
SPEECH FOR POST-LEGISLATIVE SCRUTINY LAUNCH EVENT 25 OCT 2006

Sir Terence Etherton, Chairman of the Law Commission

- 1.1 In October 2004 the House of Lords Select Committee on the Constitution published its report on 'Parliament and the Legislative Process.' The Committee recommended that in order to ensure proper scrutiny of legislation most Acts, other than Finance Acts, should be subject to some form of post-legislative scrutiny. The Government, in its Response to that report, stated in April 2005 that it was sympathetic to the principle and that it had asked the Law Commission to undertake a study of the options. In our Ninth Programme of Law Reform, published in Spring 2005, we agreed to carry out the project.

- 1.2 This is an unusual project for the Law Commission. We are usually concerned with reform of the substantive law, whereas this project relates to the legislative process and analyses Parliamentary, Governmental and external processes for the evaluation of legislation once it has been brought into force. On the other hand, as the body charged by statute with keeping all the law under review, the Law Commission is concerned with whether our laws serve their purposes. I should emphasise that the purpose of the project was not to propose that the Law Commission itself carry out post-legislative scrutiny. That would not be appropriate or feasible.

1.3 Work began on the project in July 2005 under the direct supervision of my predecessor, Sir Roger Toulson, to whose work and that of Lydia Clapinska, one of the Commission's lawyers, I should like to pay tribute. The Commission considered it vital to undertake early consultation prior to the publication of our consultation paper. We targeted and received valuable suggestions, advice and warnings from Parliamentarians, Parliamentary counsel, Parliamentary clerks, Government departments, academics and others. Critically, this early consultation generated ideas that we distilled and set out for wider consideration in our consultation paper, which was published in January this year. In March we held, in conjunction with the Statute Law Society, an open seminar on post-legislative scrutiny which proved to be a valuable part of the consultation process. During the consultation period we made a number of presentations on post-legislative scrutiny and were particularly pleased to meet with the Liaison Committee in the House of Commons and the Chairs of several select committees in the Lords. We received a good number of written responses and we are extremely grateful to everyone who has played a part in the consultation process.

1.4 Those responding to the consultation expressed overwhelming support for the principle that there should be a more systematic approach to post-legislative scrutiny. Although ad hoc review does take place, there is currently no systematic practice of reviewing laws after they have been brought into force to ensure that they are working as intended. Each year over 10,000 pages of new legislation are introduced by Acts of Parliament and statutory instruments. If European Directives and Regulations are added, the figure is doubled. There is a need to take stock and reflect on the effects of new laws to see if they are working as intended, and, if they are not, to discover why not. Parliament should be able to address how any problems can be remedied cost-effectively and to learn lessons for the future on the best methods of regulation.

1.5 There have emerged from our consultation the following 4 headline reasons for having more systematic post-legislative scrutiny:

- (1) to see whether legislation is working in practice as intended;
- (2) to contribute to better regulation;
- (3) to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work;
- (4) to improve the focus on implementation and delivery of policy aims.

We are persuaded that together these reasons provide a strong case for more systematic post-legislative scrutiny. However, we also recognise the limitations. We acknowledge there are difficult challenges in relation to post-legislative scrutiny; in particular, how to avoid a replay of policy arguments, how to make it workable within resource constraints and how to foster political will for it.

1.6 A more testing question than whether post-legislative scrutiny is desirable is the question whether there is an appropriate mechanism that can be used to achieve it. We have considered the roles of Government, Parliament and independent reviewers. The approach, in our view, should be evolutionary and should build upon what is already in place. We also acknowledge that, in order to be of value, the scrutiny work is likely to be quite detailed and therefore time-consuming. We think that it would be far preferable to have effective review of a few pieces of legislation a year rather than a perfunctory review of many Acts.

1.7 In our final report we consider separately the role of Parliament and of Government in post legislative scrutiny.

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- 1.8 With regard to Parliament, we suggest in our final report that Parliament consider setting up a new joint Parliamentary committee on post-legislative scrutiny. Departmental 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 own broad terms of reference.
- 1.9 With regard to Government, we suggest the following. First, the prelude to any system of post-legislative scrutiny must be the clarification of policy objectives. Regulatory Impact Assessments (RIAs) provide a good place for the clarification of policy objectives and setting out of criteria for monitoring and review. We recommend that RIAs should be enhanced in order to incorporate those considerations more effectively. Second, departments should give routine consideration to whether, and if so how, legislation will be monitored and reviewed. We invite the Government to consider whether departmental reviews should be published and, possibly, laid before Parliament.
- 1.10 We have considered whether review work should be carried out by an independent body. It is already the case (for example in the Charities Bill) that legislation may provide for review by an external reviewer. A new joint Parliamentary committee may wish to involve independent experts in its review work, and in this context we do see a potential role for the National Audit Office in appropriate cases. However, we do not see the need to create a new body independent of Parliament to carry out post-legislative scrutiny. This reflects the strong feeling of those who responded to our consultation that Parliament should have ownership of the process of post-legislative scrutiny.

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- 1.11 We consider that any system of post-legislative scrutiny should ensure that interested parties are able to channel their concerns about the operation of legislation to the reviewing body, and play a part in any subsequent review through consultation or by giving evidence.
- 1.12 We do not think that the timescale for review should be prescribed. On this matter there is a need for flexibility of approach to take account of different types of legislation and review.
- 1.13 We hope very much that our report will generate debate and inform future discussion and serious consideration of post-legislative scrutiny.