The Law Commission
Consultation Paper No 178

POST-LEGISLATIVE SCRUTINY

A Consultation Paper

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 22 December 2005, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by email to the above address, in any commonly used format.

All responses will be treated as public documents in accordance with the Freedom of Information Act 2000, and may be made available to third parties.

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1 Until 31 December 2005.

2 With effect from 1 January 2006.

THE LAW COMMISSION

POST-LEGISLATIVE SCRUTINY

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PART 1
INTRODUCTION

STRUCTURE OF THE PAPER

1.1 The busy reader who wants to go straight to the meat of this consultation paper will find it in Parts 6 and 7. In those Parts, we look at the purpose of post-legislative scrutiny and possible post-legislative scrutiny mechanisms.

1.2 Before that, in this Part, we set out our terms of reference, then in Part 2 we consider published research and current thinking on post-legislative scrutiny. This includes contributions to the debate from Parliamentarians and others. In Part 3 we examine existing forms of post-legislative scrutiny, which are undertaken by Government departments, Parliamentary committees, the Law Commission and other bodies. In Part 4 we look at the experience of pre-legislative scrutiny and its potential relationship with post-legislative scrutiny. Part 5 is a brief summary of some forms of post-legislative scrutiny that are undertaken in other jurisdictions, highlighting innovative methods. As mentioned, in Part 6 we examine the purpose of post-legislative scrutiny by describing the drivers for it and its benefits. In Part 7 we explore different post-legislative scrutiny mechanisms. In Part 8 we consider post-legislative scrutiny of delegated legislation. Part 9 analyses the scope for post-legislative scrutiny of European legislation. Part 10 contains a list of questions for consultees.

TERMS OF REFERENCE

1.3 On 29 October 2004, the House of Lords Select Committee on the Constitution published its report, 'Parliament and the Legislative Process.'[1] The Committee recommended that in order to ensure proper scrutiny of legislation most Acts, other than Finance Acts, should be subject to some form of post-legislative scrutiny. The Government in its Response[2] published on 20 April 2005 stated that it was sympathetic to the principle but that post-legislative scrutiny could mean anything from a wide-ranging policy review to a quite limited and technical evaluation of the effectiveness of the drafting. The Government stated that it had asked the Law Commission to undertake a study of the options.

1.4 In our Ninth Programme of Law Reform[3] we agreed to carry out this work and stated that:

> As the body charged with keeping all the law under review we naturally are concerned both at the volume of legislation that is passed by Parliament each year and whether it accurately gives effect to the policy aims avowed. We are also concerned if the law has unintended consequences which makes the law in general less certain and more complex.[4]

1 (2003-04) HL 173-I.

2 (2004-05) HL 114.

3 (2005) Law Com No 293.

4 Above, p 24.

1.5 Work began on the project in July 2005. The project aims to define the purpose of post-legislative scrutiny, by which we generally mean the review of Acts of Parliament once they have been brought into force. The project will consider whether there is a need for scrutiny of this kind and aims to identify the value or public benefit that would be derived from such scrutiny. Further questions for consideration include which legislation might be subject to such scrutiny, what form the scrutiny might take, when and by whom it might be undertaken and who should be responsible for making decisions about all of these issues. We also consider existing forms of post-legislative scrutiny and the experience of pre-legislative scrutiny. The main focus of the project is on primary legislation but we also consider delegated legislation and European legislation.

1.6 We aim to publish our final Report in June 2006. Due to the nature of this project, our aim is not to be prescriptive. Rather, our approach will be to suggest and analyse options for consideration by Parliament. We hope that this project will generate debate and inform future discussion and serious consideration of post-legislative scrutiny.

1.7 An open invitation for input on the scope of the project has been on our website since mid-September 2005. We have targeted and received valuable suggestions from Parliamentarians, Parliamentary counsel, Parliamentary clerks, Government departments, academics and others, all of whom have been able to offer expertise and insights into different aspects of legislative scrutiny and the Parliamentary process. This approach has been essential for this project, which is concerned more with the legislative process than with substantive law. Critically, this early consultation has generated ideas that we have distilled and set out in this paper for wider consideration.

1.8 On our website, we posed the following questions:

- How should post-legislative scrutiny be defined?
- What is the purpose and value of post-legislative scrutiny?
- Which types of primary legislation should be subject to post-legislative scrutiny?
- Should European legislation and delegated legislation also be subject to post-legislative scrutiny?
- What should be the benchmarks for ‘successful’ legislation?
- What form should the scrutiny take?
- By whom should it be undertaken?
- When should it be undertaken?
- Who should be responsible for making decisions about all of these issues?

We addressed these questions in our early discussions, and the answers we received have shaped our thinking in this paper.

PART 2
BACKGROUND

INTRODUCTION

2.1 Parliament has experienced many changes in recent times. In terms of structure, Parliament is now much more committee-orientated. In 1979, departmental select committees were created in the House of Commons in order to examine the expenditure, administration and policy of the relevant Government department to which each committee relates. There is also an increased number of committees in the House of Lords. Another change is the practice of publishing some Bills in draft form. This allows Parliament the opportunity to undertake pre-legislative scrutiny; the scrutiny of Bills before they are formally introduced.

2.2 The extension of Parliamentary scrutiny at the pre-legislative stage has not been complemented by a similar development at the post-legislative stage.[1] As explained in Part 3, various forms of post-legislative scrutiny do take place but there are no formal mechanisms in place to trigger systematic scrutiny of measures following enactment.

2.3 Over the years, Parliamentary committees and others have visited and revisited the idea of more systematic post-legislative scrutiny and usually recommended it as a sensible Parliamentary reform, sometimes without going into any more detail than that. This Part summarises the Parliamentary thinking on post-legislative scrutiny over the last 35 years.

2.4 In the Parliamentary session of 1970-71, the House of Commons Select Committee on Procedure published a report, The Process of Legislation[2] which included consideration of the need for "Post-legislation Committees". The Procedure Committee's background reasoning is perhaps even more pertinent today than it was 35 years ago:

> Pressure of Government business in each session often reduces the chance of securing a place in the legislative programme for a Bill to amend an Act passed within recent years. For this reason, years may pass before Parliament has an opportunity to consider legislation embodying amendments to a recent Act, the need for which has become imperative following, for example, a judgment in the courts, difficulties in interpretation, impracticability in everyday use, or the nature of the delegated legislation made under its authority.[3]

[1] Philip Norton, *Parliament in British Politics* (2005) p 103.

[2] (1970-71) HC 538.

[3] (1970-71) HC 538, p viii.

2.5 The Procedure Committee considered a proposal made by the Study of Parliament Group that should the need arise, a select committee should be appointed ad hoc to examine the working of a statute within a short period after its enactment. It was envisaged that such a committee would be empowered to take evidence from officials and outside witnesses. The committee would then make recommendations or consider the draft of an amending Bill produced by Government.

2.6 The Procedure Committee noted that the proposal for post-legislation committees was supported at that time by the Leaders of both Houses and by the Opposition Chief Whip in the House of Commons. It recommended that:

> Post-legislation committees should be appointed where necessary to enquire into difficulties in the application or interpretation of statutes and consequent delegated legislation within a short period of their enactment; where appropriate, such committees should be appointed as joint committees of both Houses of Parliament.[4]

2.7 In 1976, the Study of Parliament Group submitted evidence to the same Commons committee. The Group observed that:

> [Parliament] lacks systematic feedback from those groups and individuals affected by laws to enable it to learn from its mistakes. Bills tend to be treated as self-contained entities, virtually in isolation from what has gone before and from what may happen later, whereas most Bills are only an exclamation point in a continuous process of developing and applying policy.[5]

2.8 The Group suggested that selective monitoring should be done by specialised standing committees with investigatory powers. In contrast, the 1970-71 House of Commons Procedure Committee had recommended ad hoc select committees with members drawn from the original standing committee on a Bill.

2.9 In 1990, the Procedure Committee[6] agreed that departmental select committees should pay more attention to the ways in which legislation is implemented a few years after it comes into effect.

[4] (1970-71) HC 538, p xxxiii.

[5] Study of Parliament Group, Evidence on House of Commons Procedure, 1976, para 19 (http://www.spg.org.uk/spgev15.htm) (last visited 10 January 2006).

[6] Select Committee on Procedure, The Working of the Select Committee System (1989-1990), HC 19-I, paras 311 and 315.

2.10 In November 1992, the Hansard Society Commission on the Legislative Process, chaired by Lord Rippon of Hexham, published a report, Making the Law. In the report, the Commission recommended that "the operation of every major Act (other than Finance Acts and some Constitutional Acts) and all the delegated legislation made under it, should be reviewed some two or three years after it comes into force".[7] This conclusion reflected the "strong feeling" in the evidence collected that Parliament itself could do more to review how legislation is working out in practice.[8]

2.11 The Select Committee on Modernisation of the House of Commons was appointed in June 1997. In its First Report, published in July 1997, the Committee stressed that one of the essential criteria of any effective legislative scrutiny system is a proper method of monitoring legislation which has come into force.[9] The Committee concluded that the Liaison Committee[10] should encourage the monitoring by departmentally-related select committees of legislation newly in force. The Modernisation Committee also suggested that the option should remain open for the appointment of ad hoc select committees to consider and report on the operation of a single Act affecting more than one Government department.

2.12 During 2001-2002, Robin Cook was Leader of the House of Commons and Chairman of the Modernisation Committee. During this time, he submitted a Memorandum to the Modernisation Committee in which he observed:

> A key weakness in Parliament's scrutiny of legislation is that there is no consistent arrangement to monitor the implementation of laws once they have been passed… . Yet Members of Parliament, with their extensive constituency experience, are well-placed to monitor how new legislation is working out in practice.[11]

[7] Making the Law, The Report of the Hansard Society Commission on The Legislative Process (1992), p 95, para 393.

[8] Above, para 392.

[9] Select Committee on the Modernisation of the House of Commons, First Report (1997-98) HC 190.

[10] The Liaison Committee comprises all the chairmen of the select committees in the House of Commons. They meet regularly to look at the work of their respective committees and decide which select committee reports the House of Commons should be debating.

[11] Select Committee on Modernisation of the House of Commons, A Reform Programme for Consultation, Memorandum submitted by the Leader of the House of Commons (2001-02) HC 440.

2.13 The Conservative Party also put forward proposals for reform. Strengthening Parliament[12] was published by the Commission to Strengthen Parliament, chaired by Lord Norton of Louth. The Commission noted that too little scrutiny is undertaken of the effect of legislation and suggested that departmental select committees should be encouraged to engage in post-legislative scrutiny. The Norton Commission also envisaged a role for the House of Lords and recommended the creation of one or more committees to monitor the impact of legislation.

2.14 In 2003, the Hansard Society began a review of the Rippon Commission Report, Making the Law. The review resulted in a series of published papers. The sixth paper was published in May 2005 and considered post-legislative scrutiny. It concluded that, rather than leaving the monitoring of legislation to chance, "it should become a core function of Parliament".[13]

2.15 The Liaison Committee agreed in its Annual Report for 2002, published in April 2003, that one of the core tasks for select committees should be "to examine the implementation of legislation and major policy initiatives".[14] The Liaison Committee recommended in its Annual Report for 2003 that Ministers should "commit themselves to greater willingness to accept amendments to Bills requiring some form of regular report to Parliament – or better still to provide for such reports in Bills presented to Parliament".[15] In its Annual Report for 2004, it observed that "committees are well-suited to undertaking post-legislative scrutiny, in part because they can be more candid than government-led or government-sponsored reviews, and more responsive to the views of stakeholders".[16]

2.16 The House of Lords Constitution Committee continued the calls for reform with the publication of its report in October 2004, Parliament and the Legislative Process.[17] In the report, the Committee attached great importance to its recommendations on post-legislative scrutiny. These may be summarised as follows:

- Explanatory Notes to each Bill should include a clear explanation of the purpose of the Bill accompanied by the criteria by which the Bill, once enacted, can be judged to have met its purpose (para 87).

- Most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner (para 180).

[12] The Commission to Strengthen Parliament, Strengthening Parliament (July 2000), p 44.

[13] Hansard Society, Issues in Law Making Briefing Paper 6, Post-Legislative Scrutiny (May 2005), p 7.

[14] The Liaison Committee Annual Report for 2002 (2002-03) HC 558, para 13.

[15] The Liaison Committee Annual Report for 2003 (2003-04) HC 446, para 59.

[16] The Liaison Committee Annual Report for 2004 (2004-05) HC 419, para 74.

[17] Select Committee on the Constitution, Parliament and the Legislative Process, (2003-04) HL 173-I.

- The relevant Government departments should review each Act using the criteria in the Explanatory Notes and consultation with interested parties. The review should be deposited with the appropriate departmental select committee (paras 189 and 190).

- The Parliamentary budget should allow committees to commission research on the effect of an Act. Committees should have discretion to undertake evidence-taking inquiries themselves, if deemed necessary, in the light of the departmental review or the research that they have commissioned (paras 191 and 192).

2.17 The Government responded on 7 April 2005.[18] The key points made were as follows:

- The Government accepted that there is a case for more post-legislative scrutiny. In general, the Government agreed that six years after a Bill's enactment would provide a reasonable time-frame for review (para 47).

- The Government was not persuaded that it would be appropriate to include in the Explanatory Notes the criteria by which the Bill, once enacted, can be judged to have met its purpose. A more appropriate place to outline such criteria might be in policy documents or Parliamentary debates (para 35).

- The Government accepted that Parliament has a role to play in post-legislative scrutiny (para 48) and considered that any departmental review should include consultation with interested parties (para 49). It believed that the undertaking of inquiries is a matter for Parliamentary committees themselves (para 51) and that the use of the Parliamentary budget for such scrutiny is a matter for both Houses (para 50).

2.18 The Constitution Committee's report and the Government's response were debated in the House of Lords on 6 June 2005.[19] The following quotations provide a flavour of the debate. The speakers who mentioned post-legislative scrutiny were all in favour of it, and the debate demonstrated cross-party support for the principle of post-legislative scrutiny.

- Lord Norton of Louth (Conservative and Chairman of the Constitution Committee at the time of its report): "The implementation stage of legislation constitutes a Parliamentary black hole. By addressing it, by moving forward in a way similar to that in respect of pre-legislative scrutiny, there is the potential to develop a new and significant role for Parliament, ensuring that it plays a role at all stages of the legislative process" (col 752).

[18] Select Committee on the Constitution, Parliament and the Legislative Process: The Government's Response (2004-05) HL 114.

[19] Hansard (HL), vol 672, no 10, cols 728-770.

- Lord Holme of Cheltenham (Liberal Democrat and present Chairman of the Constitution Committee): “In our forward rush as legislators, relatively little time is spent either in Whitehall or Westminster checking whether the effects of any given Bill were those intended as opposed to the time spent on yet more initiatives… . Part of the key to improvement is to ensure absolute clarity of aim in any new Bill” (col 731).

- Lord MacGregor (Conservative): “As regards post-legislative scrutiny, I am not prescriptive about how and when that should be done but as a general principle it is highly desirable. It is also important to get the objectives and check-list of legislation in the Explanatory Notes so that there is a check-list later in order to see how well it has worked out in practice… . We are all arguing now for regulatory impact assessments for statutory instruments and post-regulatory impact assessments. I believe that it should apply to legislation. Ministers and officials will know that later they will be held to account and that would better concentrate their minds” (cols 745-6).

At the end of the debate, Baroness Amos (Leader of the House of Lords) expressed the Government’s interest in post-legislative scrutiny and announced that the Law Commission had been asked to undertake a study into how post-legislative scrutiny could best be achieved (col 769).

PART 3
EXISTING FORMS OF POST-LEGISLATIVE SCRUTINY

3.1 In this Part, we analyse existing forms of post-legislative scrutiny undertaken by Government departments, Parliamentary committees, the Law Commission, the courts and others. The overall picture is that post-legislative scrutiny does take place but it is not systematic and there are many gaps. It is apparent that post-legislative scrutiny means different things to different people in terms of its objectives and the mechanisms adopted to carry it out. This Part illustrates those differences by providing a picture of the different types of post-legislative scrutiny undertaken, ranging from reviews which examine the effect of the implementation of a particular Act or provision within an Act, to much wider-ranging policy reviews.

REVIEWS BY GOVERNMENT DEPARTMENTS

3.2 Governments undertake a large amount of review work. Reviews can take different forms. Generally, they consider the implementation of policy; legislation is just one way in which policy can be implemented. Departmental reviews can be very useful but there are no formal systems in place for departments to review the majority of legislation once it has been brought into force.

3.3 Many reviews are wide-ranging policy reviews which do not have legislation as their focus. However, there are examples of discrete reviews which focus on reviewing the operation of an Act of Parliament or part of an Act.

3.4 The Home Office review of the Protection from Harassment Act 1997 was published as a research study entitled, An evaluation of the use and effectiveness of the Protection from Harassment Act 1997.[1] The review in that case resulted from quantitative and qualitative research, which analysed the numbers of prosecutions and practitioners' views on the operation of the whole Act.

3.5 The Department for Constitutional Affairs Post-project Review & Benefits Evaluation of the Asylum and Immigration Tribunal, illustrates a review of the implications of part of an Act. The Tribunal was set up under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 in order to unify the appeal system. This review concentrates on the operation of the Tribunal set up under the Act; setting up the new Tribunal was only one of the aims of the Act.

[1] Home Office Research Study 203 (2000).

3.6 Departments sometimes review whole areas of law. For example, the Women and Equality Unit at the Department of Trade and Industry ("DTI") is currently working on a Discrimination Law Review. The terms of reference state that the review will address long-held concerns about inconsistencies in the current anti-discrimination legislative framework.[2] The aim of the review is to produce a series of proposals for a coherent framework for this area of law with a view to bringing forward a single Equality Bill.

3.7 Sometimes, Departments commission academic research into Acts of Parliament or areas of law. The DTI recently published a review of research into the impact of employment relations legislation[3] which was carried out by academics at the Universities of Warwick and Sheffield. The purpose of the review was to assess what impact employment legislation introduced since 1997 had had on employers, employees, the economy and employment relations.

3.8 Departments may also keep certain provisions or Acts of Parliament under continuous review. For example the Human Rights Unit within the Department for Constitutional Affairs keeps the implementation of the Human Rights Act 1998 under continuous review.

3.9 Departmental reviews can be triggered in different ways. The Government may commit to a review of an Act, or part of an Act or area of law in a White Paper or other policy document. Sometimes a Ministerial undertaking is made during the passage of a Bill. For example, a commitment was made to Parliament during the passage of the Crime and Disorder Bill to review Anti-Social Behaviour Orders after two years.[4]

3.10 The outcomes of departmental reviews vary. The reviews are often published but not usually laid before Parliament. On some occasions, the findings of the review are implemented. For example, the DTI reviewed the Employment Relations Act 1999. Despite the main conclusion of the review that the Act was working well, some areas were identified where changes could be made to improve the working of the Act. Those changes were subsequently made in the Employment Relations Act 2004.

3.11 Government departments will often have the best access to the information needed for proper analysis of the operation and effects of a statute. The department will also have knowledge gained from the preparation of the Bill, including the experience of drafting a Regulatory Impact Assessment.

[2] See http://www.womenandequalityunit.gov.uk/dlr/terms_of_ref.htm.

[3] DTI Employment Relations Research Series No. 45, October 2005 (http://www.dti.gov.uk/er/inform.htm) (last visited 10 January 2006).

[4] Home Office Research Study 236, 'A review of anti-social behaviour orders', January 2002 (http://www.homeoffice.gov.uk/rds/pdfs2/hors236.pdf).

Regulatory Impact Assessments

3.12 Regulatory Impact Assessments ("RIAs") must be completed for all proposed policy changes (legislative and non-legislative) which could affect the public or private sectors, charities, the voluntary sector or small businesses. In reality, this means that departments produce RIAs for virtually all proposed legislation. A copy of each final RIA must be placed in the library of both Houses of Parliament and published on the relevant departmental website. The Cabinet Office Better Regulation Executive Guidance on RIAs[5] recommends that RIAs should address post-implementation review and include a description of how the recommended policy option will be reviewed. However, the main purpose of the RIA is to provide a framework for analysis of the likely impacts of a policy change and the range of options for implementing it.

REVIEWS UNDERTAKEN BY PARLIAMENTARY COMMITTEES

3.13 Post-legislative scrutiny may be undertaken by Parliamentary committees, relying on their discretion to perform this function.

Select Committees in the House of Commons

3.14 In May 2002, the House of Commons agreed with the Liaison Committee's proposal that one of the core tasks of select committees should be "to examine the implementation of legislation and major policy initiatives".[6] This means that under their broad terms of reference, Commons select committees can undertake post-legislative scrutiny.

3.15 In practice, this kind of review is undertaken on an ad hoc basis, often in response to public concern over a specific Act. An oft-cited example is the Child Support Act 1991. Put shortly, public dissatisfaction over the difficulties faced by the Child Support Agency sparked a number of inquiries. A report of the Social Security Select Committee[7] led to the publication of the 1995 White Paper, Improving Child Support, which in turn led to the Child Support Act 1995.

3.16 The Liaison Committee, in its Annual Reports, monitors the extent to which Commons select committees fulfil their core tasks. The Annual Report for 2004 includes the following examples of committee inquiry work which considered the implementation of legislation or of major policy initiatives[8]:

- The Education and Skills Committee's examination of the impact of the Higher Education Act 2004, which allowed universities to charge differential tuition fees on home and foreign students.

[5] http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/post_implementation_review.asp.

[6] Liaison Committee Annual Report for 2002 (2002-03) HC 558, para 13.

[7] Social Security Committee 5th Report (1993-94) HC 470.

[8] Liaison Committee Annual Report for 2004 (2004-05) HC 419, p 33.

- The Northern Ireland Affairs Committee's inquiry into Electoral Registration in Northern Ireland, which was launched following the introduction of the Electoral Fraud (Northern Ireland) Act 2002 and concluded that, although the Act appeared to be having some success at combating electoral fraud, it had the unintended consequence of contributing to the steep and progressive decline in the numbers of voters appearing on the register over recent years.

- The Work and Pensions Committee's inquiry into The Introduction of Pension Credit, which examined the introduction of pension credit under the State Pension Credit Act 2002 and the ability of the Pension Service to deliver pension credit successfully.

3.17 The Liaison Committee noted that there is evidence that the Government is factoring committee work into its own legislative review processes. The Science and Technology Committee reported that the Department of Health would await the Committee's forthcoming report on its inquiry into Human Reproductive Technologies and the Law before revising the Human Fertilisation and Embryology Act 1990.

Joint Select Committees

3.18 The Joint Committee on Human Rights ("JCHR") provides an example of a joint committee which is particularly active in making contributions to the Parliamentary scrutiny of legislation. After the Human Rights Act 1998 was brought into force, the JCHR was established to consider matters relating to human rights. The Committee scrutinises all Government Bills for compatibility with the European Convention on Human Rights.

3.19 The JCHR recently submitted a report on its work during the 2001-2005 Parliament and observed that the Committee "had not systemically recorded points…which might usefully be followed-up for post-legislative scrutiny".[9] However, the Committee was able to cite instances where warnings of incompatibility with the European Convention had been issued to Government but not heeded and subsequent cases had proved the Committee right. For example, the Committee had pointed out that section 55 of the Nationality, Immigration and Asylum Act 2002 was almost certain to lead to inhuman and degrading treatment of asylum-seekers in contravention of Article 3 of the European Convention. The Court of Appeal held this to be so in the case of *Limbuela*, a decision that was recently upheld by the House of Lords.[10]

[9] Joint Committee on Human Rights, The Work of the Committee in the 2001-2005 Parliament, (2004-05) HL 112/ HC 552, p 43.

[10] *Secretary of State for the Home Department v Limbuela, Tesema and Adam* [2004] EWCA Civ 540; *R v Secretary of State for the Home Department ex parte Adam; R v Secretary of State for the Home Department ex parte Limbuela; R v Secretary of State for the Home Department ex parte Tesema* [2005] UKHL 66.

3.20 The Committee has also assessed the operation of the Human Rights Act itself, with regard to the meaning of "public authority" under the Act. This exercise involved detailed analysis of decisions made by the courts under the relevant section of the Act. The JCHR review concluded that there is a fundamental problem, not with the design of the law but with its inconsistent and restrictive interpretation by the courts.[11] The Committee did not think that amending the wording of the Act would achieve a more satisfactory application of the relevant rights and duties than the current wording. This conclusion demonstrates that a legislative solution may not be the best way to address the unintended consequences of a provision.

Lords Committees

3.21 Scrutiny committees in the House of Lords often consider subjects requiring in-depth knowledge and expertise on matters which cut across departments. These committees will be considered in particular in Parts 8 and 9 which respectively relate to delegated legislation and European legislation.

REVIEWS UNDERTAKEN BY OTHER BODIES

3.22 A great deal of Government policy is delivered not directly by Government but indirectly through a variety of agencies which are often tasked with keeping under review the legislation with which they are concerned. There are also independent bodies which undertake review work, some of which are directly accountable to Parliament. For example, the work of the Parliamentary and Health Service Ombudsman looks at how effectively Government departments and other public bodies (including the National Health Service) are exercising their legislative powers, by investigating complaints against these bodies of unfair or improper action or poor service and reporting to Parliament on its findings.[12]

Bodies with a statutory duty to review legislation

3.23 Some statutory bodies have a duty to monitor the operation of the law under which they were created. For example, the Commission for Racial Equality was set up under the Race Relations Act 1976. Under section 43(1)(c) of that Act, the Commission has a duty "to keep under review the working of this Act and, when they are so required by the Secretary of State or otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending it." Similarly the Mental Health Commission has a duty under the Mental Health Act 1983 to advise the Secretary of State on implementation and operation of the 1983 Act and the Code of Practice. The Information Commissioner is an independent official appointed by the Crown to oversee the Data Protection Act 1998, the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. The Commissioner reports annually to Parliament.

[11] Joint Committee on Human Rights, The Meaning of Public Authority under the Human Rights Act (2003-04) HL 39/HC 382, p 3.

[12] http://www.ombudsman.org.uk.

The National Audit Office

3.24 The National Audit Office ("NAO"), which is independent of Government, scrutinises public spending on behalf of Parliament. It audits the accounts of all central Government departments and agencies, as well as a wide range of other public bodies. It also reports to Parliament on the economy, efficiency and effectiveness with which these bodies have used public money. This core work is supplemented by reviews which examine corporate governance and financial management, and recommend to public sector managers ways in which departments could improve their systems and processes.[13]

3.25 The NAO also has a role independently evaluating the quality and thoroughness with which Departments undertake Regulatory Impact Assessments ("RIAs"). The NAO has identified that RIAs can improve the regulatory process and has established a number of actions that departments need to take to realise the full benefits from the process, such as integrating them with the policy development process and considering all the options including non-regulation. The NAO is currently building on its evaluations of RIAs by preparing a report that examines whether departments have created a culture of impact assessment and better regulation.

3.26 There are close links with post-legislative scrutiny. For example, the NAO recently published a report, Dealing with the Complexity of the Benefits System,[14] which considered the administration of benefits by the Department for Work and Pensions. The NAO identified that one factor that contributes to complexity is the scale of change in legislation. Between 2000 and 2004, there were six new Acts and 364 new statutory instruments affecting the law on social security.[15] The NAO went on to note that the incremental addition of regulations and their interaction with current regulations could also add to the complexity. Furthermore complexity could increase as legislation is delegated for implementation at local level.

3.27 The way in which the NAO operates provides an excellent model of really effective scrutiny work which is followed up by Parliament. The NAO's reports are presented to Parliament and published. The Public Accounts Committee in the House of Commons holds evidence sessions to consider most NAO reports and then publishes recommendations to which the Government responds. The NAO and Public Accounts Committee follow up by monitoring the implementation of their recommendations.

The Privy Counsellor Review Committee

3.28 Some Acts of Parliament contain a review provision stipulating that the Act must be reviewed by a certain body after a certain length of time. Section 122 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") provided for a review of the Act within two years by a committee of Privy Counsellors.

[13] National Audit Office Annual Report 2005, p 7.

[14] (2005-2006) HC 592.

[15] Above, p 8.

3.29 The 2001 Act also required, under section 28, the Secretary of State to appoint a person to review sections 21-23 of the Act, which contained powers allowing the indefinite detention of foreign nationals suspected of terrorist offences. The Government appointed Lord Carlile of Berriew QC as the section 28 reviewer. He has now made three reports on sections 21-23 as independent reviewer and also reviews the operation of the Terrorism Act 2000. As Lord Carlile made clear in his final report[16] on the 2001 Act, his task was to report on the operation of sections 21-23; it was for the Privy Counsellor Review Committee to advise as to whether it considered that sections 21 to 23 should remain in force. We consider the detail of the form of scrutiny used by the Privy Counsellor Review Committee in paragraph 7.52 of this paper.

3.30 The Committee duly published a comprehensive report in December 2003. One of its strong recommendations was that Part 4 of the Act (sections 21-32) which allowed foreign nationals to be detained indefinitely, should be replaced as a matter of urgency. The House of Commons debated the report in February 2004 and the Government rejected the Committee's recommendation on Part 4.

Law Commission Reviews

3.31 The mandate of the Law Commission (and of the Scottish Law Commission in relation to Scottish law) under the Law Commissions Act 1965 is to keep under review all the law, with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law. A good deal of the work of the Law Commission can fairly be described as a form of post-legislative scrutiny (although usually whole areas of law are reviewed rather than single Acts and the work also encompasses review and proposals for reform of the common law) but it would be unusual for the Law Commission to review recent legislation.

3.32 The work programme of the Law Commission is determined after wide consultation. The programme requires approval by the Lord Chancellor, who makes his decision after considering comments from the Ministerial Committee on the Law Commission. Projects can also be referred to the Law Commission by a Government department.

3.33 Parliamentary Counsel at the Law Commission prepare Consolidation Bills and the Statute Law Revision team undertakes systematic scrutiny of the statute book to identify obsolete provisions for repeal. During the Law Commission's 40 year history, more than two thousand Acts have been repealed in their entirety and thousands of other Acts have been partially repealed as a result of the work of the Statute Law Revision team.

[16] Lord Carlile of Berriew QC, Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004, p 3, para 8.

Role of the courts

3.34 The courts are responsible for the interpretation of legislation. UK courts do not have the power to strike down legislation but they were granted a powerful new mandate with the passing of the Human Rights Act 1998. Section 3 of the Act provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Section 4 of the Act provides a "judicial mechanism for bringing to the attention of Government and Parliament any provision of primary legislation which cannot be read and given effect in a manner compatible with Convention rights"[17] by allowing the highest courts to make declarations of incompatibility. Such declarations do not affect the "validity, continuing operation or enforcement of the provision";[18] it is for Parliament itself to decide whether it will amend the statute so that it will be compatible with the European Convention on Human Rights.

3.35 Following the publication of the Privy Counsellor Review Committee Report on the Anti-Terrorism, Crime and Security Act 2001, and the Government's rejection of its recommendations on Part 4, a legal challenge to the powers of detention under Part 4 was heard by the Judicial Committee of the House of Lords. The Law Lords declared that the detention power was incompatible with Articles 5 and 14 of the Convention in so far as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.[19] In response, Parliament changed the law by passing the Prevention of Terrorism Act 2005, which introduced the control orders regime.

[17] Lester and Pannick, *Human Rights Law and Practice*, (2nd edition, 2004) p38, para 2.4.

[18] Human Rights Act 1998, s 4(6)(a).

[19] *A & Ors v Secretary of State for the Home Department; X & Anor v Secretary of State for the Home Department* [2004] UKHL 56.

PART 4
EXPERIENCE OF PRE-LEGISLATIVE SCRUTINY

4.1 Pre-legislative scrutiny is the scrutiny by Parliament of legislation in draft form. It is undertaken by ad hoc pre-legislative scrutiny committees which are set up to consider draft Bills in detail prior to their introduction into Parliament.

4.2 When the Labour Party came to power in 1997, one of its commitments was to "improve the quality of legislation by better pre-legislative consultation".[1] A new committee on the modernisation of the House of Commons was set up in June 1997. In its first report, the Modernisation Committee explained that:

> There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process… . Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.[2]

4.3 Despite this enthusiasm, in practice only a minority of Bills is subject to pre-legislative scrutiny. During the Parliamentary session 2003-04, twelve draft Bills were published and ten of those were scrutinised by a committee.[3] During the same session, 38 Bills received Royal Assent. However, of the Bills that are scrutinised, many are of major importance in terms of size and complexity.[4] The way in which each draft Bill is considered is decided on an ad hoc basis. In its 2004 Annual Report, the Liaison Committee expressed frustration with the process, citing the late publication of draft Bills, delays in establishing the committees and unreasonable deadlines for reporting.[5]

1 Report of the Joint Committee on Constitutional Reform, March 1997, as quoted in Greg Power, Parliamentary Scrutiny of Draft Legislation 1997-1999 (UCL Constitution Unit publication in association with the Hansard Society) (July 2000), p 8.

2 Select Committee on Modernisation of the House of Commons, The Legislative Process (1997-98) HC 190, para 20.

3 House of Commons Library Standard Note, Pre-Legislative Scrutiny, SN/PC/2822, 3 June 2005, p 8.

4 Examples of major Acts that have been passed in recent years and that were subject to pre-legislative scrutiny include: Financial Services and Markets Act 2000, Commonhold and Leasehold Reform Act 2002, Civil Contingencies Act 2004, Gambling Act 2005.

5 Liaison Committee Annual Report for 2004 (2004-05) HC 419, p 17, para 35.

4.4 In spite of these problems, pre-legislative scrutiny is generally seen as a significant reform. Lord Norton of Louth describes it as "a new and growing area of Parliamentary activity, one which gives Parliament a valuable opportunity to scrutinise, in a structured manner, government proposals for law".[6]

4.5 It would be a mistake, we suggest, to consider post-legislative scrutiny to be a mirror image of pre-legislative scrutiny. But though they serve very different purposes, it is helpful to consider the two types of review as part of one process. As Robin Cook argued:

> The more that select committees are involved in the scrutiny of draft legislation, the better placed they will be to monitor the implementation of new laws and to propose, where appropriate, remedies to any problems they identify. Such investigation will further enhance the authority select committees can bring to commenting on earlier drafts of forthcoming legislation.[7]

4.6 This reasoning is also followed by Luzius Mader,[8] who argues that from the practical perspective, prospective (pre-legislative) and retrospective (post-legislative) evaluation are largely complementary. He explains that prospective efforts to assess methodically the possible effects of draft legislation facilitate considerably retrospective evaluation; the more explicit and differentiated prospective evaluation is, the easier it is to get reliable information retrospectively. It is even possible for the legislation to provide for the necessary data to be collected. Mader also argues that in turn good retrospective evaluation helps to create a more solid basis for prospective evaluation, because it produces useful comparative data and encourages the development of insights that permit a more accurate prognosis of the effects.

6 Philip Norton, *Parliament in British Politics* (2005) p 77.

7 Select Committee on Modernisation of the House of Commons, A Reform Programme for Consultation, Memorandum submitted by the Leader of the House of Commons (2001-02) HC 440.

8 Luzius Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" [2001] Volume 22, Number 2, *Statute Law Review* 119 at 124-125.

4.7 At present pre-legislative scrutiny committees are ad hoc committees, set up only for the purpose of scrutinising draft Bills. The Scrutiny Unit was established as part of the Committee Office of the House of Commons in 2002. The Unit consists of Parliamentary clerks, economists, lawyers and a statistician. The role of the Unit is to assist select committees with pre-legislative scrutiny of draft Bills and to provide advice on matters relating to the scrutiny of expenditure by Government departments. The Scrutiny Unit, with its experience of supporting the work of pre-legislative scrutiny committees, could assist such committees with the identification, at the pre-legislative stage, of potential areas for post-enactment review.

4.8 In Part 7, we consider further the potential relationship between pre- and post-legislative scrutiny and in particular the identification, at the pre-legislative stage, of potential areas for post-enactment review.

PART 5
POST-LEGISLATIVE SCRUTINY IN OTHER JURISDICTIONS

INTRODUCTION

5.1 Our research has not revealed any countries which have in place a formal and comprehensive system for the post-legislative review of legislation. In most of the countries we have considered there exists a patchwork of statutory review provisions and ad hoc procedures for reviewing legislation. However, we have identified some countries where innovative methods have been adopted in order to improve the scrutiny of legislation which has been brought into force. The focus here is on those innovative methods rather than providing a complete picture of all approaches to post-legislative scrutiny in each country. In this Part, frequent reference is made to sunset clauses. These are provisions in legislation which have the effect of time-limiting the provisions to which they apply.

CANADA

5.2 Statutory provisions that require legislation to be reviewed after a period of time seem to be fairly common in Canadian statutes at both the provincial and federal levels. This is so despite the fact that the Privy Council Office's Guide to Making Federal Acts and Regulations suggests that sunset clauses and mandatory review provisions should be used sparingly. The Guide warns that sunset clauses can potentially create gaps in legislative authority if the new legislative regime cannot be brought into force in time, and that provision for mandatory review of an Act within a particular time or by a particular committee limits the flexibility of Parliament.[1]

5.3 The Guide, at chapter 2.6, also covers post-enactment review but the focus here is not on review of the actual legislation but rather on the "legislative project". The Guide encourages officials to undertake this kind of review in order to improve the management and execution of future legislative projects.

[1] Privy Council Office, Guide to Making Federal Acts and Regulations, 2nd ed. (Department of Justice, 2001), p 91 (http://www.pco-bcp.gc.ca/default.asp?Page=Publications&doc=legislation/lmgtoc_e.htm&Language=E) (last visited 10 January 2006).

5.4 Our research has shown that there is no one model for review provisions in Canadian legislation. The statutory mechanisms for post-legislative scrutiny are almost as diverse as they are numerous. Review provisions can vary in a number of different aspects including: timing and frequency of reviews, who performs the review, scope of the review, who considers the review once it has been completed, whether the review is mandatory or optional, and whether there is some form of public consultation that must take place during the review. Review provisions appear frequently in freedom of information statutes, workplace health and safety legislation, and environmental legislation. However, they also appear in a variety of other statutes from the Canadian Human Rights Act to the Integrated Circuit Topography Act. Sunsetting is less common but an example can be found in Canada's Criminal Code[2] relating to certain anti-terrorism provisions.

AUSTRALIA

5.5 The main developments[3] in post-legislative scrutiny in Australia are "review of operation" provisions, the Administrative Review Council Report on Rule-making by Commonwealth Agencies and the Legislative Instruments Act 2003 (Cth). Well-established forms of post-legislative review include the use of sunset clauses, Parliamentary review and ad hoc committee review.

5.6 In 1992, the Administrative Review Council ("ARC") published its report, Rule-making by Commonwealth Agencies, (ARC 35, 1992). The report observed that in recent years there had been a vast growth in the volume and diversity of delegated legislative instruments. The ARC raised a number of concerns in relation to these instruments including inaccessibility and quality of drafting, and made 31 recommendations, including the sunsetting of rules on a ten-year, rotating basis.

5.7 Sunsetting of delegated legislation had already been established in New South Wales, Victoria, Queensland and South Australia. In Victoria, the provision for sunsetting was introduced in 1984 after the Legal and Constitutional Committee of the Victorian Parliament found that many statutory rules were no longer operative, mainly through the passage of time. The Committee therefore recommended a staged repeal of all existing statutory rules, subject to some limited exceptions, and an ongoing ten-year sunsetting period for all other statutory rules.[4]

[2] R.S.C. 1985, c. C-46.

[3] We are grateful to Professor David Weisbrot, President, Australian Law Reform Commission, for his input on developments in post-legislative scrutiny in Australia.

[4] Administrative Review Council, Rule-making by Commonwealth Agencies (ARC 35, 1992), p 58.

5.8 In 2003, the Federal Parliament passed the Legislative Instruments Act 2003 (Cth), which is significantly based on recommendations made by the ARC. One of the objects of the Act is "to provide a comprehensive regime for the management of Commonwealth legislative instruments by establishing mechanisms to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed".[5] The Act sets out a procedure for registering "legislative instruments" (which include all regulations, statutory rules currently in force, other instruments that are disallowable under the current system, and proclamations) on an online database that is maintained by the federal Attorney-General's Department.

5.9 The Act provides that legislative instruments are to be kept up-to-date and only remain in force for so long as they are needed. The basic rule is that such instruments should reach their sunset approximately 10 years after the date that they commence or are required to be lodged for registration. There are listed exceptions to this general rule and a procedure in place for the Attorney-General to defer sunsetting in certain circumstances and a procedure for Parliament to resolve that instruments continue in force. The Act provides that it will be reviewed generally after three years and the operation of the sunsetting provisions will be reviewed after twelve years.

NEW ZEALAND

5.10 There was talk at one time of creating a formal system of post-legislative scrutiny in New Zealand. The Bright Future initiative, put forward by the Ministry of Economic Development in 1999, had as one of its goals to keep the laws of New Zealand up to date. This aim was to be achieved in part by requiring Government departments to consider sunset and review clauses in all new legislation so that legislation could be constantly kept under review.[6] This aspect of the initiative, however, seems to have gone no further than the proposal stage. Indeed, compared to some other countries there are relatively few review clauses in New Zealand statutes.

5.11 In 1986, the Minister of Justice established the Legislation Advisory Committee ("LAC"). The terms of reference of the LAC include:

> To help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.[7]

[5] Legislative Instruments Act 2003 (Cth), Section 3(1)(f).

[6] Ministry of Economic Development, Bright Future: 5 Steps Ahead – Making Ideas Work for New Zealand (Wellington: Ministry of Commerce, 1999), p 93 (http://www.med.govt.nz/irdev/econ_dev/brightfuture) (last visited 10 January 2006).

[7] http://www.justice.govt.nz/lac/who/index.html.

5.12 The Cabinet has approved the LAC Guidelines, which provide a very detailed guide to making good legislation. Ministers and their officials are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with the Guidelines.[8]

5.13 The focus of chapter one of the LAC Guidelines is the means of achieving the policy objective. The chapter emphasises that an essential first step is to define clearly the policy objectives.[9] A checklist of elements that should always be addressed when creating legislation accompanies the Guidelines. The Guidelines and checklist together provide a standard which can be used by those preparing and considering legislation. It is clear that there is scope for this approach not only to facilitate scrutiny of a Bill during its passage but also to provide a basis for consideration of the measure once it has been brought into force.

SCOTLAND

5.14 In 2003, the Procedures Committee of the Scottish Parliament published a section on post-enactment legislative scrutiny in its Founding Principles Report.[10] The Committee noted that "Parliament is responsible for assessing the effect of legislation, whether it has achieved the stated purposes, whether it has had unanticipated consequences, and whether further legislation might be required".[11] The Committee praised the post-legislative scrutiny work of the Social Justice Committee on the Housing (Scotland) Act 2001. The Social Justice Committee had established a framework for scrutiny which included provision for the practical key indicators to consider and report on the Act's implementation.[12]

5.15 The Procedures Committee made the following recommendations:

> We commend and support the work of the Social Justice Committee and other committees engaged on [post-enactment legislative] scrutiny. We recommend that the framework for scrutiny established by the Social Justice Committee is adopted across the committees, and recommend that all committees should routinely consider whether to subject legislation which they have passed to post-legislative scrutiny (Recommendation 46).
>
> We consider that this activity is of sufficient importance that the Standing Orders should require committees to give regular formal consideration to the need for post-legislative scrutiny and to report annually on all such work undertaken (Recommendation 47).

8 http://www.justice.govt.nz/lac/index.html.

9 http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_1.html (last visited 10 January 2006).

10 Procedures Committee 3rd Report (2003), Report on The Founding Principles of the Scottish Parliament: the application of Access and Participation, Equal Opportunities, Accountability and Power Sharing in the work of the Parliament, Volume 1.

11 Above, para 372.

12 Social Justice Committee 3rd Report (2002), Monitoring the Impact of the Housing (Scotland) Act 2001, SP Paper 556, p 2.

5.16 It should be noted that these recommendations represent the views of a committee which no longer exists. The report was not considered by the Scottish Parliament during the session in which it was published, due to lack of Parliamentary time. Though the report was debated at a later date, these recommendations were not considered. As a result, committees of the Scottish Parliament have not adopted them although there are examples of committees carrying out ad hoc reviews.[13]

GERMANY

5.17 In 2000, the Federal Government adopted the new Joint Rules of Procedure of the Federal Ministries. The Joint Rules help to streamline co-operation between the Federal Ministries and are an important tool to modernise both their organisation and the way in which Bills are prepared.

5.18 Time limitation (sunsetting) is seen as part of a procedure to assess existing regulations and amend or abolish those which are obsolete or unnecessary.[14] The Joint Rules stipulate that the explanatory memoranda for Federal Government Bills must explain whether the law can be limited as to time.[15] During the most recent legislative period about 50 laws and ordinances were given time limits. [16]

5.19 Evaluation clauses also play a prominent part in structuring Federal Government Bills. Paragraph 44(6) of the Joint Rules provides that: "in the explanatory memorandum for the Bill, the lead Federal Ministry must state whether and, if so, after what period of time, a review is to be held to verify whether the intended effects have been achieved, whether the costs incurred are reasonably proportionate to the results and what side-effects have arisen".

5.20 The goals of evaluation include seeing which of the regulatory aims have been achieved and what changes and side-effects have resulted. On the negative side, it is difficult to attribute direct effects of legislation due to multi-causality and evaluation may place an excessive burden on ministerial administration and parliaments.[17]

[13] For example, the Justice 1 Committee conducted post-legislative scrutiny in relation to the Protection from Abuse Act 2001, in early 2004, in conjunction with the University of Glasgow.

[14] Dr Bollhoff, Simplification of Law and Reduction of Bureaucracy at the Federal Ministry of the Interior, Regulatory Evaluation by the German Federal Government (23.09.05) http://www.dti.gov.uk/about/evaluation/Dominik_B%F6llhoff.ppt (last visited 10 January 2006).

[15] http://www.staat-modern.de/Anlage/original_549908/Joint-Rules-of-Procedure-of-the-Federal-Ministries.pdf, section 2, para 43(1)6 (last visited 10 January 2006).

[16] This is Dr Bollhoff's estimate. In total round 400 laws and 1,300 ordinances were agreed by Parliament during this short (3 year) legislative period.

[17] Dr Bollhoff, Simplification of Law and Reduction of Bureaucracy at the Federal Ministry of the Interior, Regulatory Evaluation by the German Federal Government (23.09.05) http://www.dti.gov.uk/about/evaluation/Dominik_B%F6llhoff.ppt (last visited 10 January 2006).

FRANCE

5.21 In France the courts play quite a systematic role in reviewing statute law. The Cour de Cassation reviews contentious decisions of other courts and, when necessary, draws the attention of the legislature to the need to clarify the law. The Cour de Cassation takes a structured approach, producing annual reports suggesting legislative reform.[18]

5.22 The French National Assembly establishes investigatory commissions to look into various specific areas. For example, one such commission was set up in 2003 to examine the effectiveness of recommended measures concerning the security of maritime transportation of dangerous or pollutant products.[19]

EUROPEAN UNION

5.23 We refer to post-legislative scrutiny of EU legislation in Part 9.

5.24 **We welcome views or experiences of post-legislative scrutiny in the jurisdictions to which we have referred or elsewhere.**

[18] http://www.courdecassation.fr/_rapport/rapport.htm (last visited 10 January 2006).

[19] http://www.assemblee-nationale.fr/12/dossiers/enquete-transport-maritime.asp#031018 (last visited 10 January 2006).

PART 6
THE PURPOSE OF POST-LEGISLATIVE SCRUTINY

MOTIVATION FOR POST-LEGISLATIVE SCRUTINY

6.1 In discussions with Parliamentarians and others during this project, different reasons for more systematic post-legislative scrutiny have been suggested to us.

6.2 The primary reason which has been recurrently suggested to us is that legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively. This driver for post-legislative scrutiny is based on a concern that every year a huge and increasing amount of legislation is poured onto the statute book, most of which is not thoroughly digested. Much of this generates further regulation either in the form of secondary legislation or in the form of codes and guidance. There may also have been a number of amendments introduced with little time for scrutiny during the passage of the Bill. In 2003, Parliament passed 45 Acts which ran to a total of over 4,000 pages. There were also 3,354 Statutory Instruments, running to 11,977 pages. There is a perceived need to take stock of this by providing a mechanism that will enable Parliament to look back and review the effects of legislation once it has been implemented. We do not suggest that review of this kind would have any impact at all in stemming the flow or volume of legislation, rather that the fact of the flow necessitates looking back to see what lessons may be learnt. Post-legislative scrutiny should translate into better regulation. If there is to be public commitment to better regulation, an obvious part of that is the examination of legislation once it has been brought into force; it may be that wider lessons can then be learnt on the method of regulation and the necessity for legislation.

6.3 Other more controversial drivers for post-legislative scrutiny have been cited. We are inclined to regard them as secondary to the reasons set out in the preceding paragraph. One suggestion is that the knowledge that there will be post-legislative scrutiny of a measure will have a salutary effect at the legislative stage in concentrating minds and sharpening the focus on implementation and its likely effects. Opponents of this view argue that those responsible for the preparation of legislation already give full consideration to its anticipated effects.

6.4 Another suggested driver is that the knowledge that there will be post-legislative scrutiny of a measure will provide a continuing spur to those responsible for delivery of the policy aims of the legislation. The contrary view is that departments responsible for carrying through the Government's policy agenda, whether it is contained within legislation or not, already know that they are answerable to Government. Furthermore Ministers are answerable to Parliament and may be called before departmental select committees. Existing forms of post-legislative scrutiny[1] sufficiently cater for the need to look back on the effects of legislation, as and when the need arises. A more systematic approach to post-legislative scrutiny would not, it is argued, provide any incentive for more effective delivery of policy through legislation and is therefore unnecessary.

6.5 **Consultees are asked for their views in relation to these and/or other arguments for and against post-legislative scrutiny.**

ASPECTS OF POST-LEGISLATIVE SCRUTINY

6.6 Post-legislative scrutiny is a broad and undefined expression. It means different things to different people. Many to whom we have spoken see post-legislative scrutiny as having the broad purpose of assessing whether the intended policy objectives have been met by the legislation and if so, how effectively. This type of scrutiny questions whether there have been any unintended economic, legal or social consequences of the legislation. More broadly, the legislation is assessed to see whether it has benefited the general public or other intended group.

6.7 There could also be narrower forms of post-legislative scrutiny which concentrate on the legal effects of legislation. Questions here would include whether provisions contained within the Act had been brought into force, and if not, why not. At present, there is no systematic and accessible way for members of the public to find out this basic information. A narrower form of scrutiny might also examine legislation which has been brought into force and then amended shortly afterwards and the reasons for this. This narrower form of scrutiny would also look for any unintended legal consequences leading to uncertainty or having an adverse impact on the existing body of law. This would require analysing how the courts had interpreted certain provisions and how legal practitioners and members of the public had used them in practice. It is our provisional view that there are circumstances in which both forms of scrutiny would be beneficial.

THE BENEFITS OF POST-LEGISLATIVE SCRUTINY

6.8 Whether the broader or the narrower form of post-legislative scrutiny is carried out, it may have a more particular and a wider objective. The more particular may be to learn lessons relating to the implementation of the legislation under review. The wider may be to improve the legislative process. The following observations on the benefits of post-legislative scrutiny encompass both of these objectives.

6.9 Speaking on behalf of the Government during the debate on 6 June 2005, Baroness Amos said:

[1] See Part 3.

> Parliament and Government have a common interest in strengthening post-legislative scrutiny. From the Government's point of view, it could help to ensure that the Government's aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect.[2]

6.10 The Hansard Society also argue that there would be a far greater likelihood that defective legislation would be identified and rectified and that such scrutiny might lead to improvements in the quality of legislation in the first place and so decrease the need for patching or amending legislation.[3] Timely scrutiny should ensure that unintended consequences could be addressed before they become too problematic.

6.11 Margaret Beckett MP has advocated post-legislative review "in order to illuminate and see what lessons can be learnt for the future handling of the legislative process".[4]

6.12 Luzius Mader has written that, in short, the evaluation of legislation is a "pragmatic effort to improve the legislator's assumptions and knowledge about the effects of legislation. It aims at more plausibility in this field, not at certainty or scientific proof".[5]

6.13 The concept of post-legislative scrutiny is broadly welcomed. As the House of Lords Constitution Committee put it, "post-legislative scrutiny is like motherhood and apple pie in that everyone appears to be in favour of it".[6] The ultimate benefits are that it has the potential to improve the accountability of governments for legislation and lead to better and more effective law. It would bridge a gap in the system of Parliamentary scrutiny of legislation which generally ends with Royal Assent. However, beyond a broad welcome for the general concept, there is a much greater divergence of views on mechanisms that could be adopted to carry it out. Therefore, we make at the outset three cautionary comments.

6.14 First, post-legislative scrutiny should not be used to provide the opportunity for a replay of arguments advanced during the passage of the Bill, but to examine outcomes. Emergency legislation which contains a sunset clause may provide an exception to this by allowing for the re-examination of the policy behind the Bill.

6.15 Second, we recognise that the evolution of a more systematic approach to post-legislative scrutiny, if considered desirable, will depend ultimately on a combination of political will and political judgment.

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2 Hansard (HL), vol 672, no 10, col 769.

3 Hansard Society, Issues in Law Making Briefing Paper 6, Post-Legislative Scrutiny, (May 2005), p 7.

4 House of Lords Select Committee on the Constitution, Parliament and the Legislative Process, (2003-04) HL 173-II, p 160.

5 Luzius Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" [2001] Volume 22, Number 2, *Statute Law Review* 119 at 124.

6 House of Lords Select Committee on the Constitution, Parliament and the Legislative Process, (2003-04) HL 173-I, p 42.

6.16 Third, post-legislative scrutiny will place demands on resources and, above all, time of Parliamentarians and departmental staff which could otherwise be used in other ways. There are already many complaints that inadequate time is spent on the scrutiny of current legislation. If post-legislative scrutiny is to be successful in delivering benefits at a reasonable cost in terms of time and money, it needs to be carefully worked out.

6.17 In the next part of this paper we consider practical means of delivering more systematic post-legislative scrutiny.

PART 7
POST-LEGISLATIVE SCRUTINY MECHANISMS

INTRODUCTION AND GENERAL REMARKS

7.1 We see force in the argument that post-legislative scrutiny should be a more integral part of the Parliamentary process. There is potential to fill the gaps in the system by adopting a more systematic approach. We recognise that there is a tension between the desirability of an objective review and the need to entrench the process of review within Parliament. We are also aware of the ever-present resource constraints and the need for flexibility of approach. We recognise the need, so far as possible, to build on existing scrutiny systems and procedures. Above all, post-legislative scrutiny mechanisms are ultimately for Parliament to decide.

7.2 We recognise that legislation can be of widely different kinds. In some cases it is complete within the terms of the Act itself, for example designating a particular conduct as a criminal offence. In other instances, the Act is essentially a shell which provides a means by which further hard-edged law (statutory instruments) and soft-edged law (for example codes of conduct or guidance concerning implementation issued by Government departments or other bodies) may be made. Where legislation provides for powers to be given to some other body, often that body is required to provide an annual report but it is unlikely to be self-critical. Overall, there are huge variations in the size and complexity of legislation.

7.3 If we are looking at the broad question of how to improve the system of scrutinising the effects of legislation with a view to improving the quality of regulation, we need to consider systems which will allow for this wide diversity. We recognise that no one-size-fits-all proposal will be wise or workable and that resources will always be a serious concern.

7.4 Any system of post-legislative scrutiny should be underpinned by the clarification of policy objectives. This will assist with early consideration of the need for post-legislative scrutiny as well as helping to provide a basis for any future review itself. When a department produces a Bill it is desirable that thought should be given to whether the Bill or part of it should be reviewed post-implementation. It would also be desirable for the department to identify the timescale in which it expects the legislation to produce the intended results.

7.5 A process of post-legislative scrutiny could be Governmental, Parliamentary or external or it might involve elements of all three. Following the distillation of ideas gleaned from our early consultation, we offer two avenues as options which incorporate all of these three elements. The first avenue contemplates pre-planned post-legislative scrutiny for which a positive commitment to review is made in advance of enactment. We envisage that avenue 1 for the time being and for reasons of practicality will only be used in a minority of cases. The second avenue contemplates post-legislative scrutiny for which there was no prior commitment and therefore relies upon post-enactment triggers for review. The two avenues are complementary and together represent a convenient means of presenting the ideas we have received regarding how post-legislative scrutiny could be undertaken more systematically. The two avenues may be described in outline as follows.

Avenue 1: A positive commitment to review is made before or during the passage of the Bill. After an appropriate period post-enactment, the relevant Government department carries out an initial review, which is then published as a report and laid before Parliament. This process could be overseen by central Government to ensure that it is effective. The relevant departmental select committee then reviews the report and if it thinks it appropriate follows it up by conducting its own scrutiny of the effect of the legislation. It may choose to take evidence (in writing or orally) and it may commission further research by an independent body. Where more than one departmental select committee has an interest in the subject matter, it would be for them to decide between themselves how to proceed. This avenue is broadly based on the approach proposed by the House of Lords Constitution Committee which is described in para 2.16 of this paper. If the departmental select committee does not intend to conduct post-legislative scrutiny of the Act, a committee of the House of Lords might consider doing so. Alternatively, there could be a new joint committee of both Houses to co-ordinate the process of post-legislative scrutiny. The joint committee could either carry out scrutiny work itself, based on the departmental review, or perform a sifting function, directing work to another committee or to a sub committee.

Avenue 2: No positive commitment to post-legislative scrutiny is made before or during the passage of the Bill. This does not necessarily mean that the Bill is deemed inappropriate for review, but may simply reflect the fact that Government is not likely to commit to more post-legislative scrutiny than it has the resources to carry out effectively. This avenue does not presuppose a departmental review and in some respects reflects the status quo. The decision to review a particular piece of legislation is reactive and taken post-enactment, rather than being pre-planned as in avenue 1. Therefore, there are different triggers for post-legislative scrutiny in avenue 2. Central Government, as part of its better regulation agenda, could have a role in identifying, post-enactment, legislation that should be reviewed in order to kick-start a review process. Alternatively, the departmental select committee, or (if established) the new joint committee may decide that a particular Act or provisions within an Act should be reviewed. The committee could (as a departmental select committee already can) request information from the department or commission research from an independent body or undertake the review itself by launching its own inquiry and taking evidence before producing a final report. The decision by Government or a Parliamentary committee to initiate a review of the Act might result from input by an external body.

7.6 Before considering each of these avenues further, we explain in more detail the common starting point for both avenues, which is the early consideration of the need for post-legislative scrutiny.

EARLY CONSIDERATION OF THE NEED FOR POST-LEGISLATIVE SCRUTINY

7.7 We consider it sensible that a system of post-legislative scrutiny should involve consideration, at an early stage, of the desirability for review following enactment. Ideally, a document or documents that set out the policy objectives of the Bill would inform this process. This clarification of objectives would not only assist Parliamentarians during the passage of the Bill but may also help to form the basis for a future review.

7.8 In addition to clarifying the intention of the legislation, it would be helpful if departments indicated whether the Bill would be appropriate for post-legislative scrutiny and give an idea of the timescale for implementation. At this stage, one of three decisions may be made:

(1) **A positive commitment to review:** We propose that such a decision would lead to the steps described in avenue 1 which is a pre-planned route to review.

(2) **A decision that the legislation (or part of it) may well be appropriate for review:** However this would be resource-dependent, and therefore there would not be a positive commitment to review made at the legislative stage. This decision may then lead to the steps described in avenue 2, for which a decision to review is taken after the relevant provisions have been brought into force.

(3) **A decision that that the legislation is not suitable for review**. However, if a review unexpectedly became necessary, this could still be accommodated in avenue 2.

7.9 A decision about whether a Bill may be appropriate for review should be made by the department prior to the introduction of the Bill but may be modified during the legislative process. Identifying criteria for how this decision is made may lead to inflexibility. Therefore it would be better to consider whether legislation is suitable for review on a case by case basis; we discuss this further in paragraph 7.57.

Clarification of objectives

7.10 In considering suitable vehicles for the clarification of objectives of the Bill and possible criteria for review, we have identified a number of options:

(a) Purpose clauses on the face of the Bill

(b) Explanatory Notes

(c) Policy documents, including statements in White Papers

(d) Regulatory Impact Assessments

(e) Input from scrutiny committees

The primary concern here is the clarification of objectives. Therefore, we do not propose a particular vehicle or combination of vehicles but consider the merits of each in turn and invite consultees' responses on this point.

7.11 **(a) Purpose clauses:** These are statements which appear on the face of the Bill and contain the general purpose of the legislation. They could be used as a basis for measuring the effectiveness of the measure. However, there are serious limitations to their use. In his evidence to the House of Lords Constitution Committee, First Parliamentary Counsel, Sir Geoffrey Bowman warned of a risk of conflict between the purpose clause and the specific provisions in a Bill, which could lead to uncertainty.[1] This could lead to difficulties in interpretation by the courts. Purpose clauses also provide a temptation to spin. The House of Lords Constitution Committee concluded that these objections outweighed the advantage of making clear on the face of the Bill what the Bill was intended to achieve.[2]

7.12 **(b) Explanatory Notes:** The House of Lords Constitution Committee suggested that the Explanatory Notes to a Bill could contain "a clear and developed explanation of the purpose of the Bill, incorporating or accompanied by the criteria by which the Bill, once enacted, can be judged to have met its purpose".[3] Others think that this would blur the function of Explanatory Notes and could introduce an element of spin into what is intended to be a "neutral account of the Bill".[4] Explanatory Notes are published not by the Government but by the House authorities and therefore should not contain advocacy. In Queensland all Explanatory Notes to Bills contain a section on policy objectives and another on how those objectives are to be achieved.[5]

7.13 **(c) Policy documents:** In its Response to the House of Lords Constitution Committee Report, the Government was not persuaded that it was appropriate to include criteria in the Explanatory Notes by which the Bill once enacted could be judged to have met its purpose. Rather than rejecting the idea of criteria outright, the Government went on to suggest that a more appropriate place to outline such criteria might be preceding policy documents, or in debates during Parliamentary proceedings on a Bill.[6]

7.14 During the debate on the Constitution Committee Report on 6 June 2005, Baroness Amos for the Government said:

1 Parliament and the Legislative Process (2003-04) HL 173-II, p 103.

2 Parliament and the Legislative Process (2003-04) HL 173-I, p 27, para 85.

3 Above, para 87.

4 Cabinet Office Guide to Legislative Procedures, 2004, p 35, para 9.4.

5 See http://www.legislation.qld.gov.au/Bill_Docs/Bll51_05.htm (last visited 10 January 2006) for examples.

6 Parliament and the Legislative Process: The Government's Response (2004-05) HL 114, p 9, para 35.

> While we do not accept that the Explanatory Notes are the best place to put criteria for evaluating a Bill after implementation, we agree that departments should be clear about the purpose of a Bill and how they will evaluate the effectiveness of legislation once it is enacted.[7]

7.15 **(d) Regulatory Impact Assessments:** As mentioned in Part 3, paragraph 3.12, Cabinet Office Guidelines already advise that RIAs should contain a section on monitoring and review and suggest ways in which RIAs can be used as the basis for review.[8] The quality of RIAs is regularly scrutinised by the Better Regulation Task Force (which has now become the Better Regulation Commission) and the National Audit Office. In its most recent report on RIAs, the NAO found that from its sample of ten RIAs, six did not give any details of monitoring or evaluation procedures.[9] Despite the current picture, RIAs do provide a good place for the clarification of policy objectives and criteria for monitoring and review, not least because RIAs represent an existing mechanism which could be enhanced to incorporate these considerations more effectively.

7.16 However, a possible limitation of relying on the RIA process is that RIAs are completed before the Bill is introduced. Due to amendments passed during the legislative process, there may be a significant difference between the Bill as introduced by Government and the Act of Parliament that passes.

7.17 **(e) Input from scrutiny committees:** The experience of pre-legislative scrutiny is considered in Part 4. Committees undertaking pre-legislative scrutiny are well placed to identify in their reports any provisions which they feel should be reviewed in the future. There are already examples of this happening. The Joint Committee on the draft Charities Bill was able to recommend that "the Bill should contain a requirement for the Secretary of State to review and report to Parliament on the impact of the Act no later than five years after Royal Assent and that report should include an assessment of the effect of the legislation on public confidence in charities, the level of charitable donations and the willingness of individuals to volunteer".[10] This recommendation is now reflected in clause 72 of the Charities Bill. The Scrutiny Unit,[11] which has experience of supporting the work of pre-legislative scrutiny committees, could assist committees with the identification, at the pre-legislative stage, of potential areas for post-enactment review.

7.18 Other committees may also be able to have a similar input at the legislative stage. For example, the Joint Committee on Human Rights may from time to time identify parts of Bills which it considers should be reviewed post-implementation.

7 Hansard (HL), vol 672, no 10, col 769.

8 http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/post_implementation_review.asp.

9 National Audit Office, Evaluation of Regulatory Impact Assessments Compendium Report (2004-05) HC 341, p 22, para 2.33.

10 Joint Committee on the Draft Charities Bill, The Draft Charities Bill (2003-04) HL Paper 167-I/HC 660-I, p 112, para 51.

11 See paragraph 4.7 of this paper for an explanation of the work of the Scrutiny Unit.

Review criteria

7.19 The formulation of pre-prescribed success criteria may sound attractive; the benchmarks are in place in advance and any reviewing body is provided with instant terms of reference or at least some helpful guidance. However, we are not suggesting that it would always be possible or wise to try to define criteria in terms of narrow "targets". In some cases it may be possible to put "metrics" around a Bill's objectives but in many cases it will not. Ultimately, it should be for the reviewing body to consider the legislation in conjunction with any document setting out its objectives and formulate its own benchmarks against which to measure the effects of the legislation. Too much reliance on pre-prescribed criteria could create inflexibility leading to a form of review which risks overlooking consideration of unintended consequences. Furthermore, it may be difficult to adjust the success criteria during the passage of the Bill in order to accommodate amendments which may result in an Act of Parliament very different from the original Bill.

7.20 **We invite views from consultees on whether it is desirable to clarify policy objectives at an early stage and if so on the most suitable document or documents for so doing.**

7.21 Avenues 1 and 2 are now considered in greater detail.

AVENUE 1

7.22 Avenue 1 may be broken down into the following steps, which are considered in turn:

(1) The commitment to review

(2) The departmental review

(3) Parliamentary control

(1) The commitment to review

7.23 The early consideration for review, which precedes avenue 1, results in a decision that the relevant Bill or part of it should be subject to post-legislative scrutiny. The second step of avenue 1 is therefore the formulation of a positive commitment to review, that is, the legislative or procedural tool that will actually trigger review. There are different triggers for post-legislative scrutiny already in existence and it may be that different triggers are suitable for different types of legislation. We consider three types:

(a) Ministerial undertakings

(b) Review clauses

(c) Sunset clauses

7.24 **(a) Ministerial undertakings:** Ministers sometimes undertake to conduct a review of legislation. This may be done at the legislative stage. It would be helpful if at Second Reading or at some other appropriate point during the passage of the Bill the Minister were to say whether the Government intends that there shall be post-legislative scrutiny and if so, what it should cover. If they are not satisfied with what is said, it would be open to Members of either House to table amendments during the passage of a Bill which seek to insert a review clause.

7.25 **(b) Review clauses:** A review clause requires the operation of the Act or part of the Act to be reviewed after a specified period of time. During the passage of the Prevention of Terrorism Bill through Parliament in early 2005, there was protracted debate about the need for a review provision or a sunset clause in the legislation. The Government eventually agreed to a review clause. That provision is now section 14 of the Prevention of Terrorism Act 2005:

> 14 Reporting and review
>
> (1) As soon as reasonably practicable after the end of every relevant 3 month period, the Secretary of State must-
>
> (a) prepare a report about his exercise of the control order powers during that period; and
>
> (b) lay a copy of that report before Parliament.
>
> (2) The Secretary of State must also appoint a person to review the operation of this Act.
>
> (3) As soon as reasonably practicable after the end of-
>
> (a) the period of 9 months beginning with the day on which this Act is passed, and
>
> (b) every 12 month period which ends with the first or a subsequent anniversary of the end of the period mentioned in the preceding paragraph and is a period during the whole or a part of which sections 1 to 9 of this Act were in force,
>
> the person so appointed must carry out a review of the operation of this Act during that period.
>
> (4) The person who conducts a review under this section must send the Secretary of State a report on its outcome as soon as reasonably practicable after completing the review.
>
> (5) That report must also contain the opinion of the person making it on-
>
> (a) the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism; and

(b) the extent (if any) to which the Secretary of State has made use of his power by virtue of section 3(1)(b) to make non-derogating control orders in urgent cases without the permission of the court.

(6) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.

(7) The Secretary of State may pay the expenses of a person appointed to carry out a review and may also pay him such allowances as the Secretary of State determines.[12]

7.26 A review clause may be a useful tool because it is enshrined in statute and therefore has the force of law. It may simply provide for a general review or specify the particular provisions that should be reviewed, the timescale for review and who should carry it out. However, it has been observed that rather than being a pre-planned provision in a Bill, such clauses are often political compromises, representing the price the Government will pay for getting a Bill through Parliament.

7.27 **(c) Sunset clauses:** The utility of a sunset clause is to enable an Act or provision to cease to have effect automatically, after a certain period of time, unless something that is specified, e.g. a review, is done in order to keep it in place. Sunset clauses may be used in different ways. One example is the Electronic Communications Act 2000. Part I of that Act concerns the arrangements for registering providers of cryptography support services, such as electronic signature services and confidentiality services. Section 16(4) is the sunset clause which states:

> '(4) If no order for bringing Part I of this Act into force has been made under subsection (2) by the end of the period of five years beginning with the day on which this Act is passed, that Part shall, by virtue of this subsection, be repealed at the end of that period.'

7.28 The Cabinet Office Better Regulation Executive guidance on Regulatory Impact Assessments states that, "sunsetting is a way of ensuring that legislation is reviewed, kept up to date, and not left on the statute book after it has served its purpose".[13] The guidance suggests that sunset clauses are appropriate in the following situations: where the legislation addresses a time-limited problem; where there is scientific uncertainty; where there is uncertainty over the costs and benefits of the legislation; where measures extend the power of the state or reduce civil liberties and where measures are taken in the face of considerable opposition.

[12] Subsection (8) defines some of the terms used in section 14.

[13] http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/index.asp.

7.29 Careful thought should be given to the use of sunset clauses. A sunset clause on its own does not necessarily ensure that post-legislative review will take place. It may be the intention that the targeted provisions will simply lapse without any formal Parliamentary consideration. For example, Part I of the Electronic Communications Act 2000 was repealed by operation of subsection 16(4) on 25 May 2005. The Government did not try to prevent the repeal and there was no debate in Parliament. This is partly because Part I was only ever intended to be brought into force if an industry-led, voluntary regime did not work.[14] Other sunset clauses, such as those found in terrorism legislation are intended to provide for a general debate prior to a decision as to whether to renew the targeted provisions.

7.30 **We welcome the views of consultees on pre-enactment triggers to post-legislative review.**

(2) Departmental review

7.31 The next step in avenue 1 is the first stage of the post-legislative scrutiny itself: the departmental review. The proposal for a departmental review takes account of resource constraints on Parliament and also recognises that departments may have better access to some of the data required for initial review. The Act will have been the department's project; it will have prepared the legislation which is to be reviewed and will be able to draw upon that knowledge and expertise. The scope of the review will be informed by the factors which arise from the early consideration of the need for review as discussed above.

7.32 There may also be a role here for central Government. For example, as part of the better regulation agenda, central Government could oversee the process of review by departments and issue guidance as to how it might be carried out most effectively. The Better Regulation Executive already issues guidance to departments on monitoring and review of legislation and this would in effect be an extension of that work.

7.33 **Do consultees agree that where review is pre-planned the relevant Government department should ordinarily carry out the initial review of legislation? If not, who should carry it out?**

[14] Department of Trade and Industry, Information Security: Guide to the Electronic Communications Act 2000 (2004) p 4 (http://www.dti.gov.uk/bestpractice/assets/security/eca.pdf) (last visited 10 January 2006).

(3) Parliamentary Control

7.34 In order to ensure proper public accountability, it is critical that the review should be subject to some form of Parliamentary control. The Liaison Committee has said: "committees are well-suited to undertaking post-legislative scrutiny, in part because they can be more candid than government-led or government-sponsored reviews, and more responsive to the views of stakeholders".[15] The second stage of post-legislative scrutiny should involve consideration of the departmental review by a Parliamentary committee. We consider that the departmental review should be published and formally laid before Parliament. Effective post-legislative scrutiny will require commitment of time as well as breadth and depth of experience. It is a matter for Parliament what form of committee system would both recognise the existing responsibilities, and constraints on, the departmental select committees and the existing responsibilities of the House of Lords for the scrutiny of legislation, and draw on their skills and resources to best practical effect. It is not for the Law Commission to seek to tell Parliament what would be the best means for achieving this, but the following routes have been suggested to us.

7.35 **(a) Departmental Select Committees:** The House of Lords Constitution Committee concluded that departmental select committees should be the bodies for considering the effect of legislation by following up an initial departmental review.[16] Departmental select committees may occur to many as the obvious choice for this kind of work. As we have observed in Part 3, paragraph 3.14, departmental select committees do have the power to conduct post-legislative scrutiny and have in fact conducted some post-legislative scrutiny but it is fair to say that their Members are under great pressure in terms of resources, particularly time. There is therefore a genuine logistical problem resulting in a lack of capacity for undertaking post-legislative scrutiny. It may be that pressure can to some degree be relieved by the committee commissioning further research from an independent body. There may also be potential for the expansion of the Scrutiny Unit[17] in order to assist departmental select committees to carry out post-legislative scrutiny work. Even so, limitations on capacity are bound to remain. Where the departmental select committee decides not to conduct post-legislative scrutiny, there is potential for a House of Lords committee to do so, or there may be a role for a new joint post-legislative scrutiny committee as discussed below.

[15] House of Commons Liaison Committee Annual Report 2004, HC (2004-05) 419, para 74.

[16] Parliament and the Legislative Process (2003-04) HL 173-I, p 44, para 178.

[17] See paragraph 4.7 of this paper for an explanation of the work of the Scrutiny Unit.

7.36 **(b) Joint Committee:** A number of those who gave evidence to the House of Lords Constitution Committee for its report, Parliament and the Legislative Process, thought that post-legislative scrutiny should be carried out by a joint committee.[18] This would allow different sets of expertise to be brought in by the House of Lords. A joint post-legislative scrutiny committee could carry out the scrutiny itself or simply act as a filter, directing the work to another committee. One possibility is for the joint committee to have sub committees formed to scrutinise certain Acts as that need arose. Where pre-legislative scrutiny has taken place on a Bill, it is worth considering whether some of the pre-legislative committee membership should have some input, bringing the advantage of familiarity with the purpose and content of the measure by the time of the post-enactment review. There may also be scope to assess the utility of the pre-legislative scrutiny, and to identify for future reference any failings in that process. For example, a post-enactment problem may be identified that could have been prevented if consultation with a particular group had taken place. If a departmental select committee was unable or chose not to follow up a departmental review, a joint committee may be able to pick it up instead.

7.37 **(c) Lords Committee:** There may be scope for a Lords-only committee to conduct post-legislative scrutiny work. Post-legislative scrutiny work that will be very detailed or technical and which a departmental select committee does not have the capacity to follow through may be particularly suitable to be carried out by a Lords committee.

7.38 Whichever Parliamentary committee is judged to be best placed to undertake the second stage of post-legislative scrutiny, by following up the departmental review, there is potential for that committee to draw on independent bodies to assist with the review process. There are already examples of academic institutions assisting committee inquiries, (in Scotland, the Justice 1 Committee conducted post-legislative scrutiny in conjunction with the University of Glasgow). Although there is no mechanism in place at present, it could be made possible for the Law Commission to undertake research work at the behest of a committee, particularly if detailed legal analysis were required for a narrow form of post-legislative scrutiny. Similarly there may be circumstances in which a committee feels that it is appropriate to invite the National Audit Office to undertake a review.

7.39 **We seek views from consultees on the most appropriate Parliamentary body or bodies for conducting post-legislative scrutiny.**

7.40 **Do consultees see any value in having a Joint Committee on Post-Legislative Scrutiny even if such a committee does not in fact undertake all of the scrutiny work itself?**

[18] Parliament and the Legislative Process (2003-04) HL 173-I, p 44, para 177. Proponents include the Hansard Society, Dr Lewis Moonie MP and Paul Tyler MP.

AVENUE 2

7.41 Avenue 2 potentially covers two categories of legislation. The first is legislation which was considered appropriate for review at the early consideration stage but for which a positive commitment to review was not made. The second category is legislation that was not considered appropriate for review but for which review unexpectedly becomes necessary. Although we have emphasised the merits of thinking about post-legislative scrutiny at an early stage of the legislative process, it is important that any Parliamentary committee which assumes ultimate responsibility for post-legislative scrutiny should not be tramlined. It must be able to examine what it thinks should be examined, including unintended consequences of legislation. Committees are able to react to troublesome legislation by deciding to undertake a review of it, even if the need for such a review was not anticipated at an early stage. As we have noted, this is how ad hoc post-legislative scrutiny by departmental select committees already takes place. Rather than a prior decision being taken at the legislative stage, a committee itself may decide that a review should be undertaken at any stage. The enhancement on the status quo that avenue 2 would provide is an increase in the number of post-enactment triggers for post-legislative scrutiny.

7.42 The focus of avenue 2 is therefore post-legislative scrutiny which is not pre-planned or built in to the legislation itself although it is informed by the early consideration which underpins both avenues. The key here is flexibility. Avenue 2 allows for adverse unintended and unexpected consequences to be addressed. We consider here possible triggers for avenue 2 scrutiny.

Post-enactment triggers for post-legislative scrutiny

7.43 **(a) Central Government:** In keeping with the Government's better regulation agenda, there could be a role for central Government to have responsibility for a rolling programme of review. This could involve oversight of legislation after implementation and requesting Departments, where it is deemed appropriate, to undertake review of certain Acts or provisions within Acts. Central Government would itself provide the trigger for the review process, which could then pass through Governmental and Parliamentary stages as described above in avenue 1.

7.44 **(b) Parliamentary committee:** As sometimes occurs now, a committee itself may decide to undertake post-legislative scrutiny of an Act or part of an Act. This may or may not be based on a prior departmental review. The different ways in which this can work are described in Part 3.

7.45 **(c) External bodies:** Aside from matters which may come to the attention of Parliament through normal political processes, there may be scope to improve communication by external bodies with Parliament, when those external bodies wish to draw to the attention of Parliament legislation which they consider should be reviewed. For example, it may be that from time to time the Judges' Council or the Law Commission or a consumer body will wish to bring to the attention of Parliament some particularly troublesome legislation. The advantage of establishing a joint post-legislative scrutiny committee in this context would be that it would provide a channel for considered concerns about the operation of legislation to be fed back into Parliament. The joint committee could conduct an initial analysis to see whether there would be any merit in recommending further action, either to be taken by itself or another Parliamentary committee, bearing in mind the factors noted in paragraphs 7.34 to 7.38 above. Similarly, during the course of its work, the National Audit Office sometimes comes across legislation which is unduly complex and may be creating delivery problems.

7.46 **We welcome the views of consultees on post-enactment triggers for post-legislative scrutiny.**

POST-LEGISLATIVE SCRUTINY OUTCOMES

7.47 Under avenue 1 or avenue 2 the Parliamentary committee undertaking the review (whether based on a departmental review or not) would make its final assessment and report, with recommendations, to Parliament. It may be that the committee makes recommendations that the legislation should be amended in some way to address concerns with the effects of implementation. It would also be open to the committee to propose improvements for the operation of the legislation by non-legislative means.

7.48 If the outcome of the review shows that a legislative change is required, it is worth considering the potential for a fast-track mechanism to allow such changes that are considered to be desirable to improve the legislation, to be acted upon quickly. This links in to some extent with the Cabinet Office proposals for a Bill for better regulation. One of the purposes is to make it easier to remove or amend outdated, unnecessary or over-complicated legislation.[19] The Cabinet Office consultation paper also notes that there are clear links between the role of the Law Commission and better regulation objectives for simplifying and clarifying the law.[20] To this end, the consultation paper proposes that the scope of Regulatory Reform Orders[21] should be broadened to allow them to act as a vehicle to implement uncontroversial Law Commission recommendations. It may be that Regulatory Reform Orders could be used in future to address concerns arising as a result of post-legislative scrutiny, particularly where those concerns arise shortly after implementation.

[19] Cabinet Office Better Regulation Executive, A Bill for Better Regulation: Consultation Document July 2005, p 3.

[20] Above, p 12.

[21] A Regulatory Reform Order is a statutory instrument which can be used for the reform of burdensome primary legislation under the powers contained in the Regulatory Reform Act 2001.

WHAT FORM SHOULD THE SCRUTINY TAKE?

7.49 The exact form of the scrutiny will vary depending on the specific measure that is being reviewed. As discussed earlier, different Acts vary enormously and therefore the design of the scrutiny will have to be tailor-made according to the measure. The reviewing body should have autonomy to decide the form the scrutiny will take but it may be helpful to consider some of the core components required for a comprehensive review.

7.50 A narrow form of review might be limited to considering:

- Have all the provisions been brought into force?
- Has the legislation given rise to difficulties of interpretation?
- Has the legislation had unintended legal consequences?

7.51 A broader form of review would address the question whether the Act has delivered what was intended in practical as well as legal terms. This would involve questions such as:

- Have the policy objectives been achieved?
- Has the legislation had unintended economic or other consequences?
- Has it been over-cumbersome?
- Do any steps need to be taken to improve its effectiveness/operation?
- Have things changed so that it is no longer needed?

Most Parliamentarians who have spoken to us mean a review of the broader kind when referring to post-legislative scrutiny.

7.52 The method of scrutiny adopted by a reviewing body would depend on the intended scope of the review. The Privy Counsellor Review Committee Report on the Anti-Terrorism, Crime and Security Act 2001[22] provides an example. No formal terms of reference were provided by the Act. The approach of the Committee was to take evidence both from those relying on the Act's powers, such as police and security services, and those with views on their use, including a range of academics, lawyers and organisations with an interest in the field.[23] This demonstrates that one committee can undertake both the broad/political and narrow/legal aspects of post-legislative scrutiny simply by drawing on outside expertise for the different aspects. It may be that a committee has sufficient internal expertise to address the broad, political considerations but will commission an independent legal expert to address the narrow, legal considerations.

7.53 For each part of the Anti-Terrorism, Crime and Security Act, the Privy Counsellors' review briefly outlined the background to the provision, including the policy behind the approach taken. The Committee then considered its "usage" – whether the provision had been used and if so, how frequently. The Committee then stated their view on the provision and finally set out their conclusions and recommendations.

7.54 We acknowledge that the Privy Council is not a Parliamentary body and that it conducted a very wide-ranging and detailed review under conditions of confidentiality that would be difficult to replicate outside the Privy Council. However, the methodology used provides a good example of how a committee can formulate its own criteria to determine the form post-legislative scrutiny will take.

7.55 We do not think that it would be wise at this stage to be prescriptive about the form of the scrutiny by the department or reviewing Parliamentary body and that this should be a matter for its judgment in each case.

7.56 **We welcome comments from consultees on the form that post-legislative scrutiny might take.**

[22] (18 December 2003) HC 100.

[23] Above, p 21, para 72.

WHICH PRIMARY LEGISLATION IS SUITABLE FOR REVIEW?

7.57 The House of Lords Constitution Committee Report[24] recommended that "most Acts other than Finance Acts" should be subject to review. The Government in its Response to that Report accepted that there was a case for more post-legislative scrutiny but did not elaborate on which measures should be scrutinised. We are concerned at the resource implications of suggesting scrutiny of most measures enacted. In order to be of value, the scrutiny work is likely to be quite detailed and therefore time-consuming. It would be far more preferable to have effective review of a few pieces of legislation a year rather than a perfunctory review of many Acts. Careful selection is therefore required. It is important to note that in many instances, it may be desirable to review just one provision or one part of an Act. This may be a particularly appropriate approach for large Acts which may contain different parts which serve different purposes. The decision as to whether an Act is suitable for review will have to be on a case-by-case basis. However, it is possible to make some general observations, particularly in relation to the types of Acts which we do not think would be suitable for review.

Categories of legislation unsuitable for some form of post-legislative scrutiny

7.58 There are some types of legislation that we think would not be suitable for post-legislative scrutiny. These include Finance Acts, Appropriation Acts, consolidation legislation, legislation that makes minor technical changes only, and legislation where the scheme of the legislation contains its own method of independent analysis and reporting. There may also be instances where knowledge that there was to be post-legislative scrutiny might impede, rather than promote the objects of the legislation. For example, an analogous situation arose when the Joint Committee on the draft Gambling Bill considered whether the playing of a particular type of gaming machine, a "Category D" machine by under-18s causes problem gambling. The Committee recommended that the Government should commission research to establish any causal link, and review the decision to allow under 18s to play Category D machines in the light of that report. The Committee specifically rejected the notion of a formal review after a specified period of time, reasoning that "such a measure would unfairly penalise the industry by creating uncertainty and deterring investment".[25]

[24] Parliament and the Legislative Process (2003-04) HL 173-I, p 44, para 108.

[25] Joint Committee on the Draft Gambling Bill, Draft Gambling Bill, (2003-04) HL Paper 63-I, HL 139-I, p 178, para 57.

EMERGENCY LEGISLATION

7.59 We recognise that the scrutiny of all legislation would be a very great deal more than the Parliamentary system can accommodate. We do not think that it would be appropriate for us to suggest in this paper legislative provisions that represent compelling candidates for review. However, we believe that emergency legislation should always be subject to post-legislative scrutiny, particularly where it affects civil liberties. In its Report, the Privy Counsellor Review Committee made clear its "support for the principle of making emergency legislation subject to periodic review and renewal by Parliament".[26]

7.60 **We invite the views of consultees on the most suitable types of legislation for post-legislative scrutiny.**

WHAT SHOULD BE THE TIMESCALE FOR SCRUTINY?

7.61 The House of Lords Constitution Committee recommended that Acts should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner.[27] It is highly unlikely that there is one timescale that would be suitable for all types of legislation which are deemed suitable for review.

7.62 There may be cases (for example, emergency legislation) where there is strong political pressure for early review. But ordinarily, we think that early review may present disadvantages. In particular, there may have been insufficient time to permit a mature judgment to be made about the effects of the Act. If the Act aroused political controversy an early review may simply result in a continuation of the arguments about the policy of the Act rather than an attempt to monitor objectively the effects of its implementation. Another factor is that large Acts will often contain a series of commencement dates for different parts of the Act which result in the Act being commenced gradually over a number of months or even years. Our provisional view is that in many cases to expect post-legislative scrutiny three years after commencement as suggested by the House of Lords Constitution Committee might be too short a time frame. More importantly however is the need here for flexibility of approach depending on the particular Act.

7.63 There is another school of thought that considers that the purpose of post-legislative scrutiny is to provide a mechanism to address problems that arise very soon after implementation. It may be that this reactive form of scrutiny, like that we have described in our avenue 2, can take place more quickly after implementation; the purpose would be to address discrete concerns rather than undertake a more wide-ranging review. We have in mind here technical deficiencies in the Act which may require speedy correction.

7.64 **We welcome views from consultees on what should be the timescale for post-legislative scrutiny.**

[26] Privy Counsellor Review Committee, Anti-Terrorism, Crime and Security Act 2001 Review: Report, 18 December 2003, HC 100, p 9.

[27] Parliament and the Legislative Process (2003-04) HL 173-I, p 44, para 180.

A pilot study?

7.65 We recognise the evolutionary nature of the Parliamentary process and suggest that the key to any new process is to start small. We think that it would be useful to begin with a pilot form or forms of post-legislative scrutiny. One of the purposes would be to identify a few suitable Acts or provisions that would be suitable for post-legislative scrutiny.

7.66 **Do consultees consider that it would be helpful to conduct a pilot study? We welcome any ideas from consultees on the form that a pilot study might take.**

PART 8
POST-LEGISLATIVE SCRUTINY OF DELEGATED LEGISLATION

8.1 Acts of Parliament often grant Ministers powers to make delegated or secondary legislation, usually by means of a Statutory Instrument ("SI"). This means that an Act can contain general provisions, which allows for the details to be framed in delegated legislation. About 3,000 Statutory Instruments are issued each year; they have the same legal force as the parent Act of Parliament. There are two main types of statutory instrument: affirmative instruments which must be expressly approved by Parliament and negative instruments which become law without a debate or vote but which may be "prayed against" by a member of either House. In both cases, Parliament can accept or reject an instrument but cannot amend it.[1]

8.2 When considering the potential for post-legislative scrutiny of delegated legislation a paradox emerges. In one respect, it may be argued that the need is greater as Parliamentary scrutiny is not as thorough as for primary legislation. However, the sheer volume of secondary legislation means that practically, post-legislative scrutiny would be an extremely difficult task. Ideally, it would make sense to review secondary legislation post-enactment at the same time as reviewing the parent Act from which it flows, particularly where the meat of the provisions appears in the secondary legislation. But this approach fails to acknowledge that modern Acts are capable of spawning a huge amount of secondary legislation. For example, under just one Act, the Financial Services and Markets Act 2000 (which has 433 sections and 22 schedules), more than 100 statutory instruments have been made or have effect. This underlines the necessity of carefully selecting measures to evaluate.

8.3 The House of Lords plays an important role in terms of the scrutiny of delegated legislation. The Delegated Powers and Regulatory Reform Committee reports on whether the provisions of any Bill inappropriately delegate legislative powers. The Merits of Statutory Instruments Committee plays a complementary role in examining the delegated legislation which results from the exercise of those powers. The Committee has power to draw the "special attention of the House" to any of the instruments which it considers may be:

a) politically or legally important or that gives rise to issues of public policy likely to be of interest to the House;

b) inappropriate in view of the changed circumstances since the passage of the parent Act;

c) inappropriately implementing European Union legislation; or

[1] House of Lords Briefing, Scrutinising the Executive – Delegated Legislation (May 2005) (http://www.parliament.uk/documents/upload/HofLBpDelegated.pdf) (last visited 10 January 2006).

d) imperfectly achieving its policy objectives.[2]

8.4 The Joint Committee on Statutory Instruments undertakes technical scrutiny of all statutory instruments. The Select Committee on Statutory Instruments considers instruments laid before the House of Commons only, and is comprised of the Commons members of the Joint Committee.

8.5 The Hansard Society Commission in its 1992 Report, Making the Law, recommended that all the delegated legislation made under major Acts should be reviewed some two or three years after it comes into force.[3] The Conservative Party Report, 'Strengthening Parliament' noted that:

> There is a case for undertaking post-legislative scrutiny of SIs. As with primary legislation, it would be open to departmental select committees to commission research on the effect of particular SIs or to undertake a short inquiry. In the Lords, the small committees engaged in post-legislative scrutiny would be able to include delegated legislation within their remit.[4]

8.6 The Hansard Society recently endorsed this view by including it in proposals for reform to improve the functioning and scrutiny of delegated legislation.[5]

8.7 The House of Lords Constitution Committee Report, Parliament and the Legislative Process, did not include any specific recommendation with regard to post-legislative review of delegated legislation. However, in the debate on the Report on 6 June 2005, the Chairman of the Delegated Powers and Regulatory Reform Select Committee, Lord Dahrendorf said:

> In many cases, we should give much more serious consideration to the possibility, feasibility and usefulness of sunset clauses, or at any rate, of procedures which move in the direction of sunset clauses; that is, reviews in set periods and at particular times… . My personal preference would be for every piece of secondary legislation to contain a sunset clause or…a severe review clause.[6]

[2] http://www.parliament.uk/Parliamentary_committees/merits.cfm (last visited 10 January 2006).

[3] Making the Law, The Report of the Hansard Society Commission on The Legislative Process (1992), p 95, para 393.

[4] The Commission to Strengthen Parliament, Strengthening Parliament (July 2000), p 44.

[5] Hansard Society, Issues in Law Making Briefing Paper 3 Delegated Legislation, (December 2003), p 5.

[6] Hansard (HL), vol 672, no 10, col. 754.

8.8 There is experience of sunsetting delegated legislation in Australia at State and more recently at Federal level.[7] Sunsetting provides one way in which secondary legislation could be managed as it has the effect of time limiting the life of legislation which is otherwise left on the statute book, often beyond the end of its useful life. A sunset clause represents a decision that a provision should have a limited life. Therefore, such a provision may simply fall after the specified time and will not necessarily be subjected to a formal review. A review clause would allow for consideration of whether it is necessary to continue the life of the provision to which it relates.

8.9 It is worth considering whether there is any scope to maker greater use of sunset clauses in delegated legislation in order to assist with the management of the huge and increasing volume of secondary legislation. It is an unhappy state of affairs if those affected by legislation have to trawl through provisions contained in a variety of legislative instruments to which they have no centralised means of access. Until there is some form of database available to the public, by which all the relevant provisions can be accessed by ordinary search methods with appropriate hyperlinks, there is a strong argument that departments should do more than at present to consolidate the various legislative instruments so that their provisions can be found together. Sunsetting of secondary legislation could be used as a way of pressing departments to do this. It may be possible to exclude by category some types of secondary legislation which are not suitable for sunsetting, such as regulations reducing burdens, giving effect to EU Directives or underpinning procedural systems (such as the Civil Procedure Rules) or commencement orders. It may also be possible for a committee (the House of Lords Merits Committee or the House of Commons Select Committee on SIs) to refer certain categories of SI to the House if it thinks that the House might consider it inappropriate that the SI should be made without a sunset clause or review clause.

8.10 Some sunset clauses in the parent Act time-limit the effect of secondary legislation made under it. For example, section 2(2) of the Education Act 2002 stipulates that any orders made under that section shall not have effect for a period exceeding three years. Section 2(7) further limits the power of the Secretary of State by stating that no orders under section 2 can be made after the end of the period of four years beginning with the commencement date of the Act.

8.11 **We invite the views of consultees: (1) on post-legislative scrutiny of secondary legislation (in general); and (2) on whether there may be advantages in making greater use of sunset clauses in secondary legislation.**

[7] See Part 5, paras 5.5 – 5.9.

PART 9
POST-LEGISLATIVE SCRUTINY OF EUROPEAN LEGISLATION

9.1 Membership of the European Union has a huge impact on the national legislation of Member States. About half of all UK legislation which imposes costs on businesses, charities and the voluntary sector originates from the European Union.[1] Brussels produces an enormous amount of material - over 1,000 European documents are deposited in Parliament every year.[2] This Part gives a brief overview of the ways in which Parliament scrutinises European material, in order to provide a basis for consideration of the need for post-legislative scrutiny of European legislation. There is a distinction to be drawn between the scrutiny of European legislation at European level, for example, by the European Commission and scrutiny at national level where the focus is on the implementation of European legislation into domestic law. We consider both types of scrutiny in this Part but we are particularly interested in the views of consultees on the latter point.

THE IMPLEMENTATION OF EU LEGISLATION

9.2 There are three types of European legislation. Regulations are of general application. They are binding in their entirety and directly applicable in all Member States, without the need for incorporation by national legislation. Decisions are specific measures which are binding upon those to whom they are addressed. Directives are binding on Member States as to the objective to be achieved but leave the choice as to the form and method of achieving the effect to individual Member States. Directives therefore require incorporation by national legislation. This may be done by Act of Parliament or by an Order in Council or regulation under section 2(2) European Communities Act 1972.

9.3 The European Commission, the Executive arm of the EU, proposes legislation which usually has to be agreed by the Council of Ministers, comprising Government Ministers from the Member States.

[1] Cabinet Office, Improving The Way The UK Handles European Legislation: Pilot Quality Assurance Study and Transposition Conference – Synthesis Report (October 2002), p 2. See also Written Answer, Hansard (HC) vol 424, col 490W.

[2] HC Select Committee on the Modernisation of the House of Commons, Scrutiny of European Business, Second Report (2004-05) HC 465-I, para 4.

SCRUTINY AT NATIONAL LEVEL

9.4 In the House of Commons, the remit of the European Scrutiny Committee is to assess the legal and/or political importance of each EU document, decide which EU documents are debated, monitor the activites of UK Ministers in the Council and keep legal, procedural and institutional developments in the EU under review. This in practice involves the analysis of all 1,000 or so documents deposited in Parliament each year. Each document is accompanied by an Explanatory Memorandum which is signed by a Government Minister and sets out the impact on the UK and the UK Government's policy on the document. This system provides for wide coverage, rapid scrutiny where necessary and a published analysis of all documents found to be of legal and political importance.[3]

9.5 The system in the House of Lords is different but complementary. The European Union Committee in the House of Lords has very broad terms of reference, which are "to consider European Union documents and other matters relating to the European Union". Each of the Committee's members serves on one or more of the seven subject-area sub-committees on which other Lords also sit. The Chairman of the Committee conducts a weekly sift of all the EU documents received and decides which should be referred to the sub-committees for further examination. The sub-committees may simply take note of the document, or may conduct a more substantial enquiry and make a report or draft letters to be sent from the Chairman of the Committee to the Minister. The House of Lords system therefore allows for more detailed scrutiny of selected documents.

9.6 In both Houses the scrutiny systems are underpinned by the Scrutiny Reserve Resolution. The effect of this is to prevent Ministers from giving agreement in the Council of Ministers to any proposal which has not yet been cleared from scrutiny. If the scrutiny reserve is overridden, the Minister is expected to provide a full explanation.

POST-LEGISLATIVE SCRUTINY AT NATIONAL LEVEL

9.7 Lord Grenfell, Chairman of the Lords European Union Committee gave written evidence on behalf of his committee to the House of Lords Constitution Committee for its Report, Parliament and the Legislative Process. He noted that:

> As far as post-legislative scrutiny is concerned, the closest we come to this is when we call Ministers to account after they have agreed measures in the Council. I should perhaps only comment here that it must be a key theme of any post-legislative scrutiny…that one of its primary purposes be to hold Ministers to account for the success of their legislative and other initiatives.[4]

9.8 Lord Grenfell also gave oral evidence to the Constitution Committee. He explained that the European Union Committee is concerned only with draft EU legislation and not with its transposition into British law.[5]

[3] Above, para 20.

[4] Parliament and the Legislative Process (2003-04) HL 173-II, p 147.

[5] Above, p 152.

9.9 The inquiry work of UK Parliamentary committees does consider the implementation of European legislation, as well as domestic legislation. For example the House of Commons Environment, Food and Rural Affairs ("EFRA") Committee has produced a number of inquiries about the way the Government deals with legislation emerging from Europe which relates to waste. Its inquiries into hazardous waste and the future of waste management examined the likely impact of a range of European Directives, particularly the Landfill Directive. The EFRA Committee has also inquired into the End of Life Vehicles Directive and Waste Electrical and Electronic Equipment Directive and the Implementation of CAP reform in the UK.[6]

GOLD PLATING OF DIRECTIVES

9.10 An issue sometimes arises whether the "gold plating" of a Directive will impose an unnecessary or disproportionate burden on those affected by it. In its recent Report on the Scrutiny of European Business, the House of Commons Modernisation Committee considered the criticism often levied against the UK, that it is over-zealous in its transposition of EU directives into domestic law.[7] Gold plating occurs when the Government goes beyond the minimum requirement of directives. In his evidence to the Modernisation Committee, Chris Huhn MEP summed up the complaint of gold plating as follows:

> During this [transposition] process, it is quite possible for departments to hang all sorts of their own decorations onto the Christmas tree before it arrives as a statutory instrument.[8]

9.11 In an independent report prepared for the Foreign and Commonwealth Office on the implementation of EU legislation[9], Robin Bellis compared approaches to implementation by the UK, France, Spain and Sweden. He noted that all Member States had problems from time to time transposing legislation. However, the UK tended to elaborate provisions which, in general, other Member States were more inclined to copy out from the directive without modification or limitation.[10]

9.12 There may be two reasons for gold plating. The first arises from the difference in legislative techniques between drafters of legislation in the UK and in some other EU countries. The UK drafting style tends to be fuller, and the drafter may include provisions which Government considers necessary to give effect to the directive.

[6] EFRA Committee, Fourth Report, End of Life Vehicles Directive and Waste Electrical and Electronic Equipment Directive (2003-04) HC 103; Implementation of CAP Reform in the UK, Seventh Report (2003-04) HC 226-I.

[7] Select Committee on the Modernisation of the House of Commons, Scrutiny of European Business, Second Report (2004-05) HC 465-I, para 102.

[8] Above.

[9] Implementation of EU Legislation, An independent study for the Foreign and Commonwealth Office by Mr Robin Bellis, November 2003.

[10] Above, p 16.

9.13 For example, the House of Lords Select Committee on the Merits of Statutory Instruments argued that the Horse Passports (England) Regulations 2004[11] were drafted in such a way as to require 800,000 horses to be issued with passports whereas the total number that fell into the categories to be protected, the Committee argued, was more like 210,000. The Minister disputed the Committee's findings that the regulations unnecessarily went beyond the requirements of the relevant directives and those regulations are now in force. Post-legislative scrutiny would not be a means of resolving an issue about what an EU directive requires. But there may be a case for post-legislative scrutiny to see if the effect of the method of implementation is more burdensome than intended.

9.14 Secondly, however, there may be cases where Government decides as a matter of policy to add rules beyond those required by the directive. Whether or not such provisions should receive post-legislative scrutiny will depend on the same considerations as for primary legislation.

POST-LEGISLATIVE SCRUTINY AT EUROPEAN LEVEL

9.15 In 2001, Tito Gallas, head of division at the Council of the European Union, wrote about the European Commission monitoring the application of EC law. He observed that, "this is in fact a task of crucial importance; legislation has not only to be made, it has, above all, to be applied".[12] Some directives contain requirements for post-legislative scrutiny. The Commission, based on the reports of individual Member States, carries this out. For example, in Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, Article 12 provides:

> Every three years, Member States shall transmit a report to the Commission on the application of this Directive by the competent authorities. On the basis of these reports, the Commission shall submit a Community report to the European Parliament and the Council. In this report, the Commission shall assess, inter alia, the desirability of revising or extending the scope of this Directive. It shall also describe the evolution of relevant case-law in the Member States and shall consider the possibility of creating a public database containing such relevant case-law.

9.16 Similarly, Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 33, provides:

> The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32 (1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. The report shall be made public.

[11] SI 1397/2004.

[12] Tito Gallas, "Evaluation in EC Legislation" (2001) *Statute Law Review*, Volume 22, Number 2, p 93.

> The Commission shall examine, in particular, the application of this Directive to the data processing of sound and image data relating to natural persons and shall submit any appropriate proposals which prove to be necessary, taking account of developments in information technology and in the light of the state of progress in the information society.

9.17 Austria, Finland, Sweden and the United Kingdom submitted a joint proposal for amendment of this Directive.[13] In addition, the United Kingdom published a post-implementation appraisal of the Data Protection Act (based on the Directive) after a public consultation carried out by the Home Office.[14] The Commission also issued a questionnaire to be filled in by the individual Member States to which the UK responded.[15] However, although the first Commission report did highlight the various problems identified by Member States, it suggested that these could be resolved by better implementation of the Directive rather than by a change to the Directive itself.[16] Government departments currently provide the feedback from the UK to the Commission.

9.18 The House of Lords European Union Committee recently published a report, Ensuring Effective Regulation in the European Union[17]. The report emphasises the importance of regulatory reform in Europe and recommends that all key legislative proposals should be accompanied by a full impact assessment which should be drafted at an early stage and revised throughout the legislative process.

9.19 The Committee, in preparing the report, took evidence on why post-legislative scrutiny (referred to as 'ex-post assessment') would be valuable. Sir David Arculus, Chairman of the UK Better Regulation Task Force explained that:

> We believe that European Union legislation should be routinely reviewed after implementation to assess its impact. It is important to assess whether the policy objectives have been met, whether there have been any unforeseen consequences or if any further action is necessary. A review is also needed to check the validity of initial Impact Assessment and ensure the on-going viability of the IA process.[18]

9.20 The report notes that ex-post assessment would improve the quality of impact assessment as lessons could be learnt from mistakes and successes. This form of review would also help examine whether legislators are achieving what they intended to achieve. This reasoning led the Committee to the following recommendation:

[13] http://www.dca.gov.uk/ccpd/dpdamend.htm.

[14] http://www.dca.gov.uk/ccpd/dparesp.htm.

[15] http://www.dca.gov.uk/ccpd/saguide.htm.

[16] Commission of the European Communities, First report on the implementation of the Data Protection Directive (95/46/EC), p 7.

[17] 9th Report (2005-06), HL Paper 33.

[18] Above, para 72.

> We recommend that ex-post assessment of the regulatory impact of European Union legislation should be the rule rather than the exception and that the first such assessment should be carried out by the Commission no more than one year after the entry into force of the instrument in question.[19]

9.21 **Where EU legislation contains a provision for review, do consultees favour a UK review before an EU review and if so how might that practically be done? More generally, we welcome the views of consultees on the scope for post-legislative scrutiny of the implementation of EU legislation into domestic law.**

[19] European Union Committee, 9th Report, Ensuring Effective Regulation in the European Union (2005-06) HL Paper 33, para 74.

PART 10
LIST OF CONSULTATION QUESTIONS

10.1 We repeat below the questions we have posed throughout this consultation paper:

10.2 **We welcome views or experiences of post-legislative scrutiny in the jurisdictions to which we have referred or elsewhere. [para 5.24]**

10.3 **Consultees are asked for their views in relation to arguments for and against post-legislative scrutiny. [para 6.5]**

10.4 **We invite views from consultees on whether it is desirable to clarify policy objectives at an early stage and if so on the most suitable document or documents for so doing. [para 7.20]**

10.5 **We welcome the views of consultees on pre-enactment triggers to post-legislative review. [para 7.30]**

10.6 **Do consultees agree that where review is pre-planned the relevant Government department should ordinarily carry out the initial review of legislation? If not, who should carry it out? [para 7.33]**

10.7 **We seek views from consultees on the most appropriate Parliamentary body or bodies for conducting post-legislative scrutiny. [para 7.39]**

10.8 **Do consultees see any value in having a Joint Committee on Post-Legislative Scrutiny even if such a committee does not in fact undertake all of the scrutiny work itself? [para 7.40]**

10.9 **We welcome the views of consultees on post-enactment triggers for post-legislative scrutiny. [para 7.46]**

10.10 **We welcome comments from consultees on the form that post-legislative scrutiny might take. [para 7.56]**

10.11 **We invite the views of consultees on the most suitable types of legislation for post-legislative scrutiny. [para 7.60]**

10.12 **We welcome views from consultees on what should be the timescale for post-legislative scrutiny. [para 7.64]**

10.13 **Do consultees consider that it would be helpful to conduct a pilot study? We welcome any ideas from consultees on the form that a pilot study might take. [para 7.66]**

10.14 **We invite the views of consultees: (1) on post-legislative scrutiny of secondary legislation (in general); and (2) on whether there may be advantages in making greater use of sunset clauses in secondary legislation. [para 8.11]**

10.15 **Where EU legislation contains a provision for review, do consultees favour a UK review before an EU review and if so how might that practically be done? More generally, we welcome the views of consultees on the scope for post-legislative scrutiny of the implementation of EU legislation into domestic law. [para 9.21]**