Evidence-informed or value based? Exploring the scrutiny of legislation in the UK Parliament: two case studies

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Paper presented to the PSA Annual Conference 2015, 30 March to 1 April, Sheffield

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Abstract

Given the challenges and uncertainties facing contemporary societies, the quality of government policy-making and legislation is of great importance and has been subject to considerable interest by governments, academics and think tanks. There has also been considerable interest in the ideas of ‘failure’ and ‘success’ in public policy, including, recently, by King and Crew in *The Blunders of our Governments* (2013).

Drawing on insights from literature in a number of areas, including the impact of the legislative process on policy development (e.g. Brazier et al., 2008; Russell and Sciara, 2008; Fox and Korris, 2010, Thompson, 2013), the role of experts and evidence in policy-making (e.g. Pawson, 2006; Nutley et al., 2007), and on policy success and failure (e.g. Bovens and ‘t Hart, 1995; McConnell, 2010), this paper focuses, in particular, on the passage of legislation and the outcomes (or progress towards outcomes) of the subsequent Acts.

The primary concerns here are, therefore: with whether the legislation can be judged as successful in the context of its own aims, or those claimed for it by those responsible for its introduction and passage; the accuracy of claims made by both its supporters and opponents during its passage through Parliament; and the use of ‘evidence’ and ‘expertise’ during the process of parliamentary scrutiny. The paper focuses on two case studies, the National Minimum Wage Act (1998) and the Academies Act 2010, and explores the nature and extent of claims made during the passage of the bills, and the degree to which these have been realised, or not, following the introduction of the legislation.
While ideas and debates about how to make ‘good’ policy and how to implement it effectively have a long history, there has been increasing attention paid to these topics in recent years (e.g. Bochel and Duncan, 2007; Hallsworth and Rutter, 2011). This has included: interest in the processes of policy making and implementation, including the role of experts and evidence (e.g. Davies et al., 2000; Pawson, 2006; Nutley et al., 2007; Rutter, 2012), the tools or ‘instruments’ used by governments (e.g. Hood and Margetts, 2007; Howlett and Ramesh, 2009); the assessment of ‘success’ and ‘failure’, as claimed by a variety of different organisations and actors, including governments, interest groups, charitable and campaigning organisations and think tanks, academics and other commentators (e.g. Bovens and ‘t Hart, 1996; McConnell, 2010; King and Crewe, 2013); and the impact of the legislative process (e.g. Brazier et al., 2008; Russell and Sciara, 2008; Fox and Korris, 2010). The Labour governments of 1997-2010, in particular, made much of notions associated with ‘better’ policy making, such as ‘evidence based’ (e.g. Blunkett, 2000), ‘joined-up’ (e.g. National Audit Office, 2001), and ‘inclusive’ (e.g. Audit Commission, 2003) approaches, and these were affirmed, if followed less enthusiastically, by the Conservative-Liberal Democrat Coalition government of 2010-15 (for example, on resigning as a Minister in November 2014, Norman Baker claimed that there was little support for rational evidence-based policy in the Home Office (The Guardian, 2014); see also Rutter, 2012), which acknowledged the importance of making informed policy decisions on the basis of good quality evidence and research (Secretary of State for Business and Skills, 2010; Willetts, 2012).

**Scrutiny and the legislative process**

The Hansard Society has undertaken important work on scrutiny. Brazier et al. (2008) highlighted a number of factors, some of which are of direct relevance to this paper, including the influence of individual parliamentarians, the role of the two Houses, and consultation with external actors. They also noted that individual parliamentarians, and in particular those on the opposition benches at the committee stage, rely heavily on information provided by individuals and organisations outside Parliament. While arguing that ‘parliamentary scrutiny does make a difference to the final shape of an act’ (p. 184), they made a number of recommendations, including more structured consultation on legislation with greater feedback to Parliament and the public, and that pre-legislative scrutiny should be the norm for most bills. Fox and Korris (2010) also examined the legislative process, drawing on input from a range of practitioners. They noted that there are significant criticisms of the quality of policy preparation and of the extent to which expertise feeds into the process, and made a number of recommendations for improvement, including greater use of pre-legislative scrutiny and the further reform of Public Bill Committee procedures in the House of Commons.

Interest in scrutiny and the legislative process has also involved the political parties. The Conservative Party’s Commission to Strengthen Parliament suggested that ‘Primary legislation suffers from inadequate scrutiny in the House of Commons. Existing processes are simply not up to the task’ (2000, p. 22).
Amongst its recommendations were that bills should normally be published in draft, and that the relevant departmental select committee should be able to nominate at least two of its members to serve on a standing committee. It argued that the House of Lords ‘fulfils a notable role as a scrutinising and revising body. The means that it employs for this purpose generally work well’ (p. 39), but suggested that these could be strengthened by sending bills to a select committee following second reading. The Commission also noted that ‘Too little scrutiny is undertaken of the effect of legislation. Departmental select committees should be encouraged to engage in post-legislative scrutiny’ (p. 20).

At the 2010 general election parliamentary reform featured significantly in the manifestos of the three main political parties, with the Liberal Democrats, for example, promising to ‘Strengthen the House of Commons to increase accountability... and give Parliament control of its own agenda so that all bills leaving the Commons have been fully debated’ (Liberal Democrats, 2010, p. 88), and the Conservatives undertaking to allow ‘MPs the time to scrutinise laws effectively’ (Conservative Party, 2010, p. 67). However, there was no significant reform of the legislative scrutiny process of the House of Commons during the period of the Coalition government. Similarly, although in 2010 all three major parties had promised some reform of the House of Lords, this too did not happen, although more Conservative and Liberal Democrat peers were created to move the party balance within the House more into line with the share of seats in the House of Commons.

One area where there was some development under the Coalition Government was pre-legislative scrutiny, with an increase in the number of draft bills published by the government in each session compared with most sessions under the Labour government, and in the number that were considered by committees (Kelly, 2013). However, a number of significant measures, including, for example, the Fixed Term Parliaments Bill, were introduced without pre-legislative scrutiny, and the Liaison Committee (2012) criticised the government for not publishing enough draft Bills, in some instances having unreasonably short time for scrutiny, and for establishing joint committees (with members nominated by the whips) for some bills even when a House of Commons select committee (with members elected by the House) has wished to scrutinise a measure. In addition, the Joint Committee on Human Rights suggested that the government should ensure, particularly for fast-tracked bills, that committees with a legislative scrutiny function should have a proper opportunity to scrutinise the measures and to do so in time for their recommendations to inform the members of both Houses, and indeed extended this recommendation to cover all bills (JCHR, 2013).

Despite the relative lack of change, since 2010 there have been important debates about improving the effectiveness of parliamentary scrutiny (e.g. House of Commons Procedure Committee, 2011) and other related issues, such as the nature of expertise in the House of Lords – often advanced as a key argument in favour of the upper House – which arose in relation to the white paper on further Lords reform (Cabinet Office, 2011).
Drawing upon these debates and developments, this paper focuses, in particular, on one element, the relatively neglected area of legislation and the legislative process, seeking in particular to develop our understanding of the scrutiny process as it relates to issues such as the use of evidence and expertise and other aspects of debates about ‘good’ policy making and implementation. It focuses upon case studies of two major pieces of legislation, the National Minimum Wage Act 1998 and the Academies Act 2010, as examples of ‘flagship’ policies introduced early in the lives of the Labour and Coalition governments, each of which was intended to lead to significant change in its respective field.

**Methodology**

A number of challenges frequently emerge in research such as this. One of the first is generally what exactly is meant by ‘policy’? An extensive literature has developed that addresses such issues (e.g. Hogwood and Gunn, 1984; Birkland (2010); Knoepfel et al. (2011)), but even in much of the literature discussed above, it is not always entirely clear what is being addressed. For the purposes of this research, and to provide a basic platform upon which to develop ideas of success or failure, a decision was made to focus on policy as legislation. While this clearly does not encompass many of the variety of meanings that have been ascribed to policy, it is valuable as it helps reduce the challenges associated with determining whether something is or is not a policy, or for that matter what ‘the policy’ is. Parliament is also the principal arena in which government proposals, in Bill form, are subject to scrutiny and, in turn, receive legitimacy. There can be far less doubt that what is discussed there, as opposed to many other fora, is official ‘policy’.

A second challenge, closely related to the first, is assessing what the aims of a policy are. While this might appear straightforward, it is not necessarily so, even when we limit the consideration to legislation, as is further illustrated in the discussion of the case studies below. This reflects McConnell’s (2010) identification of issues such as multiple objectives and even contradictory objectives of a policy.

The research used a case study design (Becker, Bryman and Ferguson, 2012; Yin, 2014) that incorporated a variety of sources of evidence, including both documentary records and interviews with key actors.

While there are a variety of factors that might be taken into account when selecting cases for a study such as this, the research focused on two pieces of legislation, the National Minimum Wage Act 1998 and the Academies Act 2010. These were chosen as they were flagship policies of the Labour government elected in 1997 and the Coalition government elected in 2010, represent different types of legislation, reflected considerable preparatory work while in Opposition, were foreshadowed in general election manifestos, and were intended to have significant impacts upon key policy areas. A case study approach was taken in order to track the passage of the two Acts in depth. The methods drew upon those used in relation to research on the legislative process
by the Hansard Society (Brazier et al. (2008) and Fox and Korris (2010)), and on work on the beliefs of parliamentarians and the role of Parliament (e.g. Bochel and Defty, 2007). This involved:

- detailed examination of the parliamentary scrutiny of each piece of legislation using *Hansard* and any relevant committee reports, covering debates and proposals for amendments. This provided information on the arguments and any particular evidence or claims made about outcomes likely to follow from the legislation that were presented during the passage of the Acts in both Houses;

- in-depth interviews with those who were closely involved in the passage of the legislation, including politicians from both Houses, special advisors and civil servants (ten in the case of the National Minimum Wage Act and a further nine in the case of the Academies Act). These were invaluable in providing information about the gestation of the policies and legislation, and the various motivations behind them, and on decisions made and arguments put forward by supporters and opponents during the process of parliamentary scrutiny.

- Although another aspect of the project, it is perhaps worth noting that we have done some comparison of the aims and predictions with the evidence available on outcomes, such as official statistics, evaluations by government departments, assessments by such as academics and outside organisations, and views and information from the interviews outlined above.

The 'aims' of the policies were taken as those identified in parliamentary debates; claims identified in interviews are used in a supplemental way, and perhaps contribute to understanding what might be seen as 'unspoken' aims of legislation. Ethical approval for the research was gained through the University of Lincoln's processes.

**The National Minimum Wage Act 1998**

In Opposition, Labour and its supporters had done considerable groundwork on the idea of a national minimum wage. In particular, Ian McCartney, who was to become Minister of State in the Department of Trade and Industry in 1997, had been a strong advocate for the adoption of such a policy, and had done considerable work in preparation for it. In addition, the left-leaning think tank, the Institute for Public Policy Research had undertaken research on the subject, and drew on academic arguments in the UK and the US that suggested that it was possible to have a minimum wage without damaging employment levels, with evidence to support that idea also emerging from the US. In 1996 the IPPR established a Commission on Public Policy and British Business, chaired by George Bain and with representatives from business, the trade unions and academia, and its report included a section on a national minimum wage. At
around the same time, despite initial opposition from some quarters, the trade union movement and the TUC decided to support the minimum wage.

The Labour Party manifesto for the 1997 general election stated that there should be an independent low pay commission, including representatives of employers and employees, and that ‘Every modern industrial country has a minimum wage’ (Labour Party, 1997, p. 17) and argued that ‘Introduced sensibly, the minimum wage will remove the worst excesses of low pay (and be of particular benefit to women), while cutting some of the £4 billion benefits bill by which the taxpayer subsidises companies that pay very low wages’ (p. 17). Interestingly, the proposal was contained in the section entitled ‘We will help create successful and profitable businesses’, perhaps reflecting Labour’s concern to be seen as supportive of business and responsible in its handling of the economy (on the development of the policy see also Rutter et al., 2012).

For the new government the introduction of a national minimum wage was a clear priority, and the Low Pay Commission was introduced in July 1997 (again chaired by George Bain), even before the legislation was passed, although it was not asked to pronounce on the desirability of a national minimum wage, which was taken as a given. The LPC too undertook detailed research to inform its work, including from face-to-face meetings around the country. From the government’s perspective, the Prime Minister, Tony Blair, wished the initiative to be seen as an economic rather than a social justice issue, and the employment ministerial team was therefore moved to the Department of Trade and Industry, which became responsible for the introduction of the measure.

The National Minimum Wage Bill was presented to the House of Commons on 27 November 1997. Initially consisting of 53 clauses and 3 schedules, with the number of clauses later increasing to 56, it was a complex piece of legislation, with its principal purpose being to introduce the National Minimum Wage and to give a statutory basis to the Low Pay Commission.

The main arguments in Parliament

During the passage of the Bill through the House of Commons, including the marathon committee stage (19 sittings of more than seventy hours in total), from the Government’s side the arguments in the House of Commons, drew strongly on the argument that the Conservatives had failed to realise that politics had moved on, with ministers suggesting that not only had Labour won the general election but also the argument about the desirability of a minimum wage. More specifically, the Government’s arguments reflected ideas of fairness, the likely impact on the economy, the support of a variety of organisations, and the position in other states, with key arguments in each of those areas being that:

- the proposal for a minimum wage was right, just and fair;
- the pay gap between the rich and poor, and inequality, were rising;
- the bill was part of a wider strategy to help unemployed people, alongside changes to taxation, benefits and training;
• it would not harm competitiveness;
• set at a sensible level it would bring economic benefits;
• the lack of a minimum wage had increased costs to the public purse and undermined good companies that had been undercut by others;
• there was no evidence that lower wage levels resulted in higher levels of employment;

• a variety of businesses, business organisations, and important figures in industry, were in favour of the measure;

• every other developed nation had some form of protection.

The Opposition, in contrast, sought to highlight a lack of clarity in the problem, the measure and the process, the inappropriateness of the Government’s approach, the risks to the economy and employment, and the opposition of a number of organisations, arguing therefore that:

• the Bill did not address a real problem as there was not a large pool of poorly paid workers, and in the UK there was relative, not absolute poverty;
• there were too many unanswered questions about the proposals, so that, for example, it was not clear what the rate would be or who would be covered;
• the enforcement powers contained in the Bill were substantial and there were risks associated with them;
• the government should consult first and legislate second;

• legislation could not create prosperity, and that low taxes and a low regulation economy were necessary;
• there should be a minimum income rather than a minimum wage, using measures such as family credit top-ups;
• there was a possible pay/benefits cliff, and that most advantage would simply go to the Treasury;

• while low pay was a problem, there should be an allowance for regional variations (or at least the Low Pay Commission should be able to consider such things)

• jobs would disappear;

• the CBI and the Chambers of Commerce were opposed to the measure.

While most of the criticisms of the Bill came from the Conservatives, there were some concerns expressed by Liberal Democrat MPs about regional variations in pay and some therefore argued that the minimum wage should vary by region.
Perhaps surprisingly, given the work done by the Labour Party and the IPPR before the general election, there was relatively little reference by either government or opposition to evidence during the scrutiny of the Bill in the House of Commons. Indeed, one of the relatively few areas where there was specificity of arguments was the businesses and organisations that supported or opposed the measure, with, for example, the Secretary of State for Trade and Industry, Margaret Beckett, noting at second reading, comments favourable to the idea of a minimum wage from the Business Services Association and DHL, although in the same debate, both government and opposition claimed that their views reflected those of the Federation of Small Businesses.

Although there was considerable debate over the potential impact on employment, again there was little specificity, although in opposing the measure John Redwood, the Shadow Secretary of State for Trade and Industry, drew attention to a previous Department for Trade and Industry assessment in an answer to a parliamentary question that one million jobs could be lost ‘if we had a national minimum wage at half average earnings’ (HC Deb, 16 December 1997, col. 172).

There was, however, some recognition of the complexity of the relationship between a minimum wage and employment, with Margaret Beckett using the example of the United States, which has had a minimum wage since 1938, to argue that:

Employment there rose by 18 million in the 10 years to 1994. In a fairly recent example, when the state of California raised the level of its minimum wage, employment also rose. I do not suggest that there is a simple link between the raising of the minimum wage in the United States and employment rising there, as the Conservative party would try to argue if the opposite were true; I simply say that it suggests that the relationship between pay and employment is much more complicated—as are the economic effects of such a policy—than the Conservative party would wish to suggest. (HC Deb, 16 December 1997, col. 171)

The government did introduce a number of amendments at the committee stage, perhaps the most notable of which was the removal of the Armed Forces from the Bill as they would have their own pay review body. A number of Opposition amendments were defeated, including attempts to exclude people of school age, people aged under 26, people aged over 65, and people on recognised training programmes, and a Liberal Democrat attempt to uprate the National Minimum Wage each year in line with the higher of inflation or median earnings. Many more amendments were spoken to but eventually not moved.

At the report stage the government made a number of further amendments, including clarifying the distinction between volunteers (who were not covered) and employees of voluntary organisations (who were) and preventing employers for sacking workers just before they would become eligible for the Minimum Wage. A number of Opposition amendments were again defeated, including an attempt to require the Chancellor to include an assessment of the cost of the National Minimum Wage to public sector employment in the autumn statement,
and to give the Secretary of State the power to suspend the National Minimum Wage in ‘extreme economic circumstances’.

Having successfully completed the third reading stage in the House of Commons, with the Liberal Democrats also supporting it, the Bill moved to the House of Lords. Perhaps unsurprisingly, the arguments there largely reflected those in the House of Commons, with the Government claiming that the measure was right, just and fair, with the Minister of State, Lord Clinton-Davis, describing it as ‘a direct attack on the scandal of low pay and in-work poverty’ (HL Deb, 23 March 1998, col. 1030), that it would, in particular, benefit women and people from ethnic minority groups, that there would be benefits to workers, business and the economy, and that there was no evidence that the Minimum Wage would increase employment if set at a sensible level.

In contrast, the Opposition argued that the use of the USA as an example was misguided and based upon a myth that ‘They have had a minimum wage since 1938, and look how prosperous they are’ (HL Deb, 23 March 1998, col. 1036), that the measure would damage competitiveness, add to inflation, destroy jobs, and that regionality should be taken into account. There were also arguments from both sides about issues such as low pay and the likely impact of the National Minimum Wage on employment.

At the committee stage further Conservative amendments, including attempts to change the eligibility of younger and older workers, and to break the link between employers and remuneration by taking into account other benefits (such as tips), were withdrawn. So too, after brief debates, were Liberal Democrat amendments on annual uprating and allowing for different hours and patterns of work. A number of government amendments ‘tidying up’ the Bill were agreed without a division.

However, at the report stage, the Conservatives, with the support of the Liberal Democrats, succeeded in passing an amendment giving the Secretary of State the power to exempt particular persons or sectors of the economy from the National Minimum Wage. Further attempts by the Conservatives to amend the Bill by giving the Secretary of State the power to suspend the National Minimum Wage during an economic emergency, and to require the Chancellor and Secretary of State for Trade and Industry to produce an annual report to Parliament on its operation and its impact on competitiveness, wages, unemployment and taxation were withdrawn or defeated.

When the Bill returned to the House of Commons, John Redwood, for the Conservatives, again argued that there was a need for more flexible labour markets rather than for more government, that the measure would cost jobs, and that there might be a wages explosion. However, the Government was successful in reversing the Lords amendment on exemptions, the Lords then accepted the Government’s position, and Royal Assent was received on 31 July 1998.

For the Conservatives, the defeat at the 1997 general election had a number of implications for their opposition to the measure. One was clearly that as the
measure had been included in Labour’s manifesto it had considerable democratic legitimacy behind it. Others, however, were more about the Conservatives’ own circumstances. The election defeat was followed by the resignation of John Major and the election of William Hague as Conservative leader, and that, combined with the scale of the Labour victory meant that there was some lack of preparedness, so that their frontbench team was effectively left alone to develop its arguments against the proposals. At least one senior member of the Conservatives’ team was strongly of the view that ‘I feel that it is the job of the Opposition to oppose, and that is what I did. I developed the best arguments that I could given that role’. In addition, there was a desire not to present the Conservatives as heartless, and it was therefore decided to argue for a minimum income, including through mechanisms such as benefits payments, rather than to support the minimum wage. Another impact of the crushing election defeat was that the Conservatives were not lobbied by interest groups with regard to the Bill, with even business groups not wishing to engage with them at that time.

As noted above, the scrutiny of the Bill tended to focus on discussion of principle and broad philosophical positions, and to some extent about what the opposition saw as a lack of clarity in the government’s position, such as at what level the National Minimum Wage was likely to be introduced. However, there were some areas of more detailed debate, for example around the inclusion or exclusion of particular groups from coverage by the measure, and the treatment of tips, such as in restaurants.

The Opposition, in particular felt that scrutiny of the Bill was thorough, as one front bencher put it, ‘I do not recall any great victories, but I took them through the Bill thoroughly... I threw everything at it’. From the perspective of the Government, they felt all the way through the process that there were in a strong position, largely because of the work that Labour had done on the issue while in Opposition, and as a result, they felt that they had strong arguments and that the Conservatives’ position was weak, not just in terms of a lack of evidence to support their criticisms but also politically, including a lack of support outside Parliament, and those involved viewed the amendments as ‘relatively minor, and to some extent... anticipated’. The exclusion of the armed forces may not have been intended, but they and the Ministry of Defence were seen as having made a strong case, and there was a desire not to complicate the Bill and its progress. Even in hindsight, many felt that not only was it a good policy, but that it had been well prepared and drafted, as evidenced by the fact that there had been no need to amend the Act since its passage.

The Academies Act 2010

As with Labour and its preparation for the National Minimum Wage, the Conservatives had done considerable work in Opposition on free schools and academies. When Michael Gove became Shadow Secretary of State he wanted to develop the idea of free schools, and the Conservatives also wished to expand the academies programme, get schools away from local authority control (‘and the dead hand of the educational establishment’), and bring greater diversity to the
system. The extent of preparation was reflected in the Conservatives having visited Sweden to look at how free schools operated there, regular meetings with sympathetic teachers and heads, considerable time spent in schools in England (one minister suggested that when in Opposition he visited schools once a week) and producing a draft bill written by lawyers. At the same time they were doing work on other education topics, such as phonics and the curriculum, so that they were ‘preparing across the board’. In the run up to the general election they were therefore able to present civil servants with their ideas so that they were well prepared when the Coalition came to power. The link with the Policy Exchange think tank was also important, with Sam Freedman, who had been head of education there from 2006 to 2009 taking the role of policy adviser to Michael Gove from 2009 to 2013.

The Conservative manifesto for the 2010 general election stated, ‘We want every child to benefit from our reforms. So all existing schools will have the chance to achieve Academy status, with ‘outstanding’ schools pre-approved, and we will extend the Academy programme to primary schools’ (Conservative Party, p. 53). In relation to ‘free schools’ it said that, ‘Drawing on the experience of the Swedish school reforms and the charter school movement in the United States, we will break down the barriers to entry so that any good education provider can set up an Academy school’ (p. 53).

Following the general election, the Programme for Government, published by the new Conservative-Liberal Democrat Coalition, stated that, ‘We will promote the reform of schools in order to ensure that new providers can enter the state school system in response to parental demand’ (Conservative Party, 2010, p. 28) and that ‘We will give parents, teachers, charities and local communities the chance to set up new schools, as part of our plans to allow new providers to enter the state school system in response to parental demand’ (Cabinet Office, 2010, pp. 28-9).

Most Bills start in the House of Commons, although some start in the House of Lords, for example to prevent and imbalance of workload across each parliamentary session (Norton, 2013), and the Academies Bill was introduced in the House of Lords on 26 May 2010. While the reason for this is unclear, one interviewee from the Government side suggested that a decision was made to go to the Lords first as it was felt that it would be the more difficult of the two Houses to get the Bill through. The Bill sought to enable all maintained schools to become academies, including by removing the requirement to consult with the local authority before opening an academy, and to allow for the opening of many more free schools. It was a short measure with 16 clauses and 2 schedules, increasing to 20 clauses and 2 schedules following amendments during its passage. Indeed, its brevity was seen as praiseworthy by some, while others criticised it for the lack of clarity. Within government there was a view that it might have been possible to achieve its goals using the Education Act 2002, but that it would have been much slower because of the requirement for local authority run consultations, and there was a concern that local authorities would use that to block change.
The main arguments in Parliament

At second reading the newly appointed Minister (who indeed was new to the House of Lords, and who some argued may have had an easier ride because he was liked and 'in learning mode', although others suggested it was challenging for him and that he required considerable support), Lord Hill, argued that the measure was not a radical departure, but that it built upon Labour's academies programme and the Conservatives' education reforms of the 1980s. Throughout the Bill's passage the Government's key arguments in both Houses were fairly limited, focusing on philosophical positions, claims about raising standards, and the fact that the measure was part of wider reforms to the school system:

- teachers, rather than bureaucrats, were best placed to make decisions, and freedom and responsibility should be extended, with more autonomy being given to schools;
- greater trust should be placed in professionals, rather than adding unnecessary burdens and prescribing in legislation what should happen in every school;
- the academies system had been shown to raise standards, and standards would continue to rise in all schools as a result of the Bill;
- the Bill should be seen alongside other important changes, such as the Pupil Premium, the doubling in size of the Teach First initiative, new proposals on discipline, and reforms of the curriculum and assessment.

In the House of Lords the Opposition tended, unsurprisingly, to accept that Labour's academy programme had been a success. However, in opposing the Bill they drew distinctions between it and Labour's initiative, questioned the speed of the reforms, the risks of greater inequality, the lack of detail, and, frequently linked with that, a number of practical aspects, so that:

- the Bill did not simply represent a straightforward continuation of Labour's initiative, which had been focused on turning round failing schools;
- schools in deprived areas would not be supported as well as in the past;
- there would be the possibility of greater inequalities between different types of school in an area;
- the reforms were being made rapidly and there had been a lack of formal consultation, including emphasising that the Government was seeking to allow a number of schools to reopen as academies in September 2010;
- there was a lack of detail on Special Education Needs (SEN), including whether academies would be subject to the same SEN requirements as maintained schools;
the absence of formal requirements for schools to consult before converting or for founders of free schools to consult before opening a new school;

- new schools were likely to have an impact on others in the local area;
- selection would be able to continue when grammar schools or others which selected converted to academy status;
- there were issues around the National Curriculum in academies, and particularly faith schools.

SEN issues were raised consistently in the House of Lords, and at the committee stage Lord Hill undertook to think further about peers’ concerns, subsequently returning at the report stage with a government amendment that obliged academies to follow the requirements of the 1996 Education Act in the same way as maintained schools. Nevertheless, at the third reading stage a further amendment was passed, despite the Government’s opposition, requiring the Secretary of State to make alternative arrangements where a local authority had failed to make necessary provision for low incidence special needs. One member of the Government team noted that ‘SEN issues are always important in the Lords – there are lots of people with interested in SEN, disability, etc.’

With arguments over requirements to consult also being repeated, Lord Hill moved another amendment for the government at the report stage, introducing a statutory requirement for governing bodies to consult with those they thought ‘appropriate’ before or after conversion. A number of other government amendments were made, including one requiring the Secretary of State to take into account the impact of additional schools on a local area.

In the House of Commons the underlying issues remained largely the same, although the arguments were more party political and personal in tone. The Government emphasised that the Bill would improve England’s education system, noting that Britain had fallen down international league tables and that there was an attainment gap between the wealthiest and poorest pupils. Michael Gove noted the work of Leon Feinstein, of the Institute of Economic Affairs, which showed ‘that educational disadvantage starts even before children go to school’ (HC Deb, 19 July 2010, col. 24). He also emphasised both continuity with Labour’s approach and that the Government was following the path of other countries, including Finland, Sweden and the United States. However, even on the Government side, there was no real explicit indication of what ‘improvement’ might mean or how it might be measured.

Reflecting the arguments in the House of Lords, Labour claimed, for example, that the approach was different from that of the previous government, that the Bill contained no specific measures to improve standards, that it focused additional support on successful schools at the expense of others, that it allowed selection to persist, and that it was being rushed through to meet a particular deadline. In addition, Ed Balls noted that it centralised power in the hands of the Secretary of State. Some questioned whether the evidence about the positive effect of academies, and of free schools in Sweden and the USA, was actually that clear. The Conservative chair of the Education select committee, Graham Stuart,
also expressed some concerns, including over the speed with which the legislation was going through Parliament, Special Educational Needs, and the higher rates of exclusions in academies, although he also argued that the principles on which the legislation was based were correct.

For the committee stage, while the majority of bills proceed to a public bill committee, the Academies Bill went to a Committee of the whole House, although it was restricted to only three days of debate. From there it progressed directly to third reading before receiving royal assent on 27 July 2010.

As with the National Minimum Wage Act, and as noted above, there were relatively few references during the scrutiny process to what might be considered ‘hard’ evidence, with both sides tending to rely on more general claims that might relate to the impact upon the quality of education. Indeed, in debates, both Government and Opposition drew more widely than the scope of the Bill itself in their consideration of the education system. There was, however, considerably more detailed discussion over certain aspects, such as the processes of consultation required for conversion, and, particularly in the House of Lords, SEN issues. A Labour peer, who was active in opposing the Bill, argued that it was widely accepted that the research used by the Government that identified positive results from Labour’s academies programme was incorrectly generalised to the Coalition’s policies, and that while the ‘academy’ title may have been the same, the reality was very different.

Those behind the Bill suggested that they had largely foreseen some of the issues where amendments were accepted, although perhaps less so in relation to special educational needs, which some recognised that they had missed, and that on topics such as consultation, the impact on other local schools and surplus places they recognised the issues but actually saw these as part of the intent of the Bill, particularly through increasing choice and competition.

In terms of the quality of scrutiny, following the 2010 general election Labour faced a leadership election, which some saw as distracting the party from affairs in Parliament, so that one person who was involved with the Bill from the government side suggested that in the lower House ‘The main Opposition spokesman and most of their MPs were preoccupied and did not offer much scrutiny (and there was not that much to scrutinise)’, and that the quality of scrutiny in the House of Commons was ‘not particularly high’, although the same person also believed that the Bill was improved and that without the scrutiny and changes there ‘would have been more issues in the long run’. In contrast, one of the ministers responsible for the measure argued that ‘The scrutiny was very good and thorough… The Labour leads on the subject were very good and made sure that there was discussion of all of the important issues, and they put all of the arguments’ while another, in the House of Lords, said that ‘It felt like it went on for a long time, but it was properly scrutinised’. Some interviewees, however, suggested that the opposition was more muted than the Government might have expected, not only because of Labour’s leadership contest, but also because the unions were caught off guard, and because the views of local authorities were more mixed than had been anticipated. In addition, many opponents focused on
the speed with which the Bill was being taken through, rather than the scale of change.

Discussion

In many respects the two measures considered here, and their passages through Parliament, can be seen as quite different. The National Minimum Wage Bill was long, specific and detailed, with the scrutiny process lasting nine months. In contrast, the Academies Bill was a short, simple, and in many respects vague measure, which was passed in only two months.

However, there were also some similarities between the Bills. In both cases the incoming government had undertaken considerable preparatory work while in Opposition, and as a result not only felt comfortable with their own arguments, but also that they were well prepared for those of their opponents. As a result of the research that they had done both governments also used international comparators to support their measures, with Labour drawing in particular on the case of the United States for the National Minimum Wage, and the Coalition government on the Swedish system, including free schools, and the performance of charter schools in the United States, to provide support for the Academies Act.

Yet, despite this preparation and the confidence of the incoming parties, neither measure was subject to pre-legislative scrutiny, perhaps not least because the priorities of a new government to introduce its legislation in a timely fashion are likely to outweigh any commitments to greater scrutiny made while in Opposition. For example, on the Academies Act, one senior Conservative MP who was critical of the speed with which the legislation was pushed through, noted that the Secretary of State felt that the subject had been subject to considerable thought beforehand and that there was a limited window associated with the electoral mandate in which to push through what he hoped would be transformational change.

The passage of both measures was also affected by the circumstances, with an incoming government claiming a mandate for change (in the case of the Academies Act despite, or perhaps because of the creation of the Coalition government), and the Opposition being affected to at least some extent by an ongoing or recent leadership contest. In both cases too it appears that changes external to Parliament perhaps aided the government parties, with the Conservatives receiving little or no lobbying from business interests to support them in their opposition to the minimum wage, while the teaching unions did not appear as active as might have been anticipated in supporting the opponents of the Academies Bill and similarly local authorities did not present a united front on the reforms.

Interestingly, despite those similarities, the two governments made very different arguments in relation to the politics of the two Bills. In 1997 Labour felt strongly that Labour had ‘won’ the argument over the idea of a minimum wage, that it was widely supported in country, including by much of the business
community, and that the Conservatives were behind the times. In contrast, in 2010, the Coalition government argued that the Academies Act was building on Labour's own reforms and the introduction of academies, rather than suggesting that the measure was both qualitatively and quantitatively different from the work of its predecessor.

In terms of the scrutiny of the two pieces of legislation there are again significant similarities in the approaches of both governments and oppositions. There was a clear tendency on both sides to present their arguments as principled and philosophical in nature, rather than as detailed and specific, and despite the preparation that both incoming governments had done in opposition, there was relatively little use made by the governments of detailed evidence during the passage of the Bills, let alone by the opposition parties. Similarly, there were very few references to anticipated outcomes that might be measured at some point in the future, perhaps because governments are unwilling to create potential hostages to fortune for the future.

While it is perhaps unsurprising to see parties developing their arguments on the basis of principle, or philosophical positions (and indeed, that to some extent may raise questions for those who argues that the parties have come too close together), it is worth considering what that tells us about the use of evidence and expertise, and indeed the process of legislative scrutiny. Returning to some of the debates outlined at the start of this paper, about evidence-based (or perhaps evidence-informed) policy and the desire for better scrutiny of legislation, the two cases examined here suggest that there is considerable scope for further improvement, at least in the Parliamentary process. Despite the work done by Labour and Conservatives in opposition, and the confidence among many of the proponents of the two Bills, their own arguments about the measures tended to focus on principle rather than intended or likely specific outcomes, and references to evidence also were largely general claims. For both measures opponents too tended to rely on broader and more philosophical arguments, and where debate did become more detailed, it too was often concerned with mechanisms for change rather than with specific outcomes.

Conclusions

The research outlined in this paper provides a number of insights into the process of scrutiny of legislation in Parliament. In both cases considered here, the governing party had done considerable preparation when in Opposition – but, particularly given that, there was perhaps a surprising lack of detail in terms of anticipated outcomes. However, there may be a number of explanations for that: firstly, from a pragmatic political perspective, a failure to achievement specific outcomes would clearly enable future criticism of a government, which they are likely to wish to avoid; secondly, if policies are introduced primarily for ideological reasons, then specific, potentially quantifiable, outcomes are likely to be less important than the policy itself; and thirdly, given the range of individuals and interests that may be involved in the preparation of particular pieces of legislation, it is not unlikely that their aims will sometimes be potentially
different, or even contradictory, and that arguments based on more vague and philosophical positions may enable those views to be captured and unified in a way that would not be possible if more detailed statements of aims and intended outcomes were made.

Nevertheless, while perhaps understandable, this appears likely to result in scrutiny in both Houses tending to be dominated by debates drawing upon broad philosophical positions, or on particular mechanisms proposed in the legislation, such as the conversion of schools in the Academies Bill and the role of the Low Pay Commission in the National Minimum Wage Bill, rather than detailed arguments, and in the cases examined here, there was little discussion in the debates by either supporters or opponents of evidence of input from experts, or indeed by external actors more generally.

For both of these measures there was a lack of pre-legislative scrutiny, although it is questionable whether it would have made any difference in these circumstances, given each Government’s clear prioritisation of each measure, and the preparation that the parties had undertaken in Opposition. Indeed, what a period of pre-legislative scrutiny might have allowed would have been time for critics outside Parliament to organise their opposition, perhaps particularly for the Academies Bill, where there may have been less consensus on the desirability of the measure, and for a Government determined to press ahead with particular policies, that could lead to delays and difficulties. In addition, each Government clearly claimed an electoral mandate to proceed with their programme.

Both Bills therefore clearly benefitted from being introduced by a newly elected government with claims for legitimacy, while the work done in Opposition contributed to the confidence of those responsible for introducing each measure in relation to their intended ends, and also with regard to their responses to critics. In both cases this was enhanced by the framing of the arguments by the Government: in the case of the National Minimum Wage Bill those included that the Conservatives had lost the argument, and that the measure was at least as concerned with benefits for the economy as with fairness and social justice; for the Academies Bill some of the principle arguments were that the measure built upon Labour’s academies programme, and that it drew upon positive developments in countries such as Sweden and the United States, while it would also help counter Britain’s falling position in international league tables of educational attainment.

Given these factors, it is perhaps understandable that in both cases in Parliament the Opposition and other critics tended to identify a number of issues early in the process and stick with them, and that as with the government’s arguments, these often reflected broad philosophical positions. It is also unsurprising that amendments in both cases were relatively minor, and were not seen as ‘big wins’ by opponents. In both measures there was, however, no consensus among those involved in the quality of scrutiny. Those in Opposition tended to feel that they had done their best in both instances, although they also recognised that there were a variety of factors that had mitigated against their positions. Although views varied, Ministers, special advisers and civil servants were more sceptical
about the quality of Parliamentary scrutiny, and not just in relation to these measures, but often more generally.

There are also some implications from these finding for post legislative scrutiny, whether by Parliament (e.g. House of Lords Constitution Committee, 2004; Kelly and Everett, 2013) or others, as unless the aims of a Bill are made relatively clear and specific, post legislative scrutiny is likely to have to rely on post hoc judgements of the intentions and how these might be measured (in the case of the Academies Act, interpreting for example, the improvement of ‘professional freedoms’ or ‘raising standards in schools’).
Bibliography


