the clarification of policy objectives and the setting out of criteria for monitoring and review. Therefore RIAs should be enhanced in order to incorporate these considerations more effectively.¹⁵

4 The Government's Response to the Law Commission's Report

On 20 March 2008, in a written ministerial statement, the Leader of the House of Commons, Harriet Harman, announced that she was publishing *Post-legislative scrutiny – The Government's Approach*,¹⁶ the Government's response to the Law Commission's report. She continued:

The new process for post-legislative scrutiny introduces a systematic approach for strengthening the scrutiny of laws after they have been enacted by Parliament. The aim is to complement the Government's internal departmental scrutiny with parliamentary scrutiny, principally by Committees of the House of Commons, to provide a 'reality check' of new laws after three to five years.¹⁷

¹² Law Commission, *Post-Legislative Scrutiny*, October 2006, Law Com 302, Cm 6945, para 3.20

¹³ Law Commission, *Post-Legislative Scrutiny*, October 2006, Law Com 302, Cm 6945, para 3.32

¹⁴ Law Commission, *Post-Legislative Scrutiny*, October 2006, Law Com 302, Cm 6945, para 3.47

¹⁵ Law Commission, *Post-Legislative Scrutiny*, October 2006, Law Com 302, Cm 6945, para 3.16

¹⁶ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government's Approach*, March 2008, Cm 7320

¹⁷ HC Deb 20 March 2008 c74WS

In *Post-legislative scrutiny – The Government’s Approach* the Government presented a brief overview of calls for more attention to be paid to post-legislative scrutiny. Before its detailed response to the Law Commission’s report, it set out its overall approach to post-legislative scrutiny. This broadly corresponded with the Lord’s Constitution Committee report recommending that Government departments should first conduct any post-legislative reviews and then submit a memorandum to the appropriate select committee:

The Government therefore considers that the basis for a new process for post-legislative scrutiny should be for the Commons committees themselves, on the basis of a Memorandum on appropriate Acts submitted by the relevant Government department, and published as a Command paper, to decide whether to conduct further post-legislative scrutiny of the Act in question. In some cases (though not ordinarily if the Commons Committee has decided to conduct a review) it might be appropriate for a different parliamentary body – whether Lords or Commons or Joint – to conduct further scrutiny. In this way, all Acts would receive a measure of post-legislative scrutiny within Government and would be specifically considered for scrutiny within Parliament. Some, on a considered and targeted basis, would then go on to receive more in-depth scrutiny. This would reflect the approach proposed earlier by the Lords Constitution Committee.¹⁸

The Government accepted that there was a case for enhancing the role of Explanatory Notes (ENs) and Impact Assessments (IAs) to provide some criteria to judge an Act’s success later:

Broadly, the Government considers that ENs and the new IAs as currently drafted already provide a clear reference point for subsequent assessment of how an Act may be operating in practice. But the wording of the guidance in both cases will be reviewed both to see what further specific provision can be made and in the light of experience of future post-legislative reviews of Acts.¹⁹

The Government was less persuaded by Lord Norton’s call for a Joint Committee on Post-Legislative Scrutiny. It argued that existing select committees should be the primary body responsible for scrutiny to ensure they “are not displaced from their key and leading role in monitoring the policies and activities of government departments”. The Government accepted it would be difficult for select committees to prioritise post-legislative scrutiny work so memorandums submitted by departments to select committees would be published as Command Papers, “allowing Lords and other interests to take up points raised in it.”²⁰ The Government agreed that such reviews should take place between 3 and 5 years after Royal Assent.²¹

The Government set out what it believed should be included in any memorandums submitted to select committees to review:

17 The Memorandum would include:

- information on when and how different provisions of the Act had been brought into operation

¹⁸ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, para 9

¹⁹ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, para 14

²⁰ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, paras 19-20

²¹ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, para 16

- information highlighting any provisions which had not been brought into force, or enabling powers not used, and explaining why not
- a brief description or list of the associated delegated legislation, guidance documents or other relevant material prepared or issued in connection with the Act
- an indication of any specific legal or drafting difficulties which had been matters of public concern (eg issues which had been the subject of actual litigation or of comment from parliamentary committees) and had been addressed
- a summary of any other known post-legislative reviews or assessments of the Act conducted in Government, by Parliament, or elsewhere
- a short preliminary assessment of how the Act has worked out in practice, relative to objectives and benchmarks identified at the time of the passage of the Bill.

Where applicable, to avoid duplication, the Memorandum could refer to or draw on any review already undertaken following commitments made under the Impact Assessment process. So far as possible it would be intended that the Memorandum would draw principally from existing information and knowledge rather than involve extensive fresh research.²²

Although the Law Commission felt that a prescribed timescale for producing a Memorandum was inappropriate, in order to allow for flexibility when considering various types and purposes of legislation, the Government felt, “that between 3 and 5 years is a reasonable benchmark to adopt for assessing whether a more substantial post-legislative review is required”.²³

5 Initial progress

Since the publication of the White Paper, *Post-legislative scrutiny – The Government’s Approach*, the Government has issued guidance to departments on post-legislative scrutiny:

Asked by **Lord Norton of Louth**

To ask Her Majesty’s Government further to the publication of Post-Legislative Scrutiny—The Government’s Approach (Cm 7320) in March 2008, which Acts of Parliament have been subject to post-legislative review and which Acts are presently being reviewed. [HL1456]

The Lord President of the Council (Baroness Royall of Blaisdon): Since March 2008, the Cabinet Office has produced detailed guidance for departments on post-legislative scrutiny, available on the Cabinet Office website at http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/post-legislative_scrutiny.aspx

A system has also been put in place to ensure that all departments will produce Command Papers for Select Committees on the implementation of each Act passed in 2005, within three to five years of Royal Assent.

One Command Paper was published in December 2008 on the Electoral Registration (Northern Ireland) Act 2005 (Cm 7504). We expect to publish some Command Papers later this year on Acts passed in 2005. Command Papers on all remaining Acts passed

²² Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, para 15

²³ Office of the Leader of the House of Commons, *Post-legislative scrutiny – The Government’s Approach*, March 2008, Cm 7320, para 31

in 2005 will, where appropriate, be published by summer 2010 and, for subsequent Acts, within three to five years of Royal Assent.²⁴

The guidance stated that “all departments should now be making arrangements for establishing a timetable to prepare a Memorandum on each Act receiving Royal Assent since 2005 for which they are responsible”.²⁵

The guidance indicated that Government departments and select committees may conclude that a post-Royal Assent Memorandum was not required: “There will be other occasions on which the department and Committee can agree that no Memorandum is required”.²⁶ While the guidance stated some primary legislation would not require a Memorandum, it did not explicitly state whether government departments were obliged to produce a Memorandum at the behest of select committees. It did, however, say “Non-submission of a Memorandum would be the exception and the department will need to make its case to the Committee”.²⁷

The Cabinet Office’s *Guide to Making legislation* was reissued in June 2012 and guidance on post-legislative scrutiny can now be found in Part 40.²⁸ For brief details, see section 6, below.

The information about the process of post-legislative scrutiny was repeated in response to a subsequent question from Lord Norton. He was also given details of the first post-legislative review and of plans for others:

The first post-legislative review Command Paper was published in December 2008 on the Electoral Registration (Northern Ireland) Act 2005 (Cm 7504) and the second in June 2009 on the Railways Act 2005 (Cm 7660). Three further papers are due to be published by the end of February 2010.²⁹

Between December 2008 and April 2010 (the dissolution of the 2005 Parliament), seven post-legislative scrutiny memorandums were published:

²⁴ HL Deb 3 Mar 2009 WA142

²⁵ Cabinet Office, *Guide to Making Legislation*, Part 41, para 41.32 [Archived site]

²⁶ Cabinet Office, *Guide to Making Legislation*, Part 41, para 41.11 [Archived site]

²⁷ Cabinet Office, *Guide to Making Legislation*, Part 41, para 41.12 [Archived site]

²⁸ Cabinet Office, *Guide to Making legislation*, June 2012

²⁹ HL Deb 19 January 2010 ccWA238-WA239

Memorandum and Command Paper reference	Date of publication
Memorandum to the Northern Ireland Affairs Committee on post-legislative assessment of the Electoral Registration (Northern Ireland) Act 2005. Cm 7504	16/12/2008
Memorandum to the Northern Ireland Affairs Committee on post-legislative scrutiny of the Criminal Justice (Northern Ireland) Order 2005; District Policing Partnerships (Northern Ireland) Order 2005; Firearms (Amendment) (Northern Ireland) Order 2005; Public Processions (Amendment) (Northern Ireland) Order 2005. Cm 7575	30/03/2009
Post-legislative assessment of the Railways Act 2005. Memorandum to the Transport Select Committee. Cm 7660	23/06/2009
Memorandum to the Home Affairs Select Committee on post-legislative assessment of the Prevention of Terrorism Act 2005. Cm 7797	01/02/2010
Memorandum to the Welsh Affairs Select Committee on post-legislative assessment of the Public Services Ombudsman (Wales) Act 2005. Cm 7811	22/02/2010
Memorandum to the Children, Schools and Families Select Committee on post-legislative scrutiny of the Education Act 2005. Cm 7847	25/03/2010
Memorandum to the Justice Select Committee on post-legislative assessment of the Constitutional Reform Act 2005. Cm 7814	25/03/2010

Source: PIMS

6 Post-legislative scrutiny since May 2010

The process of Government departments producing memorandums on the operation of legislation after enactment has continued under the Coalition Government. In its response to the Liaison Committee's report into Select committee effectiveness, resources and powers, the Government stated that, by January 2013, 58 memorandums had been published:

... We note that out of the 58 government post-legislative scrutiny memoranda published so far only three have been the subject of dedicated reports by committees, although we acknowledge that there has been some other post-legislative scrutiny activity.³⁰

As noted above, the Cabinet Office's *Guide to Making legislation* was reissued in June 2012. The guidance on post-legislative begins with the following "key points"

- Three to five years (normally) after Royal Assent, the responsible department must submit a memorandum to the relevant Commons departmental select committee (unless it has been agreed with the committee that a memorandum is not required), published as a command paper.
- Responsible departments should draw up a timetable for producing a memorandum to meet the three to five year deadline, taking into account other review processes (including any statutory reviews required under sunseting regulations policy and post-implementation reviews).

³⁰ Liaison Committee, [Select committee effectiveness, resources and powers: responses to the Committee's Second Report](#), 24 January 2013, HC 911 2012-13, p12

- The memorandum will include a preliminary assessment of how the Act has worked out in practice, relative to objectives and benchmarks identified during the passage of the bill and in the supporting documentation.
- The select committee (or potentially another committee) will then decide whether it wishes to conduct a fuller post-legislative inquiry into the Act.
- When preparing new legislation, departments should take into account the commitment that, taken together, the impact assessment, explanatory notes and other statements made during the passage of a bill should give sufficient indication of the bill's objectives to allow any post-legislative reviewing body to make an effective assessment as to how an Act is working out in practice.³¹

Memorandums are submitted to select committees, which then decide whether to conduct inquiries into the operation of the Act in question.

As the Labour Government anticipated, select committees do not have the capacity to undertake reviews of every piece of legislation following the publication of a memorandum. However, the Justice Committee has undertaken a review of the *Freedom of Information Act 2000*, following the publication of the Government's memorandum (see section 6.2). The same Committee also took oral evidence following the publication of the Government's review of the *Mental Capacity Act 2005*.³² The Public Administration Select Committee announced that it would undertake post-legislative scrutiny of the *Charities Act 2006* in July 2012 (see section 6.3). The Health Committee has also announced an inquiry into the *Mental Health Act 2005* (see section 6.4).

However, several post-legislative reviews which have been conducted were not prompted by the publication of a memorandum. These include the Culture Committee's inquiry into the *Gambling Act 2005* (see Section 6.1) and the Committee on Members' Expenses review of the *Parliamentary Standards Act 2009*.³³

Following recommendations from the Leader's Group on Working Practices and the Liaison Committee, the House of Lords agreed to establish a select committee to review adoption legislation in 2012-13. Subsequently, the Liaison Committee has recommended the establishment of committees to undertake post-legislative scrutiny of specific pieces of legislation. (see section 7).

6.1 Culture, Media and Sport Committee review of the *Gambling Act 2005*

On 17 May 2011, the Culture, Media and Sport Select Committee announced that it would conduct a post-legislative assessment of the *Gambling Act 2005*.³⁴ This was in response to representations made from the gambling industry. The Committee's inquiry was announced before the Department for Culture, Media and Sport had published its own Memorandum to the Committee on the *Gambling Act 2005*. In line with usual practice, the Government was required to produce its Memorandum between 3 and 5 years after Royal Assent. The Act had come into force in September 2007, meaning a memorandum was required no later than September 2012. However, the Culture Committee requested that a Memorandum be

³¹ Cabinet Office, *Guide to Making legislation*, June 2012, Part 40, p249

³² Ministry of Justice, *Memorandum to the Justice Select Committee – Post-Legislative Assessment of the Mental Capacity Act 2005*, October 2010, Cm 7955; Justice Committee, *Post-legislative scrutiny of the Mental Capacity Act 2005 – Uncorrected Evidence – 23 November 2010*, 26 April 2012, HC 636-i 2010-12

³³ Committee on Members' Expenses, *The Operation of the Parliamentary Standards Act 2009*, 12 December 2011, HC 1484-I 2010-12

³⁴ Culture, Media and Sport news release, *Committee announces new inquiry into Gambling*, May 2011

produced before this in order to help inform its own inquiry.³⁵ The Government was obliging, and the Memorandum was published in October 2011.³⁶

The Culture Committee's inquiry was focused "on the key principles behind the Act which became enshrined in the core aims of the Gambling Commission".³⁷ They published their final report *The Gambling Act 2005: A bet worth taking?* on 24 July 2012.³⁸ The Committee's overall conclusion was that the Act had resulted in numerous inconsistencies and was not sufficiently evidence based.³⁹ The Government published its response to the report and its recommendations in January 2013.⁴⁰

6.2 Justice Committee review of the *Freedom of Information Act 2000*

In December 2011, the Ministry of Justice published its *Memorandum to the Justice Select Committee – Post-Legislative Assessment of the Freedom of Information Act 2000*. The introduction of the memorandum set out the scope of the post-legislative review of the Act:

5. Chapter 2 explores the objectives of FOIA at the time of its enactment by reference to the White Paper, Parliamentary debates during the passage of the Bill and external speeches.

6. Chapter 3 details the implementation of FOIA, recounts how it was commenced, describes its enabling provisions and their use and how the Act has been amended. It also discusses the support and guidance available to users and sets out previous evaluations and research.

7. Chapter 4 provides an analysis of the operation of FOIA in practice. This includes an examination of the way in which its scope has been maintained and extended; an overview of some key issues arising in the use of procedural refusals and exemptions; an analysis of request volumes, levels of disclosure and timeliness of responses; the operation of the complaints and appeals process; the role FOIA has played in proactive disclosure of information; the impact of FOIA on public authorities, particularly in relation to cost; and the impact of FOIA on commercially focused public authorities.

8. Chapter 5 evaluates the performance of FOIA against its original objectives of openness and transparency, greater accountability, better decision making and greater public involvement in decision making.⁴¹

On 20 December 2011, the Committee called for written evidence for its review of the Act. It asked for written evidence on the following issues:

- Does the Freedom of Information Act work effectively?
- What are the strengths and weaknesses of the Freedom of Information Act?
- Is the Freedom of Information Act operating in the way that it was intended to?⁴²

³⁵ Culture, Media and Sport Committee, *The Gambling Act 2005: A bet worth taking?*, July 2012, HC 421, Ev 264-265

³⁶ Department for Culture, Media and Sport, *Memorandum to the Culture, Media and Sport Select Committee on the Post-Legislative Assessment of the Gambling Act 2005*, October 2011, Cm 8188

³⁷ Culture, Media and Sport Committee, *The Gambling Act 2005: A bet worth taking?*, July 2012, HC 421, para 11

³⁸ Culture, Media and Sport Committee, *The Gambling Act 2005: A bet worth taking?*, July 2012, HC 421

³⁹ Culture, Media and Sport Committee, *The Gambling Act 2005: A bet worth taking?*, July 2012, HC 421, paras 1-51 (Chapter 5)

⁴⁰ Department for Culture, Media and Sport, *Government Response to the Select Committee Report: The Gambling Act 2005: A Bet Worth Taking?*, January 2013,

⁴¹ Ministry of Justice, *Memorandum to the Justice Select Committee – Post-Legislative Assessment of the Freedom of Information Act 2000*, December 2011, Cm 8236, paras 5-8

The Committee received 140 pieces of written evidence and took oral evidence from 37 witnesses in 7 evidence sessions. It published its report, *Post-legislative scrutiny of the Freedom of Information Act 2000*, on 26 July 2012.⁴³ The Committee concluded that:

The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability. The principal objectives of the Act have therefore been met, but we are not surprised that the unrealistic secondary expectation that the Act would increase public confidence in Government and Parliament has not been met. We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits. There is some risk—based on perception as much as reality—that policy discussions at the highest levels may be inhibited or not properly recorded because of fear of early disclosure under the Act. This was never intended to be the effect of the Act, and we believe that it can be dealt with by the proper application of the protection provided in section 35 of the Act, firm guidance to senior civil servants about the extent of the protections provided and, where necessary and appropriate, by the use of the ministerial veto to protect the "safe space" for such discussions. We also note that disclosure of such discussions is as likely to occur through major public inquiries or court proceedings as it is under the Freedom of Information Act.⁴⁴

6.3 Public Administration Select Committee review of the *Charities Act 2006*

On 19 July 2012, the Public Administration Select Committee announced that it would conduct a post-legislative scrutiny inquiry into the impact and implementation of the *Charities Act 2006*. At the same time, it published an Issues and Questions Paper.⁴⁵

The *Charities Act 2006* included a requirement to "appoint a person to review generally the operation" of the Act.⁴⁶ The review, *Trusted and Independent: Giving charity back to charities*, was conducted by Lord Hodgson of Astley Abbots and laid before Parliament on 16 July 2012.⁴⁷

The Public Administration Select Committee has completed taking evidence and is currently preparing its report.

6.4 Health Committee review of the *Mental Health Act 2007*

In July 2012 the Department of Health published its *Post-legislative assessment of the Mental Health Act 2007 – Memorandum to the Health Committee of the House of Commons*. It assessed the effects of the key elements of the *Mental Health Act 2007*, which were identified as being:

- Single definition of mental disorder
- Appropriate medical treatment: The Appropriate Treatment Test

⁴² Justice Committee news, *New Inquiry: Post-Legislative Scrutiny of the Freedom of Information Act*, 20 December 2011

⁴³ Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, 26 July 2012, HC 96-I 2012-13

⁴⁴ Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, 26 July 2012, HC 96-I 2012-13, para 241

⁴⁵ Public Administration Select Committee news release, *PASC to inquire into the impact and implementation of the 2006 Charities Act*, 19 July 2012

⁴⁶ *Charities Act 2006* (chapter 50), section 73

⁴⁷ Cabinet Office, *Trusted and Independent: Giving charity back to charities – Review of the Charities Act 2006*, July 2012

- Guiding principles
- Professional roles
- Nearest relatives' rights
- Independent mental health advocacy
- Supervised community treatment (community treatment orders)
- Places of safety
- Age-appropriate accommodation
- Deprivation of Liberty Safeguards (Mental Capacity Act 2005)
- Victims' rights (Domestic Violence, Crime and Victims Act 2004)⁴⁸

The Health Committee announced it would conduct its own post-legislative scrutiny inquiry into the *Mental Health 2007* on 20 February 2013.⁴⁹ The Committee is currently taking evidence.

7 Post-legislative scrutiny in the House of Lords

The Leader's Group on Working Practices in the House of Lords was appointed "to consider the working practices of the House and the operation of self-regulation; and to make recommendations". Its appointment was announced in a written statement on 27 July 2010.⁵⁰

The Group's report was published in April 2011. It considered post-legislative scrutiny. After reviewing the development of the Government's approach, it reflected that the call for the establishment of a joint committee on post-legislative scrutiny had not been supported and recommended the establishment of a small, standing Post-Legislative Scrutiny Committee:

139. As the Constitution Committee said in 2004, post-legislative review is "similar to motherhood and apple pie in that everyone appears to be in favour of it". But neither Parliament nor the Government has yet committed the resources necessary to make systematic post-legislative review a reality. Like the Law Commission and the Hansard Society, we see merit in post-legislative review being undertaken by a Joint Committee. However, in the absence of Government support and bicameral agreement, no progress has been made towards this goal. We therefore believe that it is time for the House of Lords to establish its own Post-Legislative Scrutiny Committee. This could lead to the establishment of a joint committee in due course—but the desirability of joint action must not be a brake on progress.

140. We envisage a small, standing Post-Legislative Scrutiny Committee with up to eight members. This standing Committee would manage the process, sifting Acts around three to five years after enactment, and identifying those most suitable for post-legislative review. It would take into account memoranda published by the Government, and seek to co-ordinate its work with the relevant Commons departmental select committees. Once the Committee had identified appropriate Acts for review (up to three or four each year) it would co-opt Members with particular interest in the subject-matter of the legislation to assist in conducting short inquiries, taking evidence from stakeholders, legal experts and others.

141. We recommend that the House of Lords appoint a Post-Legislative Scrutiny Committee, to manage the process of reviewing up to four selected Acts of Parliament each year.⁵¹

⁴⁸ Department of Health, *Post-legislative assessment of the Mental Health Act 2007*, July 2012, paras 10-122

⁴⁹ Department of Health news release, *Post-legislative scrutiny of the Mental Health Act 2007*, 20 February 2013

⁵⁰ [HL Deb 27 July 2010 cWS147](#)

⁵¹ Leader's Group on Working Practices, *Report of the Leader's Group on Working Practices*, April 2011, HL 136, paras 139-141

The report was debated in the House of Lords on 27 June 2011. The Leader of the House made the following comments on post-legislative scrutiny in his opening speech:

As regards post-legislative scrutiny, I am well aware of concerns that once legislation is passed, insufficient attention is devoted to its implementation and effects. It is of course already open to committees in both Houses to examine and report on the post-legislative memoranda published by the Government, but the Leader's Group has suggested that this House may wish to approach post-legislative scrutiny more systematically. Whether that should extend to a standing post-legislative scrutiny committee is a matter on which noble Lords will no doubt comment today. My own instinct is that our Liaison Committee is well placed to perform that strategic function and that we might make more targeted and flexible use of the expertise and experience of Members of the House by setting up ad-hoc committees whose membership is tailored to the Act under scrutiny.⁵²

There was also support for a more systematic approach to post-legislative scrutiny from Baroness Andrews; Baroness D'Souza; Baroness Hamwee;⁵³ and a number of backbench speakers, throughout the debate.

On 21 March 2012, the Liaison Committee's report, *Review of select committee activity and proposals for new committee activity*, included a proposal for the establishment of a committee to undertake a post-legislative review of adoption legislation, rather than a committee with a more general remit:

35. The Leader's Group on Working Practices recommended that the House "appoint a Post-Legislative Scrutiny Committee, to manage the process of reviewing up to four selected Acts of Parliament each year."^[4] The Leader of the House put a variant proposal to us, that it would make better use of the expertise of members to establish an ad hoc committee on a particular Act or Acts.

36. The Government have committed to publish post-legislative assessments of almost all Acts passed since 2005 within 3-5 years of their passing. While a considerable number of post-legislative memoranda have been published, relatively few Acts that are not already being considered by House of Commons committees are currently ripe for a significant post-legislative scrutiny inquiry. One Act which we believe would be suitable is the Children and Adoption Act 2006.^[5] We also consider that post-legislative scrutiny of the Act could sensibly be conducted with post-legislative scrutiny of the Adoption and Children Act 2002.

37. A post-legislative scrutiny committee could consider why the overall number of adoption placements has fallen in recent years, despite the intention behind the legislation, which was to speed up the adoption process and reduce the number of children in long-term care. The Government have stated that speeding up the adoption process is a priority, recently emphasised by the Prime Minister, and post-legislative scrutiny of the legislation in this area could consider why the process is still so slow.

38. Post-legislative scrutiny is potentially an important new area of Select Committee activity for the House of Lords. It will, however, be necessary to evaluate the outcome of the first post-legislative scrutiny committee. This will be a future task for this Committee. We recommend the appointment of an ad hoc post-legislative scrutiny committee to examine the Children and Adoption Act 2006 and the Adoption and Children Act 2002, to report in a timely manner, so as

⁵² [HL Deb 27 June 2011 c1553](#)

⁵³ [HL Deb 27 June 2011 c1556](#); [c1557](#); and [c1559](#)

to allow for evaluation of the Committee's work before the end of the 2012-13 Session.

39. If time allowed, the resources allocated to the first post-legislative scrutiny could then be made available for another post-legislative scrutiny committee to be established on another topic within the 2012-13 Session.⁵⁴

7.1 House of Lords Select Committee on Adoption Legislation

On 29 May 2012, the House of Lords agreed a motion to appoint a select committee “to consider the statute law about adoption, and to make recommendations”, and to report by 28 February 2013.⁵⁵ This was the first select committee established by the House of Lords to specifically undertake post-legislative scrutiny. The Committee’s website described its role:

This committee has been appointed to conduct post-legislative scrutiny of the legislation that sets out adoption law in England and Wales. The committee will consider the adoption process.⁵⁶

The Committee called for written evidence on 19 June 2012. It asked for written evidence on the following issues surround adoption legislation:

- What impact did the 2002 Act have on the adoption process?
- Have all aspects of the 2002 and 2006 Acts been implemented appropriately and successfully?
- Is further legislation required to improve any aspect of the adoption system?
- Can you as a respondent identify a problem and tell us if, and if so where, the legislation (including regulations), needs to change?⁵⁷

The Committee received 85 pieces of written evidence in response and took oral evidence from 52 individual witnesses over 14 sessions.

On 8 November 2012, the Committee was also given the additional task to “consider and report on the draft legislation on adoption”, by 21 December 2012.⁵⁸ The Committee report on draft legislation was published on 7 November 2012.⁵⁹

The Committee published its final report, *Adoption: Post-Legislative Scrutiny*, on 6 March 2013.⁶⁰ It concluded by emphasising the overall adequacy of existing adoption legislation, and instead made recommendations for more effective practice:

We have been struck by the number of submissions which suggested that the current legislative framework is largely adequate. None of our witnesses called for wide-ranging changes to the legislation, although one significant exception is discussed in detail in our chapter on post-adoption support (Chapter 7). Instead, there was

⁵⁴ Liaison Committee, *Review of select committee activity and proposals for new committee activity*, 21 March 2012, HL 279, paras 35-39

⁵⁵ [HL Deb 29 May 2012 c1082](#)

⁵⁶ Select Committee on Adoption Legislation, *Role* [accessed 11 December 2012]

⁵⁷ Lords Select Committee on Adoption, *Happy ever after? New Lords Committee to investigate the adoption process*, 19 June 2012

⁵⁸ [HL Deb 8 November 2012 c1095](#)

⁵⁹ Department for Education, *Draft legislation on Adoption: Early Permanence through 'Fostering for Adoption' and Matching for Adoption*, Cm 8473, November 2012

⁶⁰ House of Lords Select Committee Report, *Adoption: Post-Legislative Scrutiny*, 6 March 2013, HL 127

overwhelming evidence that the big issues of concern—delay in the adoption system, and the shortage of adopters—were the result of failures in practice. Our consideration of these issues has focused on how to achieve better outcomes for the children and families affected; where relevant we have commented on the legislation, but more frequently we have made recommendations concerning practice. One conclusion we draw from this is that legislation is only part of the picture in achieving better outcomes for children; and there should be more emphasis on practice.⁶¹

7.2 House of Lords Liaison Committee Report

In March 2013 the Lords Liaison Committee commented briefly on the work of the Select Committee on Adoption Legislation:

In our 3rd report of last Session we supported a variant proposal from the Leader of the House, that it would make better use of the expertise of members to establish an *ad hoc* committee on a particular Act or Acts. We recommended the adoption of a post-legislative scrutiny Committee to examine the Children and Adoption Act 2006 and the Adoption and Children Act 2002. We agree with Baroness Butler-Sloss, the Chairman of the Adoption Legislation Committee, that the work of that Committee has been successful and is helping to inform current debates on Children and Families policy.⁶²

It recommended that several new Lords Committees should be established, including two for post-legislative scrutiny on the *Mental Capacity Act 2005* and the *Inquiries Act 2005* respectively.⁶³

On 21 March 2013, the House of Lords agreed to the report;⁶⁴ and, on 16 May 2013, the members of the Mental Capacity Act 2005 Committee and the Inquiries Act 2005 Committee were appointed.⁶⁵

⁶¹ House of Lords Select Committee Report, [Adoption: Post-Legislative Scrutiny](#), 6 March 2013, HL 127, para 13

⁶² House of Lords Liaison Committee Report, [Review of select committee activity and proposals for new committee activity](#), 13 March 2013, HL 135, para 52

⁶³ House of Lords Liaison Committee Report, [Review of select committee activity and proposals for new committee activity](#), 13 March 2013, HL 135, paras 55-60

⁶⁴ [HL Deb 21 March 2013 cc673ff](#)

⁶⁵ [HL Deb 16 May 2013 c543](#)