A Tale of Two Houses? Post-legislative scrutiny in the UK Parliament

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Note: This paper is a work in progress and the author kindly requests that its contents are not cited.
Introduction

Post-legislative scrutiny is one of the core tasks of departmental select committees in the House of Commons (House of Commons Liaison Committee, 2012). In the last decade a more systematic approach has been taken by both the UK Government and UK 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 statue books (Cabinet Office, 2012; Kelly, 2014; 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).

Currently, due to a lack of systematic scrutiny we do not know how both Houses of the UK Parliament are undertaking post-legislative scrutiny and what the main differences are. The aim of the paper therefore is to determine the similarities and differences between the House of Commons and House of Lords when undertaking post-legislative scrutiny. In so doing it addresses the following research questions; what are the differences in the way both Houses select legislation for post-legislative scrutiny; what differences are there in the outputs of post-legislative scrutiny; and what differences are there in the way committees in both Houses follow up on government responses to committee reports. This paper will provide an evaluation of the current procedures. This has important implications on highlighting how the system is currently working and whether this is a process worth recreating in other legislatures.

This paper aims to address this gap in knowledge through the use of four case studies from both the House of Commons and the House of Lords. These case studies address how the respective Houses and committees select legislation for review, what the outputs of their scrutiny were and finally how they dealt with government responses and the subsequent follow up.

This paper contributes to our knowledge of the processes available to the UK Parliament for the undertaking of post-legislative scrutiny. This is also important as post-legislative scrutiny, as a formalised activity of Parliaments is relatively new, and there is a contribution to be made here in terms of how such procedures can be utilised in other legislatures. There is also a contribution to make hear regarding the relationship between the two Houses

Committees undertaking post-legislative scrutiny in the UK Parliament

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. Select committees in the UK undertake a range of functions. In 2012, the House of Commons Liaison Committee published a revised list of ten core tasks for departmental select committees, of which post-legislative scrutiny is just one (House of Commons Liaison Committee, 2012).

The departmental select committees we know today were created in 1979 and perform an important scrutiny function. However perhaps their success in holding the executive to account comes from the fact that these committees do not have power over things which greatly matter to government’s
survival, such as the passage of legislation and the budget. As they are less of a threat to the passage of government bills and the government’s survival, they are treated in a different way to the chamber (Giddings, 1994; Hansard Society, 2001). This has allowed them to develop somewhat free of party control. They set their own agendas (Norton, 2013) and aim to produce reports on a cross party basis (Russell & Cowley, 2016). While governments may not be impressed by critical committee reports, they very rarely threaten their existence, due to the bi-partisan nature of select committees but also because, outside of parliament, these committee reports generally do not receive much attention. However despite this governments are required to respond within two months to a committee report. The emphasis of these committees was to enhance the role of individual MPs (as opposed to parties) in influencing decision making (Giddings, 1994). 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 scrutinise 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) and members, removing the patronage powers of the whips and government in general (Benton & Russell, 2013; Russell, 2011). 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). This has reduced criticisms laid at select committees’ doors such as those of Flinders (2001) that the government could steer committees away from controversial issues of scrutiny. However it is possible that governments can find other ways to steer committees away from controversial issues such as publishing draft bills for departmental select committees to scrutinise, taking up more of their available time. While criticisms may remain, improvements have been made since 2010, which may mean that some of the issues raised in literature prior to these reforms require qualification. D’Arcy (2011) notes in his article on the post 2010 Parliament that committees have come into their own in the last four years and uses examples such as the Health Committee, as one of a number of groups (including public opinion) lobbying the government to pause and rethink aspects of its Health and Social Care Bill, as well as the critique of the Big Society by the Communities and Local Government Committee. Of course the impact of committees here is important, not just their willingness to undertake controversial inquires, although considering Flinders (2001) criticism of the problems select committees have faced in the past, this is a step forward. This is also a step forward in terms of the general literature on parliamentary committees, which suggests such active committees are inherently at tension with the classic model of parliamentary government (Longley & Davidson, 1998), and yet they are developing anyway. This is true even if the UK is developing a stronger committee system at a slower rate than other parliaments, as suggested in research by Herbert Döring in the mid-1990s (Longley & Davidson, 1998).

Benton & Russell (2013) undertook an extensive study of the impact of select committees in Westminster. Their research concluded that although select committees could be more influential, their findings did challenge those who suggest that committees are ignored by government. In fact their research showed that committees have become an integral part of policy making, due to their detailed approach of scrutinising government policy and actions. Government departments are thus more willing to engage with committees in order so they do not fall foul of them later on in the policy process. This is one of the underlying aims of scrutiny, to constrain the power of government as they
know eventually that they will have to account for their actions later on. This can also be a way of muting criticism of government later on.

Select/ad hoc committees – House of Lords

At this stage it is also worth noting the role of select committees in the House of Lords. Since the 1970s, the House of Lords has developed a number of permanent committees (Rogers & Walters, 2015), indeed before then it was very much a chamber orientated House (Norton, 2013). House of Lords select committees tend to cover more crosscutting areas and do not shadow government departments (Norton, 2013). Indeed has been noted that Lords committees should make best use of Members knowledge, complement the work of the House of Commons and address cross-departmental issues (Russell, 2013). As with parliamentary questions, the focus is on depth rather than breadth. Select committees in the House of Lords are seen as prestigious, especially the Constitution, Science and Technology and Economic Affairs Committees and are designed with the expertise of Members in mind (Norton, 2013). The same rules apply to Lords committees as they do to Commons committees regarding the government responding to reports and they also face similar challenges that Commons committees do (Rogers & Walters, 2015). They tend to be consensual in nature due to the nature of the House of Lords and their membership is usually based on merit due the expertise present in the House (Norton, 2013). Ad hoc committees have also been created since the 1970s and also form an important part of the committee structure in the House of Lords and their number set up each session was expanded in 2012 (House of Lords Liaison Committee, 2012). They are set up temporarily and disband after the publication of their reports. They are popular among Peers as they allow topical issues to be examined without a permanent committee being appointed. As they are an established part of the committee structure in the House of Lords, there is competition in terms of Peers bidding for committees covering their preferred area being set up (Rogers & Walters, 2015). Russell argues that the culture of Lords committees is different to committees in the Commons, they tend to tackle more strategic and longer term issues. They also tend to have a less adversarial relationship with government departments (Russell, 2013)

As with House of Commons committees, House of Lords committees are regarded as an effective mechanism when it comes to scrutinising the government. It is therefore not surprising that the Hansard Society (2001), as with other academics such as Longley & Davidson, (1998), Shaw, (1998) and Strom, (1998) regard select committees as the main vehicle for promoting a culture of scrutiny and accountability.

Methodology

For the case study analysis, four select committee inquiries were chosen. The individual inquiries selected for this case study analysis were determined on the basis of the following criteria; they have undertaken a full post-legislative scrutiny inquiry; which took place between 2012-2017; and that Committee staff are still available for interview i.e. they have not moved on to work outside of Parliament. Moving on could be an obstacle as they will be outside of the institution and no longer have access to their files or information on inquiries and the interviews will require them to remember back up to 5 years.

The cases chosen are all from parliamentary committees, who have similar procedures and powers, who the government is required to respond to in terms of their reports and correspondence and they are independent of government. The following committees and inquiries were assessed:
For each committee a representative of the committee secretariat and membership who took part in the inquiries were interviewed, with their remarks for attribution. In total 8 semi-structured interviews were undertaken (two per committee).

In addition to the case study analysis, the recommendations of all post-legislative scrutiny inquiries between 2008 and 2017 were assessed to provide a comparison of the output of post-legislative scrutiny. These inquiries were located on House of Commons and House of Lords committee websites for all sessions between the 2005/2006 and 2016/2017 sessions. Following the location of these inquiries a content analysis of reports was undertaken in order to code committee recommendations and the government’s response to those reports. This involved the coding of twenty reports and twenty government responses.

The recommendations were selected from those appearing in the recommendation/conclusion section at the end of a committee's report. Recommendations were coded in terms of which organisations they were directed at, with the focus upon those directed at central government. Following this set of coding it was determined that some recommendations called for more than one action. In order to ensure that government responses could be matched correctly with recommendations, they were broken down into their various calls for action. Following this there were 468 recommendations in total. Once formal recommendations directed at central government had been identified each recommendation was coded on the type of recommendation made, using a coding scheme deployed by Russell and Benton (2011). Additionally the strength of change that the recommendation calls for was also coded. This employed a modified version of Russell and Benton’s (2011) coding scheme (no/small, medium and large change), with the scale increased to five on the basis of the types of changes that post-legislative scrutiny calls for. The medium action category was expanded into three separate categories to account for the differences in action classified under the medium category (e.g. calls for more resources versus calls for the amendment of primary legislation), as defined by Russell and Benton (2011). Additionally the no/small category has been separated into no action and small action, to account for the difference between no change and small change. The categories used to measure strength of recommendation for this study are; (0) no action, (1) small action, (2) medium a action, (3) medium b action, (4) medium c action and (5) large action (see appendices for a full breakdown of coding descriptors). All reports were double coded and a random sample of committee reports were coded outside of the research team to ensure coder reliability.

To code the government responses, each response was matched with the corresponding recommendation. As with the codes for type of recommendation and strength of recommendation, the codes for government acceptance were based upon those utilised by Russell & Benton (2011). Here the code descriptions have been altered slightly to ensure relevance for post-legislative scrutiny but the scale has not been increased as with strength of recommendation. The categories used to measure government acceptance are; (1) rejected outright, (2) rejected in part, (3) neither accepted nor rejected, (4) accepted in part and (5) accepted outright.
Differences in the selection of legislation

There are differences in how the two Houses select legislation to receive post-legislative scrutiny, as was noted earlier in the paper the creation of ad hoc committees in the House of Lords is determined by the House of Lords Liaison Committee however in the House of Commons post-legislative scrutiny is one of the core tasks of departmental select committees and as such with their independence it is up to them to determine when to undertake such scrutiny.

In relation to the House of Commons there are a number of reasons why a committee may decide to undertake post-legislative scrutiny and select the legislation that it does. The Culture, Media and Sport Committee’s inquiry into the Gambling Act 2005 was selected on the basis that they had received ‘a large number of representations from the gambling industry’ (Culture, Media and Sport Committee, 2012). The industry was concerned that legitimate commercial interests were being interfered with and that the Act was difficult to interpret due to it being overly complex (Culture, Media and Sport Committee, 2012). Philip Davies, a member of the committee, noted that “it is common for organisations to approach committees with their concerns and problems” (Interview with Philip Davies MP, former member of the Culture, Media and Sport Committee). So one factor impacting upon the decisions of committees in this area is industry and interest groups. Another factor here was the fact that the Department of Culture, Media and Sport is generally not a department that sponsors many bills and legislative changes often are tacked on to other bills from other departments e.g. school sports being added to bills from the Department for Education (Interview with the former Clerk of the Culture, Media and Sport Committee). So there was a feeling that “if they were going to do post-legislative scrutiny then the Gambling Act was the most obvious Act to do” (Interview with the former Clerk of the Culture, Media and Sport Committee). In relation to the above another factor to take into account here is the committee secretariat, as there is an acknowledgement that the committee needs to fulfil their core tasks and are therefore searching for legislation to review. However it should also be noted that legislatively intensive departments can also obstruct post-legislative scrutiny by introducing new legislation in the same area frequently which supersedes previous Acts. This is because if the Act is always changing it wouldn’t necessarily meet the systematic timeframes but also governments could claim that in the drafting of the new Act they undertook some sort of post-legislative scrutiny into the previous Act.

In terms of the Justice Committee’s inquiry into the Freedom of Information Act 2000, it was selected because the Committee had received the memorandum from the Ministry of Justice and these government produced memoranda do often Act as a trigger for post-legislative scrutiny. So there is a benefit to the governments system of departmental post-legislative review. The issue was also salient at that particular moment as “the government was proposing to make changes to the Act in terms of narrowing the scope of and restricting the use of it” (Interview with Lord Beith, former Chair of the Justice Committee). “The fact that the government wanted to make changes made it more urgent to get the report out as quickly as possible” (Interview with Lord Beith, former Chair of the Justice Committee) on the basis that the committee wanted to share its assessment of the challenges before the government made a decision. The Chair also noted that there was “a reasonably high level of interest among the Members” (Interview with Lord Beith, former Chair of the Justice Committee), particularly as the committee had previously assessed whether departments were ready for freedom of information. It is therefore clear that the memorandum, the government’s desire to change the Act and the Committee’s previous interest in the policy area, triggered the inquiry.
The Liaison Committee in the House of Lords is more proactive when it comes to post-legislative scrutiny, than its House of Commons equivalent, as it formally recommends which committees are set up and what topics are examined. As such the ad hoc committees themselves are set up to undertake scrutiny into a particular Act and have no choice over the matter once it has been created. The Liaison Committee, every autumn, asks Peers for their ideas on both post-legislative scrutiny and on other more general ad hoc committees. In the case of post-legislative scrutiny, “the committee office also does research to see what legislation is suitable for post-legislative scrutiny” (Interview with the Clerk of the House of Lords Liaison Committee). They do this to “check what has and what hasn’t been done by the Commons, to give greater choice to the Liaison Committee, when making a decision and to avoid overlap between the two Houses” (Interview with the Clerk of the House of Lords Liaison Committee). Included in this research is a search for published departmental post-legislative review memoranda that are sent to departmental select committees in the House of Commons. This is important as currently, no committees in the House of Lords receive these memoranda automatically. So there is a specific process that takes place in the House of Lords, however the limited post-legislative scrutiny they can undertake per session means more thought needs to go into selection.

In terms of the factors that the House of Lords Liaison Committee takes into account, one of the key factors that the Committee takes into account is whether the inquiry would “make the best use of the expertise of Members of the House of Lords” (Interview with the Clerk of the House of Lords Liaison Committee). Indeed one of the benefits of the second chamber is that it contains many people with expertise in different sectors, as such when undertaking post-legislative scrutiny it is important to tap into that expertise as well.

One other obvious criteria is whether the legislation or topic has been or is likely to be considered by a Commons committee. This is an important consideration; while resources are stretched it is important to ensure that there is as little overlap as possible between the two Houses. This is on the basis that if committees were assessing the same issue then it is a waste of resources but it would also raise the question of what else committees might be foregoing. However, this does raise questions about self-regulation. The House of Lords is limited by asymmetrical bicameralism and sees its role as adding value to the political process, as well as complimenting the work of the Commons rather than conflicting with it (Norton, 2017). However if it is basing its work of what it considers to be the House of Commons’ domain but the House of Commons is not undertaking this work then surely such scrutiny would be complimentary rather than conflicting with the Commons.

Timing is also another important factor, in the sense that whether it is the right time to review the legislation. The Clerk noted that “there is an optimal time for post-legislative scrutiny and that is five to ten years after it has come into force” (Interview with the Clerk of the House of Lords Liaison Committee). This is different from the time frame that the Cabinet Office guidelines suggests (three-five years) (Cabinet Office, 2012). Linking this back to the point about overlap between the two Houses, a downside of assessing too early is that it might deter committees from reassessing an Act at a future point, because it had received review before. Timing is therefore vital.

Other criteria noted by Clerks include that “the Act should be a major one that has reformed the law in a fairly substantial way and to avoid anything too politically controversial” (Interview with the former Clerk of the Select Committee on the Licensing Act 2003). This is because the focus of post-legislative scrutiny is more on the Act itself rather than looking at the underlying politics of the policy. However this does restrict the House of Lords in terms of potential post-legislative scrutiny inquiries. One other criterion the Clerk noted was to “avoid legislation that is about to be substantially amended” because there wouldn’t be much point in conducting a full review (Interview with the former Clerk of the Select Committee on the Licensing Act 2003). However that being said, surely there
is an argument that if an Act were to be amended (even through another Act), that a post-legislative inquiry might help to inform such amendments.

In relation to the two cases studies on the House of Lords, the Equality Act 2010 and the Licensing Act 2003 were selected because Members had put forward those suggestions. In relation to the Equality Act 2010, Baroness Thomas of Winchester put forward the proposal to look at the effect of the Equality Act on disability and as such the Liaison Committee limited the ad hoc committee to this. So far this is the only example where the Liaison Committee has restricted the scope of the inquiry but the Clerk admitted “it was the correct decision” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 Committee), as the Act was lengthy and complex. In the case of the Licensing Act inquiry, the Clerk noted that the Licensing Act met all the above criteria except for one, “it was not about to have major amendments but it had been amended quite frequently and that was one of the problems with it” (Interview with the former Clerk of the Select Committee on the Licensing Act 2003). Specifically the Act has seen a number of amendments “relating to the law enforcement aspects of licensing and the effects of licensing on public life and disorder” (Interview with the former Clerk of the Select Committee on the Licensing Act 2003). However what had not been amended was “the work of licensing committees in local government and that was really what the committee wanted to look at” (Interview with the former Clerk of the Select Committee on the Licensing Act 2003). In the case of the Licensing Act, the committee was able to undertake a full review and decide for itself which particular parts of the Licensing Act they wanted to address. The Clerk noted that “it was a detailed piece of legislation and that it was a fairly compressed topic, as such there was no difficulty in dealing with it in one inquiry” (Interview with the former Clerk of the Select Committee on the Licensing Act 2003).

So with the processes of selection being different between the two Houses there is a clear difference in how they approach the criteria used to select legislation for post-legislative scrutiny with the House of Lords paying attention to its role as a chamber that adds value and complements the work of the House of Commons. A difference in selection is important, as if the criteria were the same then they may well be selecting similar legislation for review which, with limited resources, would be a waste.

**Differences in the outputs of post-legislative scrutiny**

In terms of the breakdown of full act based post-legislative scrutiny, the House of Commons has undertaken twelve inquiries and the House of Lords has undertaken six. On average committees in the House of Commons produce 19 recommendations per report in comparison to 41 recommendations per report made by Lords committees. This difference can be accounted for by the ways in which the two different types of committees undertake post-legislative scrutiny. Unlike departmental select committees which have a large range of tasks, ad hoc committees have (usually) only the one task they were set up to undertake. As such they are able to dedicate a full session to the inquiry and produce more detailed scrutiny. This in turn would the lead to a larger, more in-depth report with a greater number of recommendations than departmental select committees can make in the comparatively short time they have available among their other functions. Benton & Russell (2013), whose study focused upon Commons select committees found in their study that Commons committees produced an average of 16 recommendations.

Table one shows the types of recommendations being made by both Houses of Parliament. Firstly the table shows that proportionally the ad hoc committees of the House of Lords are making more recommendations calling for action in relation to legislation. The table also shows that the ad hoc
committees of the House of Lords are producing more recommendations relating to policy and practice.

In relation to the production of more recommendations calling for action relating to legislation, this is not surprising on the basis that the ad hoc committees that the House of Lords appoint to undertake post-legislative scrutiny are usually based upon the best use of expertise of the House. Regarding the appointment of Peers to ad hoc committees there is a degree of self-selection, as Peers can register their interest with their chief whip to sit on the committee, with the final membership being determined by the Committee of Selection on the advice of the Whips and the crossbench convenor to reflect the general balance of parties in the House (Rogers & Walters, 2015). Additionally the House of Lords often takes a more technical approach to scrutiny, as it does with the full line by line scrutiny it undertakes during the formal legislative process. Such technical scrutiny and professional knowledge of whether the Act is working as intended could lead to more legislative recommendations.

Table 1: Type of Recommendations from each House

<table>
<thead>
<tr>
<th>Type of Recommendation</th>
<th>House of Commons</th>
<th>House of Lords</th>
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<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Policy and Practice</td>
<td>74</td>
<td>36</td>
</tr>
<tr>
<td>Research/Review</td>
<td>53</td>
<td>26</td>
</tr>
<tr>
<td>Related to legislation</td>
<td>25</td>
<td>12</td>
</tr>
<tr>
<td>Disclosure</td>
<td>22</td>
<td>11</td>
</tr>
<tr>
<td>Recommendations from other bodies</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Co-operation</td>
<td>8</td>
<td>4</td>
</tr>
<tr>
<td>Funding and resources</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Campaigns/Public information</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Guidance</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>205</strong></td>
<td><strong>100</strong></td>
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With regards to ad hoc committees producing more policy related recommendations, this could be a reflection that the House of Lords is willing to pressure the government with stronger recommendations on the basis that they can emphasise their expertise and experience. This is especially true if there are Members on a committee with particular experience of working in the field under examination which would lead such reports and recommendations to carry more weight. Additionally House of Lords committees are not as prominent in the media as departmental select committees are, as such they may feel as if there is no need to develop a strategy of producing weaker recommendations as outlined by Benton & Russell (2013) and (Aldons, 2000) because they do not need to project influence as much. However it can be argued that departmental select committees have expertise as they shadow government departments and as such Members go on to develop subject expertise. It can also be argued that there is a different type of expertise that comes from their representative role and the insights that could bring into the operation of some legislation (Russell, 2013).

Finally there is also a difference in terms of recommendations calling for research and review, with the Lords calling for fewer. This could be down to the fact that committees in the Lords are able to hold an inquiry over an entire session and as such have more time to undertake more detailed review and potentially reach firmer conclusions than committees in the Commons.
Table 2: Strength of Recommendations made from each House

<table>
<thead>
<tr>
<th>Strength of Recommendation</th>
<th>House of Commons</th>
<th>House of Lords</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>No</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>Small</td>
<td>89</td>
<td>40</td>
</tr>
<tr>
<td>Medium (A)</td>
<td>40</td>
<td>18</td>
</tr>
<tr>
<td>Medium (B)</td>
<td>62</td>
<td>28</td>
</tr>
<tr>
<td>Medium (C)</td>
<td>21</td>
<td>9</td>
</tr>
<tr>
<td>Large</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>224</td>
<td>100</td>
</tr>
</tbody>
</table>

Table two shows that there is only a limited difference between the House of Commons and the House of Lords in relation to the strength of the recommendations that committees in both Houses are producing. This suggests that there is some consistency here in terms of the strength of recommendations that are produced in both Houses. It is argued by Aldons (2000) and Benton & Russell (2013) that committees use a strategy of producing weaker recommendations so that the government accepts more of them and as a result they appear more influential. While it is not possible to conclude that this is what is happening, the data from both Houses is showing what you might expect it to show if it were. 62% of House of Commons recommendations called for no, small or medium a action in comparison to 56% of House of Lords recommendations, so a majority of recommendations in both Houses are calling for weaker style recommendations. This difference could be explained by the more direct relationship that departmental select committees in the House of Commons have with government departments than ad hoc committees in the House of Lords. With a closer working relationship there may be a reluctance to make recommendations potentially deemed unrealistic by the government which could impact upon that working relationship. As without a productive relationship committees risk seeing their recommendations ignored (White, 2015).

Table one showed a larger proportion of recommendations calling for some kind of legislative action coming from the House of Lords, which are more likely to be classed as stronger recommendations. However with few recommendations calling for large change and the same proportion of recommendations calling for medium c change, it appears that the legislative recommendations that the House of Lords are making are not extreme in their strength (e.g. calling for the repeal of an Act or new legislation).

Table 3: Government acceptance of recommendations by House

<table>
<thead>
<tr>
<th>Acceptance of Recommendations</th>
<th>House of Commons</th>
<th>House of Lords</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>No response</td>
<td>37</td>
<td>17</td>
</tr>
<tr>
<td>Reject outright</td>
<td>51</td>
<td>23</td>
</tr>
<tr>
<td>Reject partly</td>
<td>17</td>
<td>8</td>
</tr>
<tr>
<td>Neither accept nor reject</td>
<td>32</td>
<td>14</td>
</tr>
<tr>
<td>Accept partly</td>
<td>17</td>
<td>8</td>
</tr>
<tr>
<td>Accept outright</td>
<td>70</td>
<td>31</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>213</td>
<td>100</td>
</tr>
</tbody>
</table>
Table three shows there were fewer recommendations that did not receive a response from the government in the House of Lords than there were in the House of Commons. The table also shows a greater proportion of House of Lords recommendations being rejected outright. Additionally the data shows a greater proportion of recommendations being accepted outright in the House of Commons than in the House of Lords.

With regards to fewer Lords’ recommendations receiving no response, this is surprising to some extent on the basis that ad hoc committees dissolve following the publication of their report and as such the committee is not constituted to receive the response, scrutinise it and follow up with the government like departmental select committees can. However the House of Lords Liaison Committee does follow up on behalf of ad hoc committees on priority recommendations. It could also be down to the Lords producing clearer recommendations on the basis that committees are more likely to reach a consensus due to the nature of the House and its membership. The reasons for a greater proportion of recommendations receiving no response in the House of Commons could be down to the government wanting to kick the issue into the long grass on the basis that departmental select committees can hold government departments directly accountable. It could also be an indication of departmental select committees not paying much attention or not having a follow up procedure like the House of Lords Liaison Committee when it comes to government responses, as such the government may feel like it doesn’t need to respond as effectively. It should be noted however that there is an issue with the ability of departmental select committees to undertake follow up work on top of the other inquiries and business they are trying to get through. It could be an issue of workload and the resources available to committees here. In relation to a greater proportion of Lords’ recommendations being rejected outright, part of this difference might be explained by the higher proportion of recommendations receiving no response in the House of Commons (i.e. the government might ignore recommendations so it doesn’t have to reject them). Taking into account both accepted in part and in full, the House of Commons sees a similar proportion accepted as the House of Lords (39% and 42% respectively). There is a difference however between the combined percentages for rejected in part and in full which shows 31% and 39% respectively. Overall the House of Lords sees more of a balance in the percentage accepted and rejected in comparison to the House of Commons which sees more recommendations being accepted than rejected.

**Differences in the follow-up to government responses**

In relation to the House of Commons it has been noted by all three committees that committees in general are not good at looking closely at government responses with the interviewees from the Gambling Act inquiry going as far as to say that this is because by the time they have produced their report they are tired of the issue (Interview with the former Clerk of the Culture, Media and Sport Committee; Interview with Philip Davies MP, former Member of the Culture, Media and Sport Committee). However even if the Committee themselves don’t focus upon the government response, the staff do (Interview with the former Clerk of the Culture, Media and Sport Committee). After all Members will have a number of responsibilities and as such would need the staff to pick through the response and provide them with a briefing on the issue. As such perhaps it is not too much of a revelation that Members do not pay too much attention to the response as a whole.

In relation to the Culture, Media and Sport Committee’s inquiry into the Gambling Act, it was noted that “there was the potential to issue a special report addressing the response, but the Committee didn’t take that option this time, instead they opted for a magisterial silence” (Interview with the
former Clerk of the Culture, Media and Sport Committee) suggesting they were standing by their report, which is more dignified than getting into a war of words with the government. While this may look like backing down to outsiders, it might more accurately be named ‘picking your battles’. Ultimately the Committee was more “interested in what the government had agreed to and what action they were going to take” (Interview with the former Clerk of the Culture, Media and Sport Committee).

In terms of the Committee’s follow up of the inquiry the Clerk noted that the Committee was “interested in following up on the bits of legislation that were brought forward in relation to online gambling” (Interview with the former Clerk of the Culture, Media and Sport Committee). The Committee also followed it up with evidence with the Gambling Commission, and trawled through previous reports to find any recommendations they wanted to follow up (Interview with the former Clerk of the Culture, Media and Sport Committee). Committees tend to take a holistic view with regards to the fact that a lot of the work they do will overlap with other inquiries. “They don’t want to lose sight of what they have recommended but they don’t necessarily think it is helpful to get a Minister in and go through a list of recommendations” (Interview with the former Clerk of the Culture, Media and Sport Committee). It is clear that follow up in this case is very ad hoc, while in an ideal world it would be more effective for all recommendations to be followed up on, this would take up time and resources that are not available.

In relation to the inquiry into the Freedom of Information Act, the government’s response to the Committee’s report “wasn’t particularly effusive and the government backed off from making changes” (Interview with the former committee legal specialist of the Justice Committee). The setting up of a Freedom of Information Commission in July 2015 (Rosenbaum, 2016) meant it was put on hold so “there was no reason to do much with the government response initially” (Interview with the former committee legal specialist of the Justice Committee). The lack of an enthusiastic response might suggest that the Committee didn’t recommend what the government wanted, hence the establishment of the Commission. In the end, the Commission concluded that the Act was “working well” (Rosenbaum, 2016) and only recommended minor tweaking (Worthy, 2017), to the surprise of many, as the setting up of the Commission and its remit were deemed controversial (Worthy & Hazell, 2016).

The Committee didn’t do any official follow up to the inquiry. However the option was always available to the Committee if it wanted to (Interview with the former committee legal specialist of the Justice Committee). This isn’t perhaps surprising on the basis that there wasn’t a great deal to respond to, that and the Freedom of Information Commission was undertaking further scrutiny of the freedom of information regime. The Chair added that “it wasn’t necessary at that stage to follow up because the government did back off and left things as they were” (Interview with Lord Beith, former Chair of the Justice Committee), however they did regularly see the Information Commissioner. The Committee Lead noted that “if they had recommended some significant amendments they would have followed up on how those amendments had played out” (Interview with the former committee legal specialist of the Justice Committee) and how the government had used the cover of the recommendations to make amendments to the Act.

A committee’s reaction to a government response is usually limited unless something has really bothered them about it and the focus, as you might expect, is on the positive things that government said it would do in response to the report. When committees in the Commons respond it is usually
through written correspondence or through routine oral evidence sessions. However this is different to the House of Lords.

Ad hoc committees cease to function once they report and are therefore not formally constituted when the government’s response arrives and when it comes to following up. Thus the Lords Liaison Committee also plays a role in the follow up of post-legislative recommendations with the government. Usually one year after the publication of the report or one year after the government’s response to the report has been published, to allow the government some time to implement the recommendations. The fact that “ad hoc committees dissolve after the publication of their report is seen as one of the weaknesses, if not the main weaknesses of House of Lords ad hoc committees” (Interview with the Clerk of the House of Lords Liaison Committee). This severely limits the ability to do follow up, which is in sharp contrast to a sessional committee. Sessional committees are appointed usually for a full Parliament, as such they can have a rolling work programme, which if the committee is so inclined can involve a series of follow up evidence sessions.

To combat the challenges facing follow up, not just in terms of post-legislative scrutiny, but for other ad hoc committees also, the Liaison Committee has developed various methods to follow up on behalf of ad hoc committees. The main method is to follow up on specific recommendations in writing with the relevant government department. “At the end of each inquiry the Liaison Committee will ask the committee to place an asterisk next to or otherwise highlight the recommendations they want to be followed up” (Interview with the Clerk of the House of Lords Liaison Committee). The reason for identifying the most important recommendations is Lords committees, perhaps partly due to the length of their inquiries, frequently produce a large number of recommendations. “A downside to that is government responses can then look as if they’re accepting quite a lot of recommendations but not necessarily the most important ones” (Interview with the Clerk of the House of Lords Liaison Committee). Another downside is that it may signal to the government that there are going to be certain recommendations that the committee won’t follow up on and as such create an incentive for inaction in these areas.

The Clerk also noted that she and her team “do not have the civil service contacts and relationships that Chairs and their secretariat build up during a nine month inquiry” (Interview with the Clerk of the House of Lords Liaison Committee). The expertise is held by the secretariat who by this point have moved on to another committee, which makes the process even more challenging. However there is still guaranteed follow up on the most important recommendations. As was noted above, follow up in the House of Commons rarely goes beyond routine questioning of Ministers at an annual oral evidence session or written correspondence. That being said potentially with powers to reconvene, the ad hoc committees in the Lords could lead the way in terms of conducting follow up. However it should also be noted that Members themselves can take up the cause and table oral and written questions on the issue, and they can also table relevant amendments to legislation. Despite the criticisms, there is some, albeit limited follow up with the government, which potentially wouldn’t be there without the committee. In terms of the role that the Liaison Committee plays following up priority recommendations, the Clerk of one of the ad hoc committees noted that “while some formal follow up is better than none”, he doesn’t think “it makes a great difference” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability). “The Chairman of the Liaison Committee writes to the relevant Minister and the Minister writes back but that is the end of it” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability).
Indeed it is questionable how effective such a mechanism can be as through writing a single letter is unlikely to apply much pressure on the government to act. The Clerk noted that unless the pressure applied to a Minister is sufficient then there’s nothing much further that can happen, whereas a sessional committee can ask a Minister to come back and give evidence.

In relation to both case studies on the House of Lords, Clerks noted that “although the committees ceases to exist, the Members continue to be Members of the House of Lords and retain their interest” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability). This was also supported by Baroness McIntosh who noted that she would continue to ask questions relating to the inquiry (Interview with Baroness McIntosh, former Chair of the Select Committee on the Licensing Act 2003) and Baroness Deech who noted the Equality Act inquiry sought to continue work with the House of Commons Women and Equalities Committee to further their recommendations (Interview with Baroness Deech, former Chair of the Select Committee on the Equality Act 2010 and disability). When government responses come they are circulated to Members by the Clerk. There is clearly an informal process going on here, although they do not have the powers of the committee at hand, if Members who retain an interest can organise and apply pressure themselves then they might achieve more than if they worked independently. One of the Clerks views the lack of being able to reform as a committee following the government’s response (and potentially later to follow up) “as a major failure of post-legislative scrutiny in the Lords” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability).

The Liaison Committee has also experimented with debates on reports. However a limitation of this is that the time on the floor of the House is limited. The Clerk of the Liaison Committee noted that “there was nothing she or the Committee could do that would ever likely be enough for Members in general” (Interview with the Clerk of the House of Lords Liaison Committee). The Liaison Committee here has shown initiative in terms of identifying a weakness in the processes and developing ideas to try and provide mechanisms for some follow up. That being said a written letter to a department is unlikely to be the most effective way of following up with the government, at least not as effective of having a Minister in front of a committee for questioning. One of the Clerks noted that “is process doesn’t necessarily take you any further forward in terms of getting the government to agree to your recommendations unless you get a commitment from them” (Interview with the former Clerk of the Select Committee on the Equality Act 2010 and disability). Floor time in the House potentially brings publicity both within and outside the House, but it is questionable how much publicity floor time in the House will bring. Indeed while the Chair acknowledged that it gave added publicity, she said “it didn’t really do anything to further the recommendations” (Interview with Baroness Deech, former Chair of the Select Committee on the Equality Act 2010 and disability). The chair of the Licence Act inquiry noted that the debate didn’t generate much media interest at the time (Interview with Baroness McIntosh, former Chair of the Select Committee on the Licensing Act 2003). Additionally, a skilled Minister is probably not going to give anything away unless they want to.

Conclusion

To conclude there are a number of differences in the way legislation is selected by both Houses of Parliament. In the House of Commons there is a focus upon representations from outside organisations, the legislative intensity of government departments, the production of memoranda and the salience of issues. This is not surprising from the House of Commons as sessional subject
committees will have better developed relationships with interest groups and the salience of issues will be of more importance to MPs facing re-election than Peers who don’t. Additionally the memoranda play an important role in triggering inquiries but these are not available in the same way in the House of Lords. The fulfilment of core tasks (or at least attempting too) also appears to be a factor with a close look at the legislative intensity of departments, which ultimately determines the ability of departmental select committees to undertake post-legislative scrutiny. In relation to the House of Lords, the focus is upon its subservient role in the UK Parliament. For example it focuses on considerations of whether committees in the Commons are likely to undertake post-legislative scrutiny. It is also more focused upon the more technical aspects such as whether the timing is correct, as they currently do not receive government memoranda automatically. There is also a focus upon whether it is a major piece of legislation and whether they have the expertise to do it well. This of course stems from its membership but also the length of inquiries that can take place.

This paper has also highlighted the differences between the two Houses of Parliament in terms of the output of their recommendations. In terms of the average number of post-legislative scrutiny recommendations produced by each House, the House of Lords on average produces 41 per report and the Commons, 19 per report. This will be a reflection on the amount of time that the House of Lords can spend on each inquiry. The data also showed that the strength of recommendations produced by both Houses were broadly similar. However there were some differences in type with legislative style recommendations being more likely to come from the House of Lords.

In terms of follow up the research showed that, if committees in the House of Commons do follow up, then they use convenient methods, such as written correspondence or annual oral evidence sessions, rather than undertaking a follow up inquiry. This makes sense due to the time and resource pressures on House of Commons committees. The Freedom of Information inquiry didn’t follow up but that was due to the nature of the inquiry asking for no action to be taken, as no action was taken, the Committee saw no need to follow up. But this is completely different to the House of Lords, as expected, due to the procedural nature of ad hoc committees that undertake post-legislative scrutiny. The House of Lords Liaison Committee plays an important role in the follow up of these inquiries in the House of Lords, due to ad hoc committees dissolving once a report has been published. The process of follow up is not without challenges either. While it does provide the only follow up likely, at the moment in the Lords (again due to the nature of ad hoc committees), at the same time it is only limited to written follow up. However changes could be made to make the process run more smoothly, such as allowing ad hoc committees to re-form after a report has been published, and perhaps a year later for follow up.
Bibliography


