

## **The post-legislative scrutiny gap**

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### Abstract

Post-legislative scrutiny is undertaken in both Houses of the UK Parliament and in the last decade a more systematic approach has developed. However, it is now 10 years on from the introduction of that systematic approach to post-legislative scrutiny in the House of Commons and assessments have shown that it is yet to become a regular part of committee work, at least from the perspective of published reports. Although the procedures in the House of Lords are different, the extent of post-legislative scrutiny has also remained limited. Additionally, while there are patterns emerging of certain committees engaging with post-legislative scrutiny, many do not, at least in terms of holding an inquiry.

This paper will begin by analysing the limited amount of post-legislative scrutiny that has taken place to date and what specifically committees have and have not been doing. The paper will then go on to analyse which government departments have been producing post-legislative memoranda and whether these memoranda are being picked up by departmental select committees. In so doing the paper will also analyse which committees have not, so far, been undertaking post-legislative scrutiny and explore some of the reasons for why they have not engaged.

This research forms part of a broader study into post-legislative scrutiny in the UK Parliament, assessing; how it can be undertaken; how the formal processes have been carried out and with what frequency and what the experience has been of parliamentary committees undertaking post-legislative scrutiny.

### Keywords

Committees, Scrutiny, Post-legislative scrutiny, UK Parliament, legislation

## Introduction

Post-legislative scrutiny is defined by the Law Commission of England and Wales as;

“A broad form of review, the purpose of which is to address the effects of legislation in terms of whether intended policy objectives have been met by the legislation and, if so, how effectively. However this does not preclude consideration of narrow questions of a purely legal or technical nature”. (Law Commission, 2006: 7)

One of the main roles of parliaments is to create and scrutinise laws. However it is only more recently that parliaments have begun to consider formally assessing whether such laws meet the aims and objectives as set out during the passage of that legislation through the legislative process.

De Vrieze & Hasson (2017) state that post-legislative scrutiny holds two distinct functions. There is firstly a function relating to the monitoring of the implementation of legislation. Secondly, there is an evaluation function relating to whether or not the aims of an Act are reflected in the results and effects of legislation once implemented.

In the last decade a more systematic approach has been taken by both government and parliament. With regards to the House of Commons, since 2008 government departments have been required to prepare and publish memoranda, assessing whether an Act of Parliament has met its key objectives, within three to five years of the Act entering the statute books (Kelly & Everett, 2013) These memoranda are then presented to departmental select committees for additional scrutiny. With regards to the House of Lords, in 2012 the Liaison Committee promised to appoint at least one ad hoc committee per session to undertake post-legislative scrutiny on a subject chosen by it (House of Lords Liaison Committee, 2012).

However, it is now 10 years on from the introduction of that systematic approach to post-legislative scrutiny in the House of Commons and research has shown that it is yet to become a regular part of committee work, at least from the perspective of published reports. Although the procedures in the House of Lords are different, the extent of post-legislative scrutiny has also remained limited. Additionally, while there are patterns emerging of certain committees engaging with post-legislative scrutiny, many do not (at least in terms of holding an inquiry). This paper therefore aims to address what limited post-legislative scrutiny has taken place so far and assess what factors if any are impacting upon the ability and willingness of committees to undertake more post-legislative scrutiny.

This paper will begin by analysing the limited amount of post-legislative scrutiny that has taken place to date in both Houses and what specifically committees have and have not been doing. The paper will then go on to analyse what is being named as the post-legislative gap, as while it is important to address what has received post-legislative scrutiny, it is equally important and interesting to assess what has not. The paper will therefore assess the post-legislative scrutiny gap in relation to the selection of legislation for post-legislative scrutiny, this will address both Houses, before going on to assess the gap in relation to House of Commons Committees which have not undertaken post-legislative scrutiny. House of Lords committees will not be included

in this section of analysis due to the sessional committees in the House of Lords not being required to undertake post-legislative scrutiny.

While it is important to assess what pieces of legislation have been scrutinised it is also important to address what is being avoided in order to gain a greater insight into this process and what in particular causes committees to avoid scrutinising certain types of legislation but also what causes committees to avoid post-legislative scrutiny all together. The discovery of such reasons could potentially help to find solutions in order to increase the amount of post-legislative scrutiny taking place. This paper finally also contributes to the understanding of the behaviour of parliamentary committees, particularly in what factors impact upon their decisions to launch inquiries or not.

## **Background**

As noted, post-legislative scrutiny is undertaken by two different types of committee in the UK Parliament; departmental select committees in the House of Commons and ad hoc committees in the House of Lords. As such the literature on these two types of committees should give an early indication of how these committees operate and some of the issues that might impact upon their operation.

### *Departmental Select Committees – House of Commons*

The Hansard Society (2001), as with other academics such as Longley & Davidson (1998), Shaw (1998) and Strom (1998) regard departmental select committees as the main vehicle for promoting a culture of scrutiny and accountability in the House of Commons. Select committees in the UK undertake a range of ten core tasks, which were introduced in 2002, of which post-legislative scrutiny is just one (House of Commons Liaison Committee (2012)). The competition between core tasks sees committees focus upon breadth rather than depth in inquiries.

It is 40 years since these sessional committees were created and they still perform an important scrutiny function. Their success in holding the executive accountable comes from the fact that they do not have power over things which greatly matter to government's survival, in comparison to other parliamentary committees in Western Europe (Russell & Cowley, 2016). They are therefore treated in a different way to the chamber (Giddings, 1994; Hansard Society, 2001). They set their own agendas (Norton, 2013) and face little meddling in their day to day operation from party whips (Russell & Cowley, 2016). There is also concern that with extra demands and opportunities placed upon them, that committees may no longer be in full control of their own agendas (Brazier & Fox, 2011). They also usually produce reports on a cross party basis (Russell & Cowley, 2016). The emphasis of these committees was to enhance the role of individual MPs (as opposed to parties) in influencing decision making (Giddings, 1994).

Despite being free to set their own agendas, how and why committees decide which inquiries to undertake and the role the core tasks play in this determination are unclear (Brazier & Fox, 2011). However there are a number of factors that are likely to play a part in their deliberations such as the chair, member interest, party balance, political urgency and media interest (Brazier & Fox, 2011).

Select committees give backbenchers from both sides of the House the ability to contribute, in a less partisan manner to the scrutiny of government. As such, committees have significantly improved the processes of scrutiny in ways in which the House of Commons chamber could not, e.g. the willingness of select committees to rigorously scrutinize government agencies, not just government departments, and request written and oral evidence from them (Hansard Society, 2001).

Recent reforms have increased the importance and influence of select committees, these reforms included the election of committee chairs, which has given them a welcome boost in legitimacy (White, 2015), as well as the election of members, thereby removing the patronage powers of the whips (Russell, 2011; Benton & Russell, 2013). There has also been an increase in the levels of independence among backbenches, which has contributed to a greater sense of independence among committees (White, 2015). Such select committees are now flexing their muscles (Crewe, 2015). However, research by Bates, Goodman & McKay (2017) has shown that recent reforms have not had an impact upon the attendance and turnover of Members which Brazier & Fox (2011) have noted as problematic.

#### *Select/ad hoc committees – House of Lords*

The House of Lords was originally a chamber-orientated House, however since the late 1970s, it has developed a number of permanent committees alongside a more recent increase in the use of ad hoc committees (Rogers & Walters, 2015; Norton, 2013). Their focus tends to be more cross-cutting than House of Commons Committees as they were not created to scrutinise government departments (Norton, 2013). Committees in the House of Lords tend to focus upon making the best use of the expertise of Members, address cross-cutting issues and complement the work of the Commons (Russell, 2013).

There are however some similarities between the two Houses when it comes to committees, the same rules apply to both sets of committees in terms of responses from the government (Rogers & Walters, 2015), and they both operate in a consensual manner (Norton, 2013). However Russell (2013) argues that the culture of committees in the House of Lords is different to the Commons in the sense that they tend to tackle more strategic and long term issues and they also tend to have better relationships with government departments (Russell, 2013). Ad hoc committees form an important part of the committee structure in the House of Lords and their usage was expanded in 2012 (House of Lords Liaison Committee, 2012). These committees are only temporary and disband after they have reported, however they allow for detailed scrutiny of government over the course of a year.

#### **Methods**

This research took a mixed methods approach. The paper starts off quantitatively, with an audit of post-legislative scrutiny. As there was limited data on post-legislative scrutiny, including on the total number of inquiries that have taken place, descriptive data was needed to lay a

foundation for the rest of the study. This audit included the collation of data on the number of post-legislative scrutiny inquiries that have taken place, the session, the parliament, the legislation which has received post-legislative scrutiny as well as the committee which had undertaken the scrutiny. Data has also been collated on the number of Acts receiving post-legislative scrutiny in each inquiry and the government under which the legislation was introduced. Data was also collated on the report output of committees in order to compare post-legislative scrutiny output and other committee output. This data was located from individual committee webpages on the UK Parliament website, from individual post-legislative scrutiny reports as well as from legislation.gov.uk. This data was collected for all post-legislative scrutiny inquiries that have taken place between 2008-2017.

Finally in terms of quantitative data collection, an audit was also undertaken of post-legislative review memorandum published by government departments. These memoranda were located through searches on the gov.uk website as there is currently no other central depository where these memoranda are stored. While this might not be the perfect method of detection, it is currently the only way to access them publically. This data was compiled along departmental lines.

The paper comes to a conclusion with the qualitative elements of this study this took the form of eight semi-structured interviews with clerks from across eight different committees. Five of these committees were from the House of Commons, three of which had undertaken post-legislative scrutiny and two had not. The following criteria were deployed in order to aid selection; the committees have undertaken a formal post-legislative scrutiny inquiry (systematic post-legislative scrutiny); which took place either in the 2010-2015 or the 2015-2017 Parliaments (so that Clerks would still be around and the inquiry wouldn't be a too distant memory).

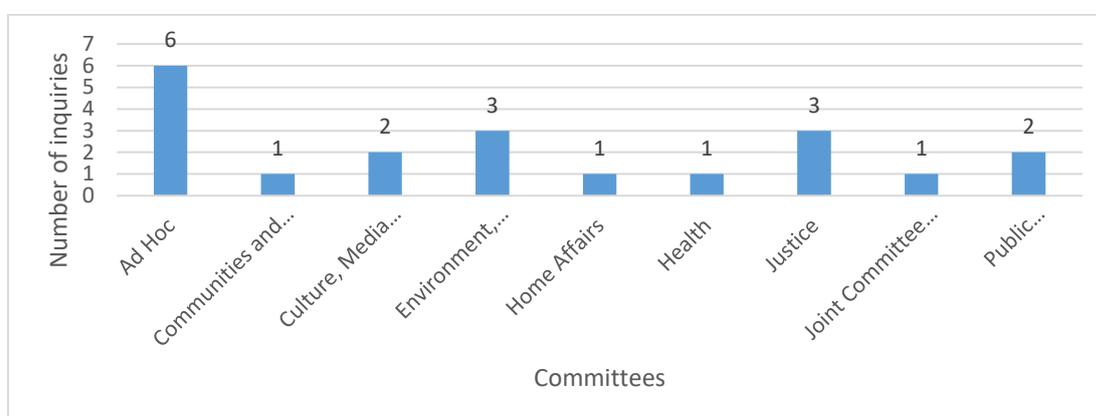
During scoping interviews it was suggested that the Public Administration and Constitutional Affairs Committee was not appropriate to assess as the staff had left the House of Commons. Additionally, the then clerk of an additional committee noted they would only give an interview if it were anonymous, which would be challenging with a case study approach focusing upon specific inquiries. That left four committees, however and the Environment, Food and Rural Affairs Committee didn't undertake its inquiries until after the selection had been made for the research. The final choices came down to the availability of interviewees and access to committee staff. For the two committees which had not undertaken post-legislative scrutiny, from the analysis (see page 11) four committees were deemed appropriate to study here as they had fewer reasons to not undertake post-legislative scrutiny (in terms of legislative intensity of their departments). The two committees selected were chosen on the basis of the availability of staff.

Three interviews were undertaken in the House of Lords, two from committees which had undertaken post-legislative scrutiny and one from the House of Lords Liaison Committee which selects which pieces of legislation go on to receive post-legislative scrutiny. Interviews took place with the clerks of these committees. The same criteria for the selection of House of Commons committees was used here too.

## Post-legislative scrutiny undertaken between 2008 and 2017.

Figure 1 shows that ad hoc committees (in the House of Lords) have undertaken the most post-legislative scrutiny since the start of the 2005 Parliament. This is due to the fact that since 2012, the House of Lords determined that it would create a number of ad hoc committees each session to scrutinise specific issues and that at least one of those committees would be a post-legislative scrutiny committee (House of Lords Liaison Committee, 2012). There was one committee in each session, except in the 2013-14 session which had two. In terms of the House of Commons, the Justice Committee and the Environment, Food and Rural Affairs Committee have been the most active, with the Culture, Media and Sport Committee and the Public Administration and Constitutional Affairs Committee coming joint third with two inquiries each over the course of the nine year period studied.

Figure 1: Formal post-legislative scrutiny inquiries by committee



**Source: (CLG (2013); CMS (2009, 2012); EFRA (2008a, 2016b, 2017c); H (2013); HA (2014b); JCHR (2014a); J (2012, 2013a, 2015); PACA (2013a, 2013c); SCAL (2013); SCEL (2015); SCEAD (2016); SCIA (2014); SCLA (2017); SCMCA (2014))**

The other committees in figure 1 have undertaken post-legislative scrutiny once in that time period and not every parliamentary committee is part of figure 1; indicating they have not undertaken formal post-legislative scrutiny at all during this time period.

Table 1 shows formal post-legislative scrutiny as a percentage of published departmental select committee reports between 2005 and 2017. Table 1 shows that post-legislative scrutiny forms a small part of a committee's output. Post-legislative scrutiny forms a greater proportion of committee work (although still small) for the Culture, Media and Sport Committee, Justice Committee and the Environment, Food and Rural Affairs Committee.

Table 1: Formal post-Legislative Scrutiny as a percentage of committee work between 2005 and 2015

Committee	Percent
CMS	3
J	3
EFRA	3
PA	1
H	1
HA	1
CLG	1
<i>Total</i>	2

Source: (UK Parliament, 2016b)

Table 2 shows the party of government which introduced the legislation receiving formal post-legislative scrutiny. It shows that 17 out of the 20 Acts which have been subject to formal post-legislative scrutiny were introduced under previous Labour Governments (1964-1970, 1997-2001, 2001-2005 and 2005-2010), with only two pieces of legislation being introduced by the 2010-2015 Coalition Government<sup>1</sup>. This can potentially be explained by the fact that the 2008 system encouraged the production of a memorandum, and thus encouraged post-legislative scrutiny, of Acts passed since 2005. During the first half of the 2010 Parliament, it would be Labour-introduced legislation which was receiving post-legislative review by the relevant government department. However, we are now well beyond the first half of the 2010 Parliament (Caygill, 2019b). The legislation of the 2010-2015 Coalition Government should now be receiving departmental post-legislative review.

It should also be noted that not all post-legislative scrutiny is driven by memoranda published by government departments under the systematic process, as committees can and do select legislation to receive post-legislative scrutiny without receiving a post-legislative memorandum first. There is no procedural obstacle that could stop committees addressing the legislation of the 2010-2015 Coalition Government. Recent reforms were supposed to have emboldened committees, however, this does not appear to be the case in relation to the selection of legislation to receive post-legislative scrutiny.

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<sup>1</sup> A third Act from the Coalition Government has been scheduled for review by an ad hoc committee in the House of Lords between 2019-2020. This was announced after the research for this paper was completed.

Table 2: Legislation receiving formal post-legislative scrutiny by party of government

Committee	No of Acts scrutinised	Act(s) involved	Party of Government
Ad hoc (Lords)	2	Adoption and Children Act 2002	Labour
	N/A	Children and Adoption Act 2006	Labour
Ad hoc (Lords)	1	Equality Act 2010	Labour
Ad hoc (Lords)	1	Extradition Act 2003	Labour
Ad hoc (Lords)	1	Inquiries Act 2005	Labour
Ad hoc (Lords)	1	Mental Capacity Act 2005	Labour
Ad hoc (Lords)	1	Licensing Act 2003	Labour
Digital, Culture, Media and Sport	1	Gambling Act 2005	Labour
Digital, Culture, Media and Sport	1	Licensing Act 2003	Labour
Environment, Food and Rural Affairs	1	Veterinary Surgeons Act 1966	Labour
Environment, Food and Rural Affairs	1	Animal Welfare Act 2006	Labour
Environment, Food and Rural Affairs	1	Flood and Water Management Act 2010	Labour
Health	1	Mental Health Act 2007	Labour
Home Affairs	1	Regulation of Investigatory Powers Act 2000	Labour
Housing, Communities and Local Government	1	Greater London Authority Act 2007	Labour
Joint Committee on Human Rights	1	Terrorism Prevention and Investigation Measures Act 2011	Conservative/Liberal Democrat
Justice	1	Legal Aid, Sentencing and Punishment Act 2012	Conservative/Liberal Democrat
Justice	1	Freedom of Information Act 2000	Labour
Justice	1	Serious Crime Act 2007	Labour
Public Administration and Constitutional Affairs	1	Charities Act 2006	Labour
Public Administration and Constitutional Affairs	1	Statistics and Registration Service Act 2007	Labour

Source: (HM Government, 1966, 2000a, 2000b, 2002, 2003a, 2003b, 2005a, 2005b, 2005c, 2006a, 2006b, 2006c, 2007a, 2007b, 2007c, 2007d, 2010a, 2010b, 2011, 2012)

This suggests that there might be some bias in the selection of legislation that receives post-legislative scrutiny on the basis that some of the legislation of 2010-2015 Coalition Government now falls into the three-five year timeframe for post-legislative review by a government department. However, the subsequent memoranda from these reviews do not appear to be getting picked up by committees. This raises the question of whether this is a result of the party in government at the time. There may be an unwillingness among MPs from the governing party to subject their own government's legislation to post-legislative scrutiny. The bias here is not completely unexpected as parliament is a political body and as such is going to act in a political way. It is key however for parliament and especially committees to be aware of these inherent biases over selection and work to address them.

### **The post-legislative gap: Selection of legislation**

The focus so far has been on the post-legislative scrutiny that has taken place. However, this raises an interesting question about what legislation is not receiving post-legislative scrutiny. In the previous section, the selection of legislation was addressed and in particular the party which introduced it. It showed that there is something of a party bias when it comes to the selection of legislation, with legislation introduced by the 2010-2015 Coalition Government not yet receiving much attention when it comes to post-legislative scrutiny with only two Acts having been reviewed so far. Indeed, the final three post-legislative scrutiny inquiries included in this research were on Labour introduced legislation (Animal Welfare Act 2006; Licensing Act 2003; Flood and Water Management Act 2010). There is clearly a gap here in the coverage of post-legislative scrutiny, especially if you consider that government departments are now required to complete their own post-legislative review 3-5 years after an Act has entered the statute books. This could be more accurately referred to as a post-legislative gap (i.e. what legislation is not receiving post-legislative scrutiny). While the government process appears to be systematic, the parliament side of it is less so.

At the time of writing, taking into account the 3-5 year post-legislative departmental review process, committees, as long as departments are producing their reviews on time, should now have received the reviews for the first three sessions of the 2010 Parliament (2010-2012; 2012-2013; 2013-2014). This is assuming that government departments take the full five years to produce the review. Indeed David Lloyd, Head of the House of Commons Scrutiny Unit noted that they tend to come towards the end of the given time period because of other departmental priorities (Lloyd, 2017). That totals 102 pieces of legislation<sup>2</sup> that should have received their departmental reviews and only 2 pieces of that legislation have received post-legislative scrutiny (2%).

In terms of the lack of post-legislative scrutiny on the coalition government's legislation in the House of Lords, this might be explained by the longer time frame the Lords likes to take when undertaking post-legislative scrutiny. Interviews with clerks in the House of Lords pointed to a period of time greater than five years needing to pass before legislation is deemed suitable to undertake post-legislative scrutiny on an Act (Caygill, 2019a). Michael Collon, who was the clerk for the inquiries into the Licensing Act and the Equality Act suggested that seven to eight years would need to pass before it was possible to see the full effects of the Act (Collon, 2017b). This was on the basis that not all of

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<sup>2</sup> Not including financial legislation.

the Act necessarily comes into force at the same time. Indeed, this view was shared by the clerk of the House of Lords Liaison Committee who stated that the optimal time for post-legislative scrutiny is somewhere between 5 and 10 years (Tudor, 2017). This would potentially explain why the House of Lords has not addressed much legislation passed by the 2010-2015 Coalition Government, if it is taking that long term view.

In justifying this longer term view Michael Collon noted that '3 years is too short a time as you can't really see what an Act is doing, what has been achieved and what hasn't' (Collon, 2017a). So while the government focuses upon the date of Royal Assent, it might, in fact, be better to focus upon the date of commencement, as the House of Lords Constitution Committee (2004) does. In relation to this point he raised the case of the Licensing Act 2003 which the House of Commons Culture, Media and Sport Committee scrutinised just three years after it the Act had come into force. The report ended up being short, on the basis that there wasn't much to say other than noting that it was too soon after the Act had been passed to make any concrete suggestions (Collon, 2017a). The House of Lords assessed the legislation again in the 2016/2017 session, 11 years after its enactment on the statute books.

One additional issue that might be influencing the House of Lords in this area is the general desire to avoid anything too politically controversial (Collon, 2017b). Such an aim might deter the House of Lords from addressing the legislation of governments that are still in office due to the timidity of the House of Lords which flows from its unelected status and the primacy of the House of Commons (Russell, 2013). This could explain why so few Acts from the Coalition Government have been assessed as well. The challenge here is that potentially the legislation that is the most controversial or contentious is, in fact, the legislation in most need of review and the House of Lords with its more independent and consensual approach to legislation and scrutiny might be the better place to undertake such a review.

From the perspective of the House of Commons, Elizabeth Flood, the former clerk of the Culture, Media and Sport Committee noted that there is a tendency to put at least a parliament (around five years) between the legislation being passed and the undertaking of post-legislative scrutiny. She also noted that it is possible that a time frame of seven to eight years would be necessary depending upon the policy area in question (Flood, 2017). So there is also the potential for a slightly elongated time frame in the Commons as well. If five years is the minimum from their perspective then this does fit with the government's framework of 3-5 years for post-legislative review by a department. However, only two Acts of the Coalition Government have been reviewed. With a time frame closer to the government's and with 102 pieces of legislation being eligible for review, the Commons does not have the same reasoning to avoid such legislation, especially as the government is accountable to the House of Commons and therefore for any problems with the Acts and their implementation.

### **The post-legislative gap: House of Commons Committees and UK Government**

Post-legislative gap does not just appear in terms of the legislation selected for post-legislative scrutiny. There is also a post-legislative gap in terms of the committees that have not undertaken formal post-legislative scrutiny since 2010.

Table 3 shows the House of Commons departmental select committees that have not undertaken a formal post-legislative scrutiny inquiry since 2010. The Foreign Affairs, International Development, Defence and the Northern Ireland, Scottish and Welsh Affairs committees can be excused to some degree as these departments are not as legislatively intensive in comparison to the others. Additionally, the Treasury Committee could also be excused to a limited degree because financial legislation is currently not eligible for post-legislative scrutiny under the government’s agreement with parliament, nor was it deemed eligible by the House of Lords Constitution Committee (House of Lords Select Committee on the Constitution, 2004; Office of the Leader of the House of Commons, 2008). However, questions have since been raised as to whether such exemptions should be made. Nevertheless, the core tasks of departmental select committees are relevant to all departmental select committees, of which post-legislative scrutiny is one of those tasks. That leaves an additional four committees which have not undertaken a formal post-legislative scrutiny inquiry. In relation to Business, Energy and Industrial Strategy it has undertaken a number of inquiries classified under informal post-legislative scrutiny whereas the other two committees have not.

Table 3: Departmental select committees which have not undertaken a formal post-legislative scrutiny inquiry.

<b>Committees</b>
Business, Energy and Industrial Strategy Committee
Education Committee
Defence Committee
Foreign Affairs Committee
International Development Committee
Northern Ireland Affairs Committee
Scottish Affairs Committee
Transport Committee
Treasury Committee
Welsh Affairs Committee
Work and Pensions Committee

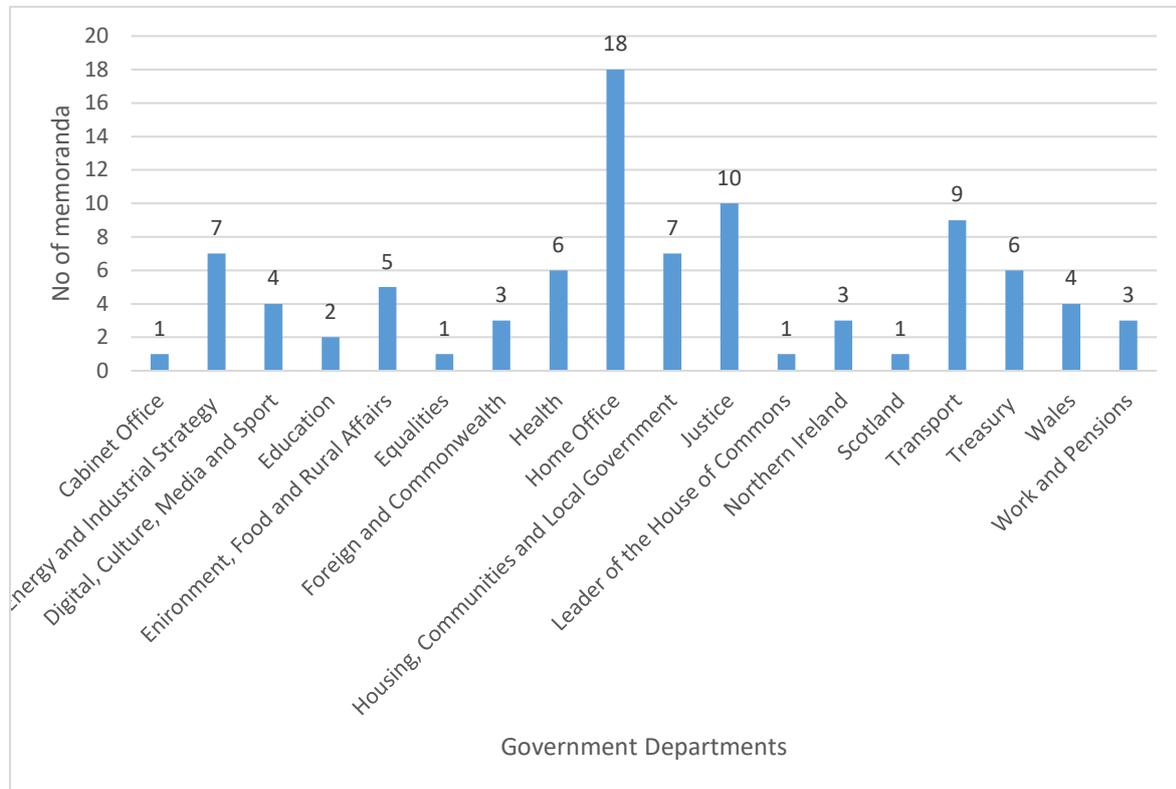
However, when assessing the post-legislative memoranda published by government departments, figure 2 raises a number of issues. Firstly, the Home Office has published far more memoranda than the Home Affairs Committee has taken up for post-legislative scrutiny. While not all legislation will require scrutiny, with the Home Affairs Committee having only undertaken one inquiry in comparison to eighteen memoranda having been published, it again shows that post-legislative scrutiny is not systematic. Additionally, for each of the committees listed in the previous paragraph for not having undertaken any post-legislative scrutiny, all of their respective departments (except International Development and Defence)<sup>3</sup> have been publishing memoranda, albeit, some more than others. This suggests that the problem of a lack of post-legislative scrutiny is not down to a lack of memoranda

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<sup>3</sup> The Department for Exiting the European Union and the Department for International Trade have been excluded from this study on the basis that at the time of writing they are two years old and their legislation is not eligible for post-legislative scrutiny, at least currently.

coming from government. That is not to say that the government has produced all of the memoranda that they are required to. The data here has been sourced from gov.uk and has been collected assuming that all memoranda have been published as required on that website. At the time of writing 91 memoranda had been published by government departments on gov.uk.

Figure 2: Post-legislative memoranda published by government departments



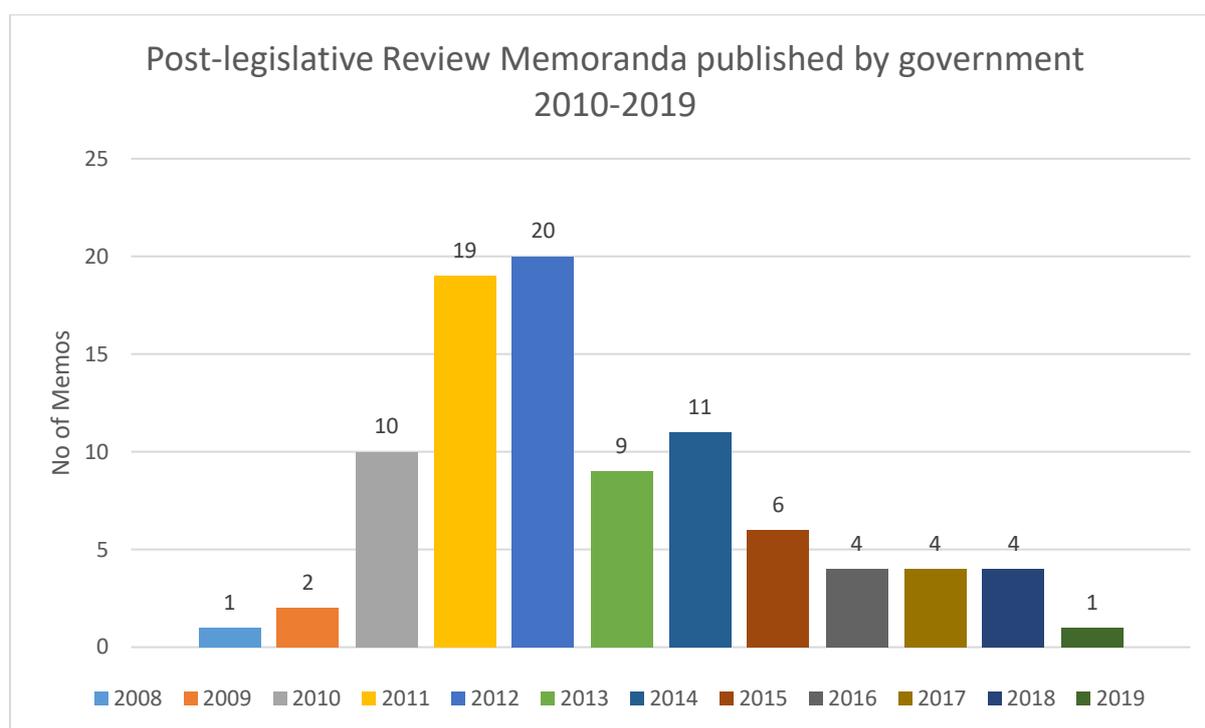
(Source: gov.uk)

However while there have been 91 post-legislative memoranda published by government departments between 2008 and 2019. This is some way below the amount of legislation that has gone on to receive royal assent in the same time period. For instance between the 2010-2012 and 2013-2014 session 102 pieces of legislation received royal assent however only 11 of them (11%) have received their post-legislative review memoranda, despite these Acts falling into the 3-5 time frame for post-legislative review agreed between the government and the House of Commons. Eight of those were on government bills and three on private members bills<sup>4</sup>. This suggests that while there is a problem with committees picking up memoranda (and they do not need a memo to launch an inquiry) there is also a problem at the government end in terms of publishing these memoranda<sup>5</sup>.

<sup>4</sup> Post-legislative scrutiny has not yet been undertaken on private members' bills.

<sup>5</sup> It is worth pointing out though that there is no depositary for the memos other than the Gov.UK website but there is no guarantee that all these memos are on the website (although clearly 91 are).

Figure 3. Post-legislative memoranda published between 2010-2019<sup>6</sup>



(Source: gov.uk)

Figure 3 shows a steady increase in the undertaking and publication of post-legislative review memoranda up until 2012 however since then it has declined to single figures each year<sup>7</sup>. It is between 2011 and 2014 when most memoranda are published, perhaps it is not surprising that in this time period it will be Labour introduced legislation that will be within the timeframe for post-legislative review. It has been highlighted that there is some bias in the selection of legislation (Caygill, 2019b) however perhaps there is a bias in relation to government departments as well. Particularly as we see the number of memoranda decline as coalition legislation reaches the point of requiring review. This could also be having an impact upon the selection of legislation by committees for post-legislative scrutiny, as noted above a bias has been noted by committees and research (Caygill, 2019a) does suggest that memoranda do act as a trigger for post-legislative scrutiny. However it should be noted it is not the only trigger and there is nothing preventing committees launching an inquiry without a memorandum from the government. There is an additional factor impacting upon the 2017 to the mid 2019 period and that is the pressure that the UK’s exit from the European Union is putting on government departments (e.g. staff being loaned from other departments to the Department for Exiting the European Union) (Owen & Lloyd, 2018), it is conceivable that post-legislative review has fallen off departmental radars.

<sup>6</sup> Mid-2019

<sup>7</sup> 2016, 2017 and 2018 each include one memorandum requested by the House of Lords Liaison Committee for scrutiny by an ad hoc committee, therefore not officially part of the 3-5 timeframe set out by the government and the House of Commons.

## **The post-legislative gap: Case studies**

In order to understand why this post-legislative gap is occurring interviews were undertaken, with the clerks of two House of Commons committees which have not engaged with post-legislative scrutiny. These committees were the Education Committee and the Work and Pension Committee. In terms of the Education Committee, the clerk noted that they came very close to launching a post-legislative scrutiny inquiry into the Children and Families Act 2014 but due to the surprise calling of the 2017 General Election this inquiry did not proceed (Ward, 2017). It remains to be seen whether this inquiry goes ahead in the 2017 Parliament, to date it has not. So there was a problem here of events taking over. This can be both political events like elections halting committee work or even new policy announcements which divert the attention of the committee away from tasks such as post-legislative scrutiny. However, it appears that post-legislative scrutiny was on their agenda even if only lower down it. In terms of the Work and Pension Committee, attention is paid to what is likely to be published by the department in terms of post-legislative memoranda and discussions are held about what if anything the committee would like to move forward with but the committee does not usually make much further progress than that (Mellows-Facer, 2017).

There is also the potential for committee work programmes to be overtaken by parliamentary and legislative cycles, in the sense that once one bill has been passed work starts on the next (Ward, 2017). There is then a conveyor belt of legislation, which a) undertakes some of its own post-legislative review in terms of looking back at the previous Act and amending it through a new one and b) means post-legislative scrutiny doesn't take place as the legislation is not on the statute books long enough before the next piece of legislation comes along and supersedes it. Ward (2017) notes that the Department for Education has been in a state of permanent revolution since 2010 with a near constant cycle of legislation coming out of the department. This means there is plenty of material to potentially look at but also makes the job of undertaking post-legislative scrutiny more challenging if it is superseding earlier laws. It also potentially eliminates some legislation from the running for post-legislative scrutiny. This problem was also raised in relation to the Work and Pensions Committee, in that nearly every year a new Pensions Bill appears, potentially superseding or dealing with the challenges presented in the previous Act. As a result, the government department does not produce a memorandum or a review as it claims it reviewed the legislation when crafting the new bill (Mellows-Facer, 2017). This might partially explain the low number of post-legislative review memos arriving for Coalition legislation however an equally compelling explanation would be that government departments are being overwhelmed by Brexit and as such post-legislative review is even further down on the agenda than usual.

This does come down to power, to some extent, as the power to pull together and produce these memoranda rests with the government, and not parliament. Although parliament can call for papers they rely upon government for their production and for the information contained within them. While parliament has little or no coercive powers, it is also left weaker at being at an informational and resource disadvantage to government. Access to information is a vital foundation for all scrutiny and the government led focus in terms of post-legislative scrutiny memoranda, could be a limitation to wanting to undertake it in the first place. In terms of power in this situation, parliament often relies upon convention and the creation of an obligation, and commitment from government what Lukes (1974) would term persuasion or manipulation. Boulding (1989) in *Three Faces of Power* refers to this

as the kiss. Although, as the parliamentary reform literature notes, the government will be in no hurry to change this face and alter the balance of power (Kelso, 2009). It should be noted that it is not unusual to see bodies internal to legislatures undertaking this kind of review which is currently undertaken by the executive in the UK (De Vrieze & Hasson, 2017).

That being said both clerks argued that their committees had undertaken post-legislative scrutiny in other ways (Ward, 2017; Mellors-Facer, 2017). For the Education Committee, this included a number of sessions they had on the work of the Children's Commissioner for England which the clerk argued had a clear and demonstrable link to the Children and Families Act 2014. In relation to the Work and Pensions Committee, Mellows-Facer (2017) argued that they did a lot of work that was driven by politics and driven by constituency mailbag issues. One of those issues related to the state pension age and the Women Against State Pension Inequality (WASPI) campaign. It was a very high profile politically driven inquiry and in practice, a lot of what they focused upon was tantamount to looking at the legislation and whether it was achieving its objectives or whether policy was enacted in a way it ought to have been (Mellows-Facer, 2017). He argued that a lot of it was about communication and it bore quite a lot of the hallmarks of a post-legislative scrutiny inquiry. He also noted that he didn't think anyone involved was consciously thinking that at the time. However, in hindsight, you could see it in those terms (Mellows-Facer, 2017). This highlights the issue that perhaps post-legislative scrutiny, is being undertaken in a variety of forms, aside from a formal committee inquiry, which might not be detectable at first glance. Care is required here however, as these alternative forms have not yet been mapped out and as such caution should be taken in classifying them as post-legislative scrutiny. That being said the Law Commission in its 2006 report on post-legislative scrutiny noted that more systematic post-legislative scrutiny could take different forms (Law Commission, 2006), the problem is we do not yet know what these alternative forms are. This emphasises the need for additional research into alternative forms of post-legislative scrutiny, particularly as both clerks specifically noted the challenges in identifying where post-legislative scrutiny has taken place.

Ward (2017) also noted a problem of Members' interest in relation to post-legislative scrutiny and the potential lack of interest as Members often want to address and look at the symptoms of a problem rather than looking at the root causes. Indeed Mellows-Facer (2017) argues that post-legislative scrutiny is often way down on the list of priorities of members and because they only maybe spend a couple of hours a week on committee work, it never rises much higher on the list of priorities. Indeed, a survey undertaken by the Hansard Society in 2011 found that MPs spent only 14% of their time on committee work (Korris, 2011). This is in comparison to 21% of time being spent in the Chamber and 59% spent on constituency related issues (campaigning, casework, and meetings) (Korris, 2011). Ward (2017) argued that interest in the study or review of legislation and the legislative process is probably restricted to the Members who are lawyers or who are more technically minded (Ward, 2017). He suggested that they would never refer to an inquiry as post-legislative scrutiny as it was a sure way to turn off Members and potentially miss an opportunity for public engagement (Ward, 2017). Instead, he noted that mentions of post-legislative scrutiny would be placed in the terms of reference so that witnesses would understand how to approach the inquiry.

There is also an additional problem raised by Mellows-Facer (2017) which has impacted upon the Work and Pensions Committee at least, and that is in relation to the turnover of committee membership. Data from the Institute for Government shows that turnover on the Work and Pensions

Committee in the 2010-2015 Parliament was over 150%, which will have had a big impact upon the dynamic and interests of the Committee (Freeguard, 2015). That being said, the Justice Committee was active in terms of undertaking post-legislative scrutiny during the 2010 Parliament but had a turnover of just over 140% (Freeguard, 2015). The chair of the Justice Committee at the time, however, was committed to undertaking post-legislative scrutiny (Beith, 2017) which will have had an impact upon its prevalence here despite the turnover in Members. Turnover might not be the most important factor when determining whether to undertake post-legislative scrutiny, but if a chair is ambivalent to it, turnover is unlikely to help push it up the agenda. He argued that you may at the start of a parliament plan to address a particular Act a few years down the line but if a number of Members' change (including those with the desire to do it) then that can cause a change to the work programme via Members' priorities (Mellows-Facer, 2017). This potentially ties in with events discussed earlier and a high membership turnover makes planning and sticking to a long term work programme more challenging. Members' interest is important here in determining committee behaviour but also in terms of new Members' interests as they join committees and dilute the earlier interests.

This, therefore, sheds some light on why post-legislative scrutiny in the case of the Education Committee has been limited. Ultimately it came down to events and Members' interest but also potentially the hidden nature of such work. There may also be a perception gap in terms of recognising where post-legislative scrutiny is taking place, as well as a broader post-legislative scrutiny gap. In relation to the Work and Pensions Committee, in addition to the points raised above, the turnover of committee members has caused issues with long term planning. It is clear that both committee secretariats have post-legislative scrutiny and their other core tasks in mind when trying to put together a work programme but the challenges outlined above have meant at least in terms of these committees, a post-legislative gap has been created.

## **Conclusion**

In the last decade a more systematic approach has been taken by both government and parliament. However, it is now 10 years on from the introduction of that systematic approach to post-legislative scrutiny in the House of Commons and research has shown that it is yet to become a regular part of committee work, at least from the perspective of published reports. Although the procedures in the House of Lords are different, the extent of post-legislative scrutiny has also remained limited.

Post-legislative scrutiny remains limited as a form of scrutiny at least from the perspective of committees launching inquiries and publishing reports. From the limited amount of post-legislative scrutiny that has taken place it is possible to locate a gap or rather a post-legislative scrutiny gap. This gap appears both in terms of the selection of legislation (in particular through a lack of selection of legislation passed by the 2010-2015 Coalition Government onwards), but also in terms of committees in the House of Commons which are not undertaking post-legislative scrutiny despite post-legislative review memoranda being published across almost the full range of government departments.

However there are a number of reasons for why committees might not be formally engaging with post-legislative scrutiny. These included, events taking over. These can be both political events like elections halting committee work or new policy announcements which divert the attention of the committee away from tasks such as post-legislative scrutiny. There is also the problem of committee

work programmes being overtaken by parliamentary and legislative cycles. There is often a conveyor belt of legislation, which undertakes some of its own post-legislative review in terms of looking back at the previous Act and amending it through a new one. This often means that post-legislative scrutiny doesn't take place as the legislation is not on the statute books long enough to receive a post-legislative memorandum or before the next piece of legislation comes along and supersedes it. In addition there was a problem, with long term planning due to the turnover of committee membership. Turnover might not be the most important factor when determining whether to undertake post-legislative scrutiny, but if a chair is ambivalent to it, turnover is unlikely to help push it up the agenda. Finally there is also a lack of Member interest in post-legislative scrutiny, and with member driven committees, interest is vital.

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