



Northern Ireland
Assembly

Chairpersons' Liaison Group

Report on Strengthening Committee Scrutiny

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Purpose and Membership

Purpose

The Chairpersons' Liaison Group (CLG) is made up of the Chairperson of all committees of the Assembly, including Statutory, Standing and Ad Hoc committees (with the exception of the Business Committee). The CLG fulfils a strategic and practical liaison role in relation to the work of Assembly Committees, helping to develop common approaches to common problems and promoting good practice. In particular, the CLG seeks to:

- define a set of core tasks for statutory committees;
- identify, evaluate and assess options for improving the collective effectiveness of Assembly Committees;
- represent the common interest of committees;
- facilitate liaison between committees and the Executive;
- facilitate liaison between committees and the Assembly Commission;
- guide the clerk assistants in making decisions about financial and other resource allocations;
- identify, on behalf of committee members, common areas for development and training.

The CLG ordinarily has 14 members, comprising the chairpersons of each of the 9 statutory committees and 5 of the Standing Committees (excluding the Business Committee). Since its establishment in September 2020, CLG has also included the Chairperson of the Ad Hoc Committee on a Bill of Rights. The CLG includes a Chairperson and Deputy Chairperson, and has a quorum of 5 members.

Membership

The CLG has 15 members, including a Chairperson and Deputy Chairperson, and a quorum of five members. The membership of the CLG is as follows:

- Ms Carál Ní Chuilín MLA (Chairperson) ^{1 2}
- Ms Sinead McLaughlin MLA (Deputy Chairperson) ^{3 4}
- Dr Steve Aiken OBE MLA
- Dr Caoimhe Archibald MLA
- Ms Paula Bradley MLA
- Mr Jonathan Buckley MLA ⁵
- Ms Linda Dillon MLA ⁶
- Mr Colm Gildernew MLA
- Mr William Humphrey MLA
- Mr Chris Lyttle MLA
- Mr Declan McAleer MLA
- Mr Daniel McCrossan MLA
- Ms Emma Sheerin MLA
- Mr Mervyn Storey MLA ⁷
- Mr Peter Weir MLA ^{8 9}

¹ With effect from 1 April 2021 Sinéad Ennis replaced William Humphrey as Chairperson

² With effect from 20 September 2021 Carál Ní Chuilín replaced Sinéad Ennis as Chairperson

³ With effect from 1 April 2021 Colin McGrath replaced Sinéad Ennis as Deputy Chairperson

⁴ With effect from 22 October 2021 Sinead McLaughlin replace Colin McGrath as a Member and Deputy Chairperson of the Chairpersons' Liaison Group

⁵ With effect from 21 June 2021 Jonathan Buckley replaced Michelle McIlveen as a Member of the Chairpersons' Liaison Group

⁶ With effect from 20 September 2021 Linda Dillon replaced Sinéad Ennis as a Member of the Chairpersons' Liaison Group

⁷ With effect from 21 June 2021 Mervyn Storey replaced Paul Givan as a Member of the Chairpersons' Liaison Group

⁸ With effect from 21 June 2021 Pam Cameron replaced Mervyn Storey as a Member of the Chairpersons' Liaison Group

⁹ With effect from 6 July 2021 Peter Weir replaced Pam Cameron as a Member of the Chairpersons' Liaison Group

Abbreviations and Acronyms used in this Report

| | |
|-------------|--|
| CAMS Office | Clerking and Member Support Office |
| CIPFA | The Chartered Institute of Public Finance and Accountancy |
| CLAC | Constitutional and Legislative Affairs Committee |
| CLG | Chairpersons' Liaison Group |
| DPLRC | Delegated Powers and Law Reform Committee |
| ESR | Examiner of Statutory Rules |
| ETI | Enterprise, Trade and Investment |
| MLAs | Members of the Legislative Assembly |
| PAC | Public Accounts Committee |
| PAPON | Parliamentary and Assembly Procedural Officials Network |
| RaISe | Research and Information Service |
| RHI | Renewable Heat Incentive |
| SL1 | A policy memorandum in relation to a proposed Statutory Rule |
| SR | Statutory Rule |
| TOR | Terms of Reference |

Executive Summary

1. The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme identified “limitations inherent in *[the Enterprise, Trade and Investment (ETI) Committee’s]* role” and found that “reasons for this included its own limited resources and its dependence on the Department for information and analysis to allow it to perform its challenge function robustly”.
2. As a result, the Inquiry’s report made recommendations around strengthened Assembly Committees to increase scrutiny and help ensure that systematic changes are made and sustained; and that the Assembly considers what steps are needed to strengthen its scrutiny role, particularly as conducted by Assembly Committees, in the light of lessons from the RHI. The Inquiry recommended that such a consideration might include “*significantly increasing the resources available to statutory committees and, generally, identifying what steps are needed to improve the effective scrutiny of Departments and their initiatives, whether in Assembly Committees or in the Assembly Chamber itself*”.
3. The Chairpersons’ Liaison Group (CLG) agreed to review committee scrutiny with a view to identifying how the recommendations of the RHI report could be implemented to strengthen the scrutiny role carried out by committees, particularly in relation to the scrutiny of primary and subordinate legislation by statutory committees.
4. The review has identified a number of areas and made a number of corresponding recommendations which it believes will enhance the scrutiny process and help to ensure high quality robust legislation is produced.
5. The limitations of the existing staffing resource available to support the work of Assembly committees is evident. Committee remits continue to widen (for example, the need to consider issues relating to the UK’s exit from the European Union). Resource limitations are a significant concern, particularly when recognising that insufficient resourcing was seen as a contributor to the events that led to the RHI Inquiry. The CLG therefore strongly recommends increasing the staffing complement for statutory committees, subject to appropriate review, as soon as possible in the 2022-27 mandate.
6. The limited subject expertise available to committees is something that needs to also be addressed. There is a professional and well-resourced Research and Information

Service (RaISe) in the Assembly but committees should also be encouraged, where possible and appropriate, to avail of external expertise to assist in improving the scrutiny process. This is also an issue for the Examiner of Statutory Rules (ESR) in relation to the scrutiny of delegated powers in bills, and a recommendation is made in respect of this issue.

7. The CLG makes two recommendations in relation to the ESR, in relation to the need for a review to determine if the current model is still fit for purpose and if an alternative approach to the consideration of delegated legislation is required.
8. Insufficient time to scrutinise subordinate legislation to the necessary level of detail was iterated by a number of those who provided input to this review. CLG is therefore of the view that the current arrangements are in need of review, particularly as this lack of time could be contributing to deficient legislation being passed. Leading on from this, the CLG is also of the view that improved timetabling of legislation would assist in managing committee work programmes and the management of resources.
9. CLG also makes recommendations in relation to the openness and transparency of the legislative process, greater engagement with a wider range of stakeholders and the provision of training and development for members.
10. As a result of this review, the CLG has made a total of 33 [recommendations](#) aimed at strengthening the scrutiny of primary and subordinate legislation as well as the need for pre- and post-legislative scrutiny. CLG believes it is essential its recommendations are acted upon to ensure that the Assembly delivers on its obligations as detailed in the RHI Inquiry Report.

Introduction

1. Statutory committees of the Northern Ireland Assembly are established in accordance with paragraphs 8 and 9 of the Belfast/Good Friday Agreement, Section 29 of the Northern Ireland Act 1998 and under Assembly Standing Order 48.
2. Statutory committees have a scrutiny, policy development and consultation role with respect to their respective department and Assembly Standing Orders also make provision for the scrutiny of primary and subordinate legislation.
3. As per Standing Order 56, the Public Accounts Committee (PAC) also has a significant scrutiny role in relation to the departments that are the subject of the Northern Ireland Audit Office's reports into which the Committee opts to carry out its inquiries. CLG agreed, at its meeting on 2 June 2020, to include both the PAC and the Audit Committee in the scope of this review.
4. [*The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive \(RHI\) Scheme*](#) identified "limitations inherent in *[the Enterprise, Trade and Investment (ETI) Committee's]* role" and found that "reasons for this included its own limited resources and its dependence on the Department for information and analysis to allow it to perform its challenge function robustly".
5. As a result, the Inquiry's report made recommendations around strengthened Assembly Committees to increase scrutiny and help ensure that systematic changes are made and sustained; and that the Assembly considers what steps are needed to strengthen its scrutiny role, particularly as conducted by Assembly Committees, in the light of lessons from the RHI.
6. The Inquiry recommended that such a consideration might include "*significantly increasing the resources available to statutory committees and, generally, identifying what steps are needed to improve the effective scrutiny of Departments and their initiatives, whether in Assembly Committees or in the Assembly Chamber itself*". Relevant extracts from the RHI report are included at [Appendix A](#) to this report.
7. As a result of the above, the CLG agreed to review committee scrutiny with a view to identifying how the recommendations of the RHI report might be implemented to strengthen the scrutiny role carried out by committees, particularly in relation to the scrutiny of legislation by statutory committees.

8. At its meeting in May 2020, the CLG agreed the [terms of reference](#), [methodology and scope](#) of the review.
9. Whilst the CLG is not established in Standing Orders, and does not therefore have the same powers as committees of the Assembly, its purpose includes a strategic and practical liaison role in relation to the work of Assembly Committees, helping to develop common approaches to common problems and promoting good practice. In doing so, it aims to identify, evaluate and assess options for improving the collective effectiveness of Assembly Committees.

Terms of Reference

In order to assess and implement the recommendations of the RHI report, as detailed in this report's [Introduction](#), the following terms of reference were agreed by the CLG at its meeting in May 2020:

- To examine how committee scrutiny is currently carried out at the Assembly;
- To consider the approach to scrutiny carried out by committees in other legislatures including, but not limited to, Westminster, the Oireachtas, the Scottish Parliament and the National Assembly for Wales;
- To consider the staffing and other resources these legislatures have in place to support the scrutiny function of their committees;
- To identify, review and update previously conducted research in the area of committee effectiveness, particularly as it pertains to scrutiny, carried out by the Assembly's Research and Information Service (RaISe);
- To identify innovative approaches that would improve scrutiny by committees;
- To work with Assembly officials and identify how pre-legislative and post-legislative scrutiny could be developed;
- To work with departmental officials to determine how best to identify and provide the information required by committees in order to strengthen their scrutiny role;
- To identify training and development needs for Assembly staff, MLAs and research support within parties to enable those involved in the scrutiny process to be better equipped to carry out that function;
- To consider the resources currently available to statutory committees and whether these should be strengthened or enhanced to better deliver effective scrutiny; and
- To make recommendations on whether and how to strengthen the resources available to statutory committees and any other steps needed to improve the effective scrutiny of departments.

Methodology and Scope of Review

To deliver on the terms of reference, the CLG adopted the following methodology:

- The Clerking and Member Support (CAMS) Office should take forward this work on behalf of CLG and provided briefing and updates as appropriate;
- Benchmarking against other legislatures to consider how they carry out committee scrutiny, what their staffing structures are and drawing conclusions as to how the Assembly might improve its scrutiny function;
- Reviewing previous work of RaISe on committee effectiveness, updating that work with a focus on committee scrutiny and conduct further research that may be identified as necessary;
- Taking the views of Assembly staff, MLAs, party support staff and others as appropriate on how they feel scrutiny could be improved; and
- Producing a draft report for CLG's consideration and agreement making recommendations to the Assembly Commission, and others as appropriate, that deliver on the recommendations of the RHI report.

The CLG also agreed the scope of the review to include that:

- This work will remain within the terms of reference, as agreed by CLG. It will result in a report by CLG that will make recommendations to the Assembly Commission, and others as appropriate, for consideration, approval and implementation; and
- It cannot be guaranteed that all of the findings and resultant recommendations would be accepted by the Assembly Commission and what can be delivered will need to be prioritised and affordable in both the short term and the long term; and a mechanism will need to be put in place for review to ensure it delivers as required.

Consideration of Issues

1. Having agreed the terms of reference, methodology and scope of the review, CLG received a number of briefings on how committee scrutiny might be improved. The briefings included:
 - The Assembly’s Examiner of Statutory Rules (ESR), on 15 September 2020, on the work of the Office of the ESR; how subordinate legislation is currently scrutinised and areas where it might be improved; and on areas of best practice in other jurisdictions;
 - RaISe, on 2 February 2021, on Committee scrutiny and engagement: areas of good practice and innovation in other legislatures;
 - RaISe, on 28 September 2021, on pre- and post-legislative scrutiny, specifically the consideration of approaches in other legislatures; and
 - The ESR, on 28 September 2021, on the role and remit of the ESR.
2. Further to the briefings, the CAMS Office hosted a workshop on 26 February 2021, attended by committee clerks, to take their views on how scrutiny might be strengthened.
3. The CAMS Office also sought the views of MLAs and their Assembly support staff via a questionnaire issued on 1 June 2021.
4. Finally, the views of officials in other jurisdictions were sought during a conference on 26 March 2021 of the Parliamentary and Assembly Procedural Officials Network (PAPON).
5. The information received and views provided concentrated on 4 areas: scrutiny of subordinate legislation; pre-legislative scrutiny of primary legislation; scrutiny during the passage of primary legislation; and post-legislative scrutiny of primary legislation.
6. What the information received emphasised was the fact that there is no definitive solution and it may be that best practice is context-based. It was acknowledged agreed that that striving to continually improve the scrutiny function was an ongoing process across all jurisdictions. With this in mind, the information received centred around seven key areas:
 - Scrutiny of subordinate legislation;

- Pre-legislative scrutiny of primary legislation;
 - Scrutiny during the passage of primary legislation;
 - Post-legislative scrutiny;
 - Availability of member resources;
 - Engagement and Innovation; and
 - The role and powers of the ESR.
7. The following sections address the issues raised as they pertain to the different scrutiny roles and then addresses each of the above areas in turn and makes recommendations for change.

Scrutiny of subordinate legislation

1. This section considers the role of statutory committees in the scrutiny of subordinate legislation. The role of the ESR in this process is detailed in the section on [the role and powers of the ESR](#).
2. As a result of the growing reliance on the use of delegated powers and ‘skeleton’ bills¹⁰ it is imperative that the subordinate legislation receives sufficient scrutiny, particularly given the recommendations of the RHI Inquiry Report. This approach of producing ‘skeleton’ bills has been criticised by the Chairperson of the House of Lords’ Secondary Legislation Scrutiny Committee¹¹ as detrimental to the scrutiny of legislation and the creating of high quality legislation, and has led to two reports from House of Lords committees on this matter¹².

Views expressed by Members and their support staff

3. Five responses were received to the questionnaire to members and their Assembly support staff. The need for departmental officials to make themselves available to brief committees on the intent of subordinate legislation was emphasised as a means to delve into the detail of proposals through appropriate questions put to officials. So too was the need for concise briefing papers and the opportunity to receive one to one briefings from departmental officials and RaSe as appropriate.
4. The short timeframe in advance of motions being debated was also considered an issue.
5. One response highlighted the need for training to be provided to members on the legislative process as well as a longer period of time to be built into the process. This would afford committee members the required skills and the necessary time to appropriately scrutinise the subordinate legislation.
6. Another respondee emphasised the perception that subordinate legislation is less important than other committee business on account of the extremely short time allocated on the indicative timings for committee meetings to consider the memorandum detailing the policy objectives of proposed subordinate legislation

¹⁰ ‘Skeleton bills’ are where broad delegated powers are sought to fill in policy details at a later date.

¹¹ <https://twitter.com/UKHouseofLords/status/1463451645463965698>

¹² <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/159146/two-lords-reports-published-on-the-balance-of-power-between-parliament-and-the-executive/>

(known as an SL1s) and the associated Statutory Rules (SRs). They expressed the need for these to be given greater priority and to require more detailed briefings from departmental officials on the intent of the subordinate legislation.

7. One response to the questionnaire indicated that the current approach to scrutiny is efficient on account of the clarity of the process but not as effective as it could be.
8. The need for improved transparency and accessibility was raised as a quick win that ensures members and the public are aware of legislation being laid and are provided with a clear concise explanation of its policy intent. It was further suggested that the SL1 and SR should be made more widely available and not retained in committee. Proposals to improve transparency and accessibility are included later in this section.
9. The same resposdee also expressed a need for a consistent approach across committees to the handling of subordinate legislation and potential for committees to be given the power to amend subordinate legislation.

Views expressed by committee clerks and the Examiner of Statutory Rules (ESR)

10. In response to the CAMS Office engagement with committee clerks, some clerks reiterated the need for subordinate legislation to be given more time and greater priority in committee meetings and also suggested that the reference to it as 'secondary' legislation might diminish its importance.
11. Clerks felt that the current process works well in terms of the SL1 being provided to the committee in advance of the SR being laid and it was suggested that a similar approach might be worth exploring in relation to primary legislation.
12. However, the SL1 itself was criticised in terms of it potentially being outdated and may need revised to ensure that it meets the needs of committees. There were no suggestions put forward as to how it might be improved. This is perhaps something that requires a detailed analysis.
13. In terms of delivering better scrutiny, it was felt that the time permitted to scrutinise statutory rules is insufficient and should be longer so as to permit meaningful engagement and scrutiny. This discussion prompted a concern in relation to the timeliness of the ESR reporting so as to allow committees to properly scrutinise subordinate legislation and to take action, e.g. prayer of annulment. It was felt that the time period was reduced as a result of the committee waiting to receive the report on the rule. This is an issue that can be resolved between Assembly Officials.

14. Committees often find themselves under pressure from departments to quickly agree SL1s and SRs on the basis there will be a detrimental impact on those to whom the SR relates. CLG is clear that committees should have sufficient time to consider subordinate legislation and it is not acceptable for departments to bring forward such legislation at a late stage and expect committees to respond to a deadline of the department's making.
15. The view was expressed that the timetable should not be driven by the department but should be determined by the nature and complexity of the policy area and the appropriate level of engagement needed with stakeholders. It was considered that a less prescriptive approach to the passage of subordinate legislation, where committees were given more control over the process, may contribute to the avoidance of an RHI-type recurrence.
16. CLG notes that there is a range of subordinate legislation received by committees that may entail different levels of scrutiny. Many of these will be SRs relating to routine requirements, for example the uprating of various payments. Others will require more detailed consideration of policy implications and others, though more rarely, as in the case of RHI initiative may be a new and innovative initiative requiring both engagement with stakeholders and availing of external expertise.
17. It was felt that a traffic-light type system should be put in place to help determine which pieces of subordinate legislations could be considered quickly without excessive need for deliberation; which subordinate legislation would require further information and greater clarity before a committee makes its decisions; and which would require much more detailed analysis before the committee comes to its decision. For example:
 - Green – routine subordinate legislation e.g. uprating of payments.
 - Amber – SL1s indicating a new policy or changes to policy that require engagement with stakeholders.
 - Red – SL1 indicating new policy initiatives that may also require significant spend. This requires engagement with stakeholders and availing of external expertise.
18. Resourcing requirements was expressed as an issue of concern. This is rehearsed on a number of occasions throughout this report but it is evident, given the increasing volume of subordinate legislation and the need for more robust scrutiny, that there is

a need to review the staffing support provided to committees. This is detailed further in the [availability of member resources](#) section.

19. The increase in the volume of subordinate legislation across legislatures due to the increasing inclusion within primary legislation of delegated law-making powers is discussed in the annexed RaiSe paper “Parliamentary Scrutiny of Delegated Legislation – A Comparative Review”.
20. In evidence provided to the CLG, the ESR discussed the need for greater outward engagement than is currently the case particularly in respect of the information that is made public. Other legislatures appear to be more proactive in making information on the passage of subordinate legislation more transparent and accessible through the use of trackers and links to motions in plenary and other appropriate information relating to the legislation. The ESR does engage where possible with members and staff, and also with external stakeholders such as departmental officials to raise awareness and understanding of scrutiny objectives, good legislative practice, and to build relationships which serve good scrutiny.
21. Some work by the Business Office has also been taken forward in relation to tracking COVID-19 related subordinate legislation and consideration should be given to expanding this to include all statutory rules as it provides a high level of transparency.
22. To put in place and to manage such a system may be resource-intensive and would involve considerable work between the ESR and business areas within the Clerking business unit.

Views expressed by colleagues from other jurisdictions

23. As agreed in the terms of reference for this review, the CAMS Office sought the views of colleagues in other legislatures during the PAPON 2021 Spring Conference on what they considered to be good practice in the scrutiny of subordinate legislation. There was however, a lack of consensus as to what constitutes effective scrutiny. It was agreed that committees do not engage widely enough with stakeholders and significant reliance is placed on the information provided to the committee by departmental officials.
24. Feedback also referenced the time implications on members and committees that may result in subordinate legislation becoming deprioritised and therefore preclude detailed scrutiny.

25. The conference did not extend to consideration of the scrutiny of primary legislation.

Recommendation 1

To enhance transparency, SL1s and SRs should be published on the committee website upon receipt. In addition, social media platforms should be used to advise the general public and stakeholders of key subordinate legislation being considered by the committee.

Recommendation 2

CLG recommends and expects that departments will adhere to an agreed timeframe for scrutiny of subordinate legislation in accordance with recommendation 5. Where this is not possible the Minister should write to the chair explaining why the scrutiny of an SL1/SR must be expedited.

Recommendation 3

It is important that the time taken from receipt of the SR by committee to the committee receiving the ESR's report is strictly adhered to. Unless otherwise advised by the ESR in writing, CLG expects the ESR to report within two weeks of the ESR's office receiving an SR.

Recommendation 4

In order to clarify the level of scrutiny required by a committee, CLG recommends that Assembly officials and Executive officials undertake a review of the existing arrangements for scrutiny of subordinate legislation with a view to enabling committees having, where appropriate, greater time and opportunity to carry out more effective scrutiny of both SL1s and statutory rules. CLG recommends the basis for this approach should be a 'traffic light' system to categorise the level of scrutiny required for a particular SL1/SR, as discussed in paragraph 17.

Recommendation 5

CLG recognises that the timelines for scrutiny of subordinate legislation is a potential barrier to detailed scrutiny where engagement with stakeholders and/or external expertise is required. CLG therefore recommends that where a committee identifies the requirement to engage with stakeholders or avail of external expertise (e.g. following consideration of the SL1) it will advise the department following the committee meeting at which this is decided and agree a timeframe for consideration of the SL1 and subsequent SR.

Recommendation 6

Consideration should be given to the development of a 'legislation tracker'. This would enhance transparency and provision of information on the passage of legislation. Such increased outward engagement would assist in delivering the CLG's objective to "identify, evaluate and assess options for improving the collective effectiveness of Assembly Committees".

Recommendations 7

CLG considers there to be potential in the proposal for committees to be given amending powers in relation to subordinate legislation and recommends that the Assembly and Executive Review Committee considers how this could be facilitated.

Recommendation 8

CLG recommends that subordinate legislation should be given more time and higher priority during committee meetings and that references to it as secondary legislation should be avoided to not diminish from its importance.

Recommendation 9

CLG considers that the current SL1 is potentially outdated and should be reviewed to ensure that it fully meets the needs of committees. CLG recommends that Assembly Officials review the SL1, in conjunction with departmental officials, for consideration and approval of CLG early in the 2022-2027 mandate.

Pre-legislative scrutiny

26. Pre-legislative scrutiny can be considered to be “the detailed examination of an early draft of a Bill that is done by a parliamentary select committee before the final version is drawn up by the Government”¹³ and it plays an important role in enhancing the quality of legislation.
27. A problem pertaining to pre-legislative scrutiny is the willingness of departments to publish a draft bill but, where this is possible, it should indicate legislative intent; allow earlier engagement in the legislative process; highlight important or contentious issues early; and therefore provide more opportunity to committees to influence the content of a bill¹⁴. It would allow the Assembly to satisfy itself that the interests and concerns of stakeholders have been identified and reflected in the policy development. It can also be argued that it would lead to better legislation and therefore reduce the need for subsequent amending legislation.
28. The Scottish Parliament’s committee involvement in the passage of primary legislation begins at stage 1 when the bill is referred to the lead committee. In Wales, the first stage involves consideration of the general principles of the bill by a committee (or committees). This early involvement by committees in Scotland and Wales does not necessarily mean quality scrutiny but is a marked difference in approach to the Assembly’s procedure.
29. The Commission on Parliamentary Reform in Scotland made recommendations for the inclusion of two additional stages in the committee scrutiny process to facilitate pre- and post-legislative scrutiny but this was rejected by the Presiding Officer’s Advisory Group which noted that the Programme for Government provides an opportunity for committees to identify areas for pre-legislative scrutiny. Likewise, in Wales, the benefits of pre-legislative scrutiny were highlighted but no recommendations were adopted.
30. In the Assembly, committees do not have a formal involvement in the passage of legislation until such time as it is referred to the committee following Second Stage.

¹³ *Pre-legislative scrutiny - UK Parliament*

¹⁴ National Assembly for Wales Constitutional and Legislative Affairs, *Committee Making Laws in Wales*, October 2015: <https://senedd.wales/laid%20documents/cr-ld10379/cr-ld10379-e.pdf>

31. In 2013, Dáil Eireann established pre-legislative scrutiny in Standing Orders and this is something that might merit consideration by the Committee on Procedures.
32. Dáil Eireann evaluated its pre-legislative scrutiny process in 2020 and reported that just over 40% of recommendations (146 of 350 recommendations) in relation to draft bills were accepted by Ministers thereby clearly demonstrating that pre-legislative scrutiny can have a significant direct impact on government legislation and can also help to frame subsequent debate on the bills.
33. A major impediment to effective pre-legislative scrutiny is time. The Cabinet Office's 'Guide to Making Legislation'¹⁵ advises three to four months for pre-legislative scrutiny; several parliamentary committees have argued that 12 weeks should be the usual, or even the minimum, timeframe.

Views expressed by Members and their support staff

34. In a response to the questionnaire to members and their staff, one member expressed the view that involvement at committee stage was sufficient and that progress of the bill could be monitored until it is referred to the committee. During this time the committee should be able to call the appropriate Minister to discuss issues of concern if they arise.
35. In responses received, the usefulness of pre-legislative scrutiny was broadly accepted and the need for both formal and informal engagement was identified as a means to engage with relevant stakeholders.
36. Another respondent expressed the desire to see more in-depth briefings on the need for proposed bills, lessons learned from other jurisdictions or past interventions, and the perceived benefits/costs associated with the legislation. The same respondent also expressed the need to impress upon committees the importance of their scrutiny role on the development of legislation.
37. A respondent to the questionnaire recognised the benefits to be gained from pre-legislative scrutiny and emphasised the importance on having an impact at the early stages, both by committees and by those affected by the proposals. Early intervention, it was felt, might ease the passage of the bill through the Assembly if issues were identified before the legislation is introduced.

¹⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf

Views expressed by committee clerks

38. Included in the review's terms of reference was the objective of working with Assembly officials to identify how pre-legislative scrutiny could be developed. The following paragraphs outline the views expressed.
39. In discussions with committee clerks, they felt that the role of statutory committees in assisting the Minister in the development of policy is not as it should be and is something that needs to be raised as a concern.
40. They discussed how Private Members' Bills present difficulties in terms of a lack of pre-legislative scrutiny as they tend to be introduced without prior liaison with the relevant committee and this, it is argued, potentially diminishes the quality of the legislation produced and can lead to the need for significant changes at amending stages.
41. Committee clerks also felt that there should be a Standing Order setting out how the Executive should present its programme for legislation.
42. Effective planning by committees is essential if their scrutiny role is to be effective. Production of an Executive legislative timetable would help facilitate this planning which would incorporate the potential for pre-legislative scrutiny. CLG therefore encourage the Committee for Procedures to bring forward a Standing Order requiring an annual debate on the Executive legislative timetable.
43. CLG noted that sub-section 15(3) of the Assembly and Executive Reform (Assembly Opposition) Act (Northern Ireland) 2016 requires Standing Orders to make provision for an annual debate on the Executive legislative timetable. If this Standing Order was in place, then the Assembly and its committees would be able to plan on the basis of knowing with certainty what Executive legislation was planned for the year ahead. This would assist considerably in enabling committees to plan their scrutiny accordingly. Advice from the Clerk to the Committee on Procedures is that implementation of this is being taken forward by the Committee on Procedures.
44. Furthermore, 'New Decade, New Approach' stated that the First Minister and deputy First Minister should bring forward a programme of legislation and this was identified as important if committees are going to engage in pre-legislative scrutiny.

Views expressed by CLG

45. The CLG recognises the potential merits of pre-legislative scrutiny. While departments hold public consultations on legislative proposals there is no consultation on the subsequent bill introduced to the House.
46. The CLG believes that departments, following the initial consultation, should produce a draft bill for further public consultation. The draft bill should then be presented to the relevant committee for consideration before Introduction. The CLG recognises that this is a significant deviation from current practice but believes that this approach will allow for early engagement with the public and stakeholder groups in order to produce and facilitate public consideration of a draft bill; potentially reduce the time committees subsequently spend on the scrutiny of a bill; facilitate early changes to bills to produce better legislation; and produce fewer amendments at later stages based on early consensus-building.
47. Preparations to implement this approach should be taken forward within the Assembly and in discussions with departmental officials.

Recommendation 10

CLG recommends that departments, following the initial consultation on proposed primary legislation, should produce a draft bill for further public consultation that it presents to the relevant committee for consideration before Introduction and that preparations to implement this approach should be taken forward within the Assembly and in discussions with departmental officials.

Recommendation 11

CLG recommends that the Committee on Procedures considers bringing forward a Standing Order requiring an annual debate on the Executive legislative timetable.

Recommendation 12

CLG recommends that each department provide the relevant statutory committee with a legislative work programme for the year ahead at the beginning of each Assembly year.

Recommendation 13

CLG recognises that departmental plans in respect of the development of legislation may be delayed. Therefore, each department should provide in-year updates as to the progress of the development of bills to facilitate ongoing prioritisation of the committee work programme.

Scrutiny during the passage of primary legislation

Views expressed by Members and their support staff

48. In response to the questionnaire by members and their Assembly support staff, a suggestion was made that informal workshops with officials (with researchers in attendance if appropriate) might provide a more efficient means to gather evidence but that the formal evidence gathering element of committee scrutiny is also necessary. Focus needs to be retained on the overall objectives of the legislation. In terms of strengthening the process it was suggested that greater detail, in addition to the formal legal wording of amendments, should be provided that explains the reason for proposed amendments and their impact.
49. In response to the questionnaire, a view expressed was that the Assembly Legal Service and RaSe should be available much earlier in the process, and before a bill reaches committee, for the benefit of individual members as well as to the committee. It should be noted however that these options *are* available as and when required, at the request of the committee and members.
50. Another respondent emphasised the need for early intervention by committees to make the process more effective from the outset.

Views expressed by committee clerks

51. Committee clerks expressed the views, as has been expressed in research provided to the CLG, that extensive engagement and higher quality debate at committee stage results in higher quality legislation. However, there is a reliance on departments providing information at early stages and this is not always forthcoming or it can arrive at a stage when it is too late to be useful to the committee. As with scrutiny of subordinate legislation, it was felt by clerks that the committee stage is too short and almost always results in an extension being sought.
52. It was felt that there is a need for improved communications with departmental officials to smooth the process through the stages of the bill.
53. The increased reliance on the accelerated passage procedure is also impacting the work of committees and removes their potential to add significant value to those bills.

Recommendation 14

CLG notes that the committee stages of a number of bills have not progressed as quickly as planned due to delays in information being provided by departments. CLG recommends that Ministers ensure that such requests are given priority in order to expedite them through internal departmental processes. Where delays occur the Minister should write to the committee providing an explanation as to the cause of the delay and a date by which the information will be provided.

Recommendation 15

CLG notes that a number of committees in this mandate have had to consider multiple bills concurrently. This is simply not good practice and increases the risk of committee scrutiny being impacted. CLG recommends that, in the development of the legislative timetable, Ministers ensure that this is not repeated in future mandates.

Recommendation 16

Under SO 33(2) the committee stage is defined as 30 working days from the date of referral to the committee. It is possible to extend this period under SO33(4) until a date specified in the motion to extend.

Of the 19 Executive bills introduced since January 2020 which have not been subject to the accelerated passage procedure, there have been motions to extend the committee stage of 17.

CLG recommends that the Committee on Procedures considers whether SO33(2) and SO33(4) are still appropriate.

Recommendation 17

CLG is aware that some committees produce an 'Issues log' during consideration of a bill. This allows a contemporary record of issues raised, clarification sought, amendments received etc., and is often based on a traffic light system. CLG recommends that this is adopted by all committees as a means of tracking issues raised in written and oral submissions and during committee stage by members. This will help monitor the department's actions in respect of recommendation 14.

Recommendation 18

While stakeholders and the wider public assist committees in their scrutiny of legislation committees do not provide direct feedback as to how their input has helped the committee. In the interests of transparency CLG therefore recommends

that the issues log is used to help committees provide feedback to stakeholders on how their input assisted the committee.

Recommendation 19

While committees seek the views of stakeholders who provide a certain level of expertise to inform the committee stage CLG recommends, as with subordinate legislation, that where necessary committees consider availing of independent external expertise. CLG also recommends that Assembly officials consider how the identification and appointment of an external expert can be done in an expeditious way conducive to the timeframe of the committee stage.

Recommendation 20

There have been 18 Private Members' Bills (PMB) introduced in this mandate since January 2020. While this has been a positive development it has contributed to huge pressure on committees and their support teams, already considering Executive legislation. CLG understand that the Committee on Procedures has agreed a number of proposals to help streamline the PMB process and provide clarity to members on their role and responsibility as well as the support provided by Assembly officials. CLG recommends that the Committee on Procedures brings forward these proposals as soon as possible to ensure they are in place for the beginning of the new mandate.

Post-legislative scrutiny of primary legislation

54. Post-legislative scrutiny can be considered to be “an inquiry by a [...] committee into how a new law has worked in practice since it came into force”¹⁶. It is important as it addresses the effects of the legislation in terms of whether its intended policy objectives have been met and, if so, how effectively.
55. Post-legislative scrutiny is more developed in European parliaments than pre-legislative scrutiny and a 2014 report of the House of Lords Constitution Committee¹⁷ included evidence from the Chair of the Joint Committee on Human Rights which stated that as much attention should be paid to what happens after legislation becomes law as is paid to achieving the law. The report concluded that legislative scrutiny frequently ended at Royal Assent with little or no evaluation of whether the legislation actually achieved its aims. The issue of post-legislative scrutiny was subsequently examined by the Law Commission.
56. In its report¹⁸, the Law Commission identified a number of reasons why post-legislative scrutiny is desirable, including: examining whether the legislation works in practice; contributing to better regulation; concentrating minds and sharpening the focus on implementation and whether policy aims have been met; identifying and disseminating good practice; and improving the quality of legislation.
57. A 2013 report of the Scottish Parliament’s Standards, Procedures and Public Appointments Committee¹⁹ identified post-legislative scrutiny as a wide-ranging concept that can mean different things to different people, ranging from a technical analysis of legal drafting to a wider policy review. It identified a number of good practices by committees and referenced the potential for committees to embed mechanisms for post-legislative scrutiny into legislation during the passage of bills (e.g. provision for a review of the operation of the legislation within a specific time period). The report concluded that it was ultimately a matter for committees to decide whether or not to carry out post-legislative scrutiny.

¹⁶ *Post-legislative scrutiny - UK Parliament*

¹⁷ <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/17302.htm>

¹⁸ http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf

¹⁹ *8th Report, 2013 (Session 4): Post-Legislative Scrutiny : Scottish Parliament*

58. A 2016 report agreed that the Scottish Parliament's Public Audit Committee²⁰ should include post-legislative scrutiny within its remit that would allow it to consider previous acts of the Scottish Parliament to determine whether they have achieved their intended purpose. The report went on to include a checklist to be followed when considering whether or not to conduct post-legislative scrutiny. That said, the Session 5 Legacy Report²¹ of the Public Audit Committee recommended that post-legislative scrutiny be removed from its remit on account of the relevant subject committee having the subject knowledge and expertise.
59. The Welsh Parliament in 2015 reported on the recognised benefit of post-legislative scrutiny²² but noted that it had not been routinely carried out by committees, perhaps because of capacity issues. Whilst not dictating the need for committees to carry out this scrutiny it recommended that it be incorporated into their work.
60. Dáil Eireann's Standing Orders, as with pre-legislative scrutiny, provide for post-legislative (or post enactment) scrutiny 12 months following the enactment of a bill, with the exception of the Budget Bill and the Appropriation Bill. It requires the member of the Government or Minister of State to lay a report in the Parliamentary Library, thus placing the onus on government to report, as opposed to the committees. Committees do, however, have to power to require a Minister or Minister of State to appear before them to discuss post-enactment reviews.
61. The Chartered Institute of Public Finance and Accountancy (CIPFA) recommended that post-legislative scrutiny should be part of a holistic approach to assessing the merits or otherwise of legislation and they have developed a number of useful principles for the design of a framework to undertake this scrutiny.
62. The additional staffing resource implications, and the implications on those called to give evidence and departmental officials must be taken into account when deciding how best to staff a committee team and whether a committee will conduct post-legislative scrutiny.

²⁰ The Scottish Parliament, Post-legislative scrutiny: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105094.aspx>

²¹ *Session 5 Legacy paper | Scottish Parliament*

²² *cr-ld10379-e.pdf (senedd.wales)*

Views expressed by Members and their support staff

63. In response to the questionnaire to members and their Assembly support staff, it was suggested that a high-level strategic review should be carried out one-year after a bill becomes an act. This view was expressed by others who responded to the questionnaire and went on to include the need for briefings from a wider range of sources than just the relevant Minister and departmental officials and to include the costs associated with implementation of the legislation in the review.
64. Another response expressed the view that post-legislative scrutiny is as important as pre-legislative scrutiny and that it should be included in the work programme of committees. This view has also been expressed in the research papers provided to the CLG that considered practice in other parliaments.
65. A resondee emphasised the dearth in post-legislative scrutiny, something that is widely acknowledged as a key factor in the law-making process. They also recognised the significant resourcing implications, as did another resondee, but feels that the outcomes would justify the investment.

Views expressed by committee clerks

66. Included in the review's terms of reference was the objective of working with Assembly officials to identify how post-legislative scrutiny could be developed. Committee clerks identified the lack of post-legislative scrutiny as detrimental and expressed the need to improve in this area. They felt that it should be factored into committees' forward work programmes. It was suggested that the model applied in the Public Accounts Committee might be worth considering whereby departments would be asked to report to the committee on progress towards delivering on legislative objectives. Post-legislative scrutiny could also be factored into End-of-Mandate (Legacy) Reports thereby increasing the likelihood that it was followed up on by the subsequent committee.

Views expressed by CLG

67. CLG acknowledges the potential benefits of post-legislative scrutiny and that this can be done in a number of different ways to various levels of detail. For example, this could entail:
- (i) the formal assessment of the implementation of legislative proposals; or

(ii) the formal assessment of the implementation of legislative proposals and the impact of the legislation; or

(iii) (ii) plus additional scrutiny by the relevant Assembly committee to which the original legislation was referred.

68. However, CLG recommends that *at a minimum* post-legislative scrutiny should include a report by the relevant department on the implementation of the legislative proposals and this should take place 18 months after the commencement date of the legislation.

Recommendation 21

CLG recommends that consideration be given to possible approaches to post-legislative scrutiny, as detailed on paragraphs 67 and 68 but, *at a minimum*, post-legislative scrutiny should include a report by the relevant department on the implementation of the legislative proposals 18 months after the commencement date of the legislation.

Recommendation 22

CLG notes that the level of scrutiny decided upon should be determined by an objective process. CLG recommends officials develop a system to select legislation for different levels of post-legislative scrutiny based on criteria agreed by committee. In each case this should be presented to the committee for agreement.

Recommendation 23

As part of its committee stage considerations a committee will decide on the level of post-legislative scrutiny required by the department and determine an appropriate means to ensure this is carried out i.e. amendment to bill, assurance by the Minister. The committee's decision may include seeking the views of stakeholders and others impacted by the legislation.

Availability of Member resources

69. In considering this review, the CLG sought comparisons with other legislatures. The Scottish and Welsh Parliaments are obvious comparators, given that they also are unicameral legislatures and their committees are also dual purpose committees that scrutinise both policy and legislation.
70. A review in 2017 of the Scottish Parliament²³ identified a number of factors that inhibited effectiveness in the scrutiny of government. These included party discipline; excessive amounts of legislation in some committees reducing the ability to develop their own agenda; too little pre- and post-legislative scrutiny; and high turnover of committee membership resulting in a lack of institutional memory. The review made recommendations that included, strengthening the depth, expertise and capabilities of those available to support parliamentarians. The review identified the need for greater resources to support members' scrutiny options; increasing ability to interrogate evidence; enabling committees to undertake their own research; and greater legal advice to guide committees on primary and subordinate legislation.
71. A review by the Welsh Parliament in 2017²⁴ also identified similar issues to the Scottish review and emphasised the fact that politicians sit on multiple committees which could hamper their ability to gain in-depth subject expertise that would facilitate better scrutiny.
72. Membership of committees is, however, a party decision so a view in this regard is not expressed in this report. That said, a stronger support team for each committee, equipped with the necessary in-depth subject knowledge, would assist members in the passage of legislation and would see the committee team providing a greater role in informing members on the details of the policy area.

Committee staff support

73. The staffing complement providing support to statutory committees of the Assembly has remained broadly unchanged. Staff support is an area that received criticism in the RHI report (see relevant RHI recommendations at [Appendix A](#)).

²³ <https://test123582.files.wordpress.com/2016/10/commissiononparliamentaryreformreport-june20171.pdf>

²⁴ https://www.assembly.wales/en/abthome/about_us-commission_assembly_administration/panel-elec-reform/Pages/Assembly-Electoral-Reform.aspx

74. Committees of the Welsh Parliament are supported by a clerking team of four staff, as well as support from additional staff providing legal, research, translation and communications services. In Scotland, committees are supported by a team of 4 staff with support from research and others as necessary. Statutory committees in the Assembly are also supported by a team of four staff but Scotland and Wales have the equivalent of a Clerk, a Senior Assistant Clerk, an Assistant Clerk and one administrative support person, whereas in the Assembly our committees have additional administrative support but, with the exception of the Justice Committee, do not have a Senior Assistant Clerk.
75. The value of pre- and post-legislative scrutiny has gained prominence in recent years as methods to enhance and assess the quality of legislation. However, both are resource intensive and if effective scrutiny is to be conducted, resources need to be provided and this is an issue expressed throughout this review.
76. As previously mentioned, CIPFA has recommended that post-legislative scrutiny should be part of a holistic approach to assessing the merits or otherwise of legislation. Any additional staffing resource implications must be taken into account when deciding how best to staff a committee team to appropriately provide an enhanced legislative scrutiny function.

Views expressed by Members and their support staff

77. In response to the aforementioned questionnaire, it was proposed that additional resources should be put in place if there is to be real interaction with members and their support staff and if tangible outputs are to be achieved.
78. Another response expressed the opinion that the additional resources required would match the value added to the pre- and post-legislative scrutiny process. This would make staff and members think differently about legislation thereby potentially delivering more robust legislation.
79. Responses also centred on how expediting legislation has a significant impact on the workload of members and staff and is likely to result in errors.
80. A respondent emphasised the fact that staffing levels are insufficient and there is a need to strengthen the current committee support, particularly with regard to the legislative process and departmental policy proposals.

Views expressed by staff from other jurisdictions

81. In discussion with staff from other legislatures, the need to prioritise the workload of committees to give greater attention to scrutiny of subordinate legislation was discussed but the impact of members sitting on a number of committees, coupled with the small teams to support committees, often results in this not being possible.

Views expressed by committee clerks

82. Committee clerks expressed the views that increased scrutiny, both in relation to subordinate and primary legislation would have a significant impact on already stretched resources and to increase further the roles and responsibilities of committee teams would not be sustainable within current staffing allocations.
83. It is also recognised that not every statutory committee may require a dedicated additional staff member but there may be times that temporary additional staffing is required. Flexible working arrangements should also be considered where staff are not assigned to a particular committee but are able to move between committees on the basis of workload.
84. In addition, supplemental staffing resources would provide committees opportunity to implement the objective of the Northern Ireland Assembly Commission's (the Assembly Commission's) Annual Plan for 2022-23 in relation to "Designing Assembly specific models of legislative scrutiny and support based on relevant international best practice".

Wider scrutiny work of committees

85. Whilst this review has considered strengthening committee scrutiny in terms of primary and subordinate legislation, committees engage in the scrutiny of policies and strategies and also conduct inquiries. Therefore, in taking a holistic approach in relation to the overall scrutiny role of committees any additional resources provided would allow committees to more effectively progress these other aspects of committee work programmes and, potentially, give scope to committees introducing their own legislation.
86. Furthermore, the objective of the Assembly Commission's Annual Plan mentioned previously includes an outcome to "*enhance support for members in their policy and budget scrutiny, legislative scrutiny and post-legislative scrutiny by increasing capacity, capability, opportunity and independent input*". This objective's key

milestone for delivery in 2022-23 is to “Implement agreed proposals to enhance policy and budget scrutiny, legislative scrutiny and post-legislative scrutiny.”

87. Given the ongoing demands on staff there is a concern that budget scrutiny does not receive the attention it requires. As work continues to improve how committees scrutinise the budget process, and in order to deliver the Assembly Commission’s milestone in relation to budget scrutiny, the recommendation of providing additional staffing support would assist in this regard.
88. European issues will likely also continue to impact the work of committees. CLG received briefing in November 2021 on the Inter-Parliamentary Forum that will give consideration to international treaties including trade deals and the work of the forum may have an impact on the work of statutory committees.
89. In September 2021, CLG received briefing on proposals for new or amended EU law that will require consideration by departments and committees of explanatory memoranda associated with the EU law. At that meeting CLG agreed to write to the First Minister and deputy First Minister on this issue emphasising the need for departments to engage with committees prior to finalising its input to the Government Explanatory Memorandum and that committees be provided with a final copy of the Explanatory Memorandum. This will add to committees’ work programmes.
90. Also related to UK Withdrawal from the European Union and committee scrutiny is the issue of common frameworks. A number of committees have already considered issues relating to common frameworks resulting from the UK Withdrawal from the European Union. However, the majority of these have yet to be presented to committees and whilst the common frameworks deadline is February 2022, there may potentially be legislative out workings in the future that will impact the work of committees.
91. Whilst most primary legislation resulting from the UK Withdrawal from the European Union has concluded, democratic consent mechanisms will likely have an impact on committees in the future and this work will be in addition to normal requirements.
92. The additional staff resources would have an important role in providing the additional support that will likely be required in relation to EU issues going forward.

Views of the CLG

93. CLG has considered the resources currently available to statutory committees and whether these should be strengthened or enhanced to better deliver effective scrutiny. In doing so, CLG has heard evidence from a range of sources who have expressed the view that the resources currently available to statutory committees limits the extent to which committees scrutinise departments. CLG is satisfied that, with appropriate resources in place, the scrutiny which committees carry out could be more effective. Resources include the permanent staffing resource available to committees as well as that provided by RaISe, Legal Services and other business areas across the Assembly secretariat and, where appropriate, external expertise.
94. CLG has noted the additional senior support that committees at the Scottish Parliament and the Senedd/Welsh Parliament benefit from (e.g. through the provision of a Senior Assistant Clerk) and acknowledge how such support could benefit committees of the Assembly. Given the range of recommendations made by CLG in this report and the additional duties placed on staff, CLG recommends that the staffing complement of statutory committees should be enhanced to include an additional senior member of staff with specific responsibility for supporting committees in carrying out their scrutiny functions. This would include committee scrutiny in relation to all aspects of a department's work including scrutiny of primary and secondary legislation, budget scrutiny and scrutiny in relation to new work streams arising from EU exit.
95. CLG notes that it is the role of the Assembly Commission to provide the Assembly with the staff and services required for its purposes, and that the implementation of this recommendation falls to the Commission.
96. The staffing and other resources required by Assembly committees vary considerably during the course of a mandate, however committee resourcing has historically been relatively inflexible. In adding additional staffing capacity to statutory committees, CLG recommends introducing greater flexibility and team working across the range of services provided to committees by the Assembly Commission, together with administrative improvements and efficiencies in order to strengthen committee scrutiny whilst being mindful of ensuring value for money.
97. This recommendation will assist in delivering recommendations 1, 36 and 38 of the RHI Inquiry Report.

98. CLG acknowledges any proposals for increasing staff numbers will require consideration by the Assembly Commission.
99. The purpose of the CLG includes a role that seeks to “identify, on behalf of committee members and the staff in the Committee Office, common areas for development and training”. CLG notes that a Member Induction and Development Plan has been developed for delivery at the beginning of the 2022/27 mandate and is of the view that appropriate training in all areas of legislative scrutiny should be provided to members as a priority in the Members’ Induction and Development Plan for the 2022-27 mandate. This would assist in delivering Recommendation 38 of the RHI Inquiry Report in relation to steps needed to improve effective scrutiny.

Recommendation 24

CLG recommends that the staffing complement of statutory committees should be enhanced to include an additional senior member of staff with specific responsibility for supporting committees in carrying out their scrutiny functions. This would include committee scrutiny in relation to all aspects of a department’s work including scrutiny of primary and secondary legislation, budget scrutiny and scrutiny in relation to new work streams arising from EU exit.

Recommendation 25

The staffing and other resources required by Assembly committees vary considerably during the course of a mandate depending on workload, however committee resourcing has historically been relatively inflexible. In adding additional staffing capacity to statutory committees, CLG recommends that the Assembly Commission introduces greater flexibility and team working across the range of services provided to committees, together with administrative improvements and efficiencies in order to strengthen committee scrutiny whilst being mindful of ensuring value for money.

Recommendation 26

CLG recommends that appropriate training in all areas of legislative scrutiny is provided to members as a priority in the Members’ Induction and Development Plan for the 2022-27 mandate. This would assist in delivering Recommendation 38 of the RHI Inquiry Report in relation to steps needed to improve effective scrutiny.

Engagement and Innovation

100. Central to the scrutiny role of committees is the gathering, collation, and analysis of evidence as well as the practical application of this evidence to the scrutiny of the issue at hand e.g. legislation, policy, strategy or to assist with committee inquiries.
101. Committees of the Assembly have increasingly made use of the Assembly Commission's Public Engagement business unit to try to involve target audiences or hard to reach groups and this has resulted in significant increases in engagement activity with committees. The use of Citizen Space, a digital platform used for engagement activities, is a relatively recent development in committee engagement. CLG is supportive of committee staff developing their skills in the use of Citizen Space to ensure it is fully utilised in engagement by committees with the aim of enhancing the evidence-base.
102. Collaboration with other business areas, with the expertise needed to broaden the scope of committee engagement is welcomed and committees are encouraged to continue to do so. The CLG has previously considered and agreed a proposed framework for committee engagement that includes the use of Citizen Space as well as greater collaborative working and innovative engagement. At its meeting on 16 November 2021 CLG agreed that the CAMS Office should develop detailed proposals to deliver the aims and objective of the engagement framework.
103. However, CLG believe it is primarily through the work of committees that stakeholders engage in Assembly proceedings. It is therefore of the opinion that a key task for the Public Engagement Unit should be committee engagement with stakeholders.
104. Currently, committees of the Assembly gather evidence in written and oral form, whereas the Welsh Parliament permits evidence to be provided electronically in the form of audio and video clips and images. It is felt that this helps to reach people with lower levels of literacy. A reliance on written submissions and oral evidence in committees will exclude those for whom written and oral submissions are not best suited.
105. The information provided on the Welsh Parliament and the Assembly's websites place an onus on the resposdee to contact the committee clerk if they wish to submit evidence in an alternative format. However, CLG believes it would be appropriate for

the Assembly to be more proactive, e.g. offer alternative formats as an option for all during the call-for-evidence.

106. Committee clerks identified the benefits to be gained from video conferencing in terms of permitting engagement with a much more diverse range of stakeholders that would not necessarily have been possible in the traditional face-to-face setting and are supportive of continuing the use of video conferencing. This is particularly the case where individuals may have to travel a long distance either nationally or, potentially, internationally.
107. CLG also notes that other parliaments/assemblies have considered a range of innovative approaches to engagement, often based on deliberative engagement principles. Initiatives in the Scottish Parliament have included a range of digital tools; mini-publics; pop-ups in public spaces; attempts to make calls for evidence more engaging; and co-design with the Youth Parliament, the Children's Commissioner and others. The CLG acknowledged that benefits are to be gained from such innovative approaches and would encourage the exploration of better, more engaging, ways to connect to target audiences which should result in better and more effective committee scrutiny.

Use of external experts to assist the scrutiny process

108. Very rarely, there has been a need to procure external expertise to assist committees with legislative scrutiny. This has occurred when specialised legal knowledge has been required to help clarify issues for the committee during its deliberations. Such expertise may exist in the private sector, academia, or indeed elsewhere in the public sector and other parliaments / assemblies. The use of external subject experts by committees has been discussed a number of times in this report and the CLG is of the view that such experts should be used as and when required to enhance the scrutiny process.

Recommendation 27

CLG recommends that committee staff are offered training in the use of Citizen Space to enhance their digital skills, to ensure there is expertise across the committee team and to maximise use of the facility offered by this platform.

Recommendation 28

CLG recommends that a key task for the Engagement Unit should be to support committees in engagement activities with stakeholders. CLG recommends that committees should be assured of the appropriate support needed from the Engagement Unit when undertaking engagement activities with stakeholders. CLG also recommends that committees, working with the Engagement Unit, continue to trial, review and implement innovative approaches to engagement to underpin the scrutiny role of committees.

Recommendation 29

The CLG recommends that a review is carried out by Clerk Assistants early in the new mandate to how best facilitate the provision of evidence in alternative formats such as braille, audio/video clips, sign language etc. This will increase accessibility to committee proceedings, provide greater opportunities for potentially 'hard to reach' groups to engage with committees and therefore help contribute to more effective committee scrutiny.

Recommendation 30

CLG recognises the innovation in video-conferencing brought about by the Covid-19 pandemic which allowed committee meetings to continue in either a hybrid or fully virtual format. It also acknowledges this approach obviates the need for witnesses to travel to Parliament Buildings to give evidence. This potentially increases the range of witnesses available to committees, increases accessibility to stakeholders and cuts down on CO2 emissions as a result of travelling to Parliament Buildings. CLG therefore recommends that appropriate video-conferencing facilities are maintained for committee proceedings to be used by committees as required.

Recommendation 31

CLG recommends that resources are made available to committees to avail of external expertise and that clerk assistants and committee clerks routinely advise committees of the opportunity to avail of such expertise to further strengthen the scrutiny process. This recommendation will assist in delivering recommendation 1 of the RHI Inquiry report.

The role and powers of the ESR

109. The Assembly appears to be unique from other parliaments as its committees delegate technical scrutiny to the ESR rather than carry out this function themselves; furthermore, it is unique in delegating such scrutiny to an individual rather than a committee. In 2002, the Committee on Procedures carried out a review of the ESR/Committee arrangements and concluded that the arrangement in place facilitated the efficient passage of legislation. It is now almost 20 years since the review and there may be merit in reconsidering the appropriateness of the current arrangement.
110. This proposal would, as with others in this report, assist in delivering the CLG's objective to "identify, evaluate and assess options for improving the collective effectiveness of Assembly Committees" and also recommendations 36 and 38 of the RHI Inquiry report.
111. The position and remit of the ESR are provided for under Standing Order 43 and the role, broadly speaking, is to assist committees in undertaking *technical* scrutiny of certain statutory rules. This is distinct from the committee's consideration of the merits of the policy as detailed in SL1s. At this stage scrutiny should provide the committee with clarity on the policy objectives of the legislation. Committees largely focus on this aspect of subordinate legislation scrutiny since, as noted above, the technical scrutiny is delegated to the ESR.
112. The Scottish and Welsh Parliaments specify ten grounds under which attention of the Parliament should be drawn to delegated legislation and these are listed in Standing Orders. The appropriate extract from the Standing Orders of the Scottish Parliament is included at [Annex F](#), for information.
113. Effective scrutiny of delegated legislation is underpinned by effective delegated powers contained within the primary legislation. The Scottish and Welsh Parliaments have a mechanism in place whereby their respective Delegated Powers and Law Reform Committee (DPLRC) and Constitutional and Legislative Affairs Committee (CLAC) have a role to play in the scrutiny of the delegation of powers but there is no such mechanism in place in the Assembly. It has, however, been stated by the House of Commons Political and Constitutional Reform Committee that:

...the Assembly began to consider delegated powers in legislation (against criteria similar to those used by the [House of Lords] Delegated Powers and Regulatory Reform Committee) in 2007. This function is also generally delegated to the ESR, who reports to the appropriate committee.

114. As the ESR's role in relation to the scrutiny of delegated powers within a bill during its legislative process is not specified in Standing Orders, there may be merit in providing for this scrutiny more formally.
115. The current position is that committees can request legal advice from the ESR on the delegated powers in a bill, and on any delegated powers contained within made amendments to a bill but it is not automatically provided. If this arrangement was to change and the scrutiny of delegated powers was to be provided for in Standing Orders, it may have resource implications.
116. It is also worth observing that, whilst the Delegated Powers Memorandum accompanying a bill is published, the relevant report from the ESR is not. A member of the public trying to follow the consideration by a committee of delegating provisions will, therefore, find it difficult to do so.

Recommendation 32

CLG recommends that the Committee on Procedures gives consideration to conducting a review of the current ESR/Committee arrangements with the overall aim of determining if they still facilitate the effective passage of legislation, or if an alternative model for consideration of delegated legislation should be adopted.

Recommendation 33

CLG recommends that the Committee on Procedures considers the appropriateness of including, in Standing Orders, the role of the ESR in relation to the scrutiny of delegated powers in bills, including those subject to accelerated passage procedure, and that advice provided to committees by the ESR in this regard is published. Any such proposals would require thorough investigation and, if deemed appropriate in terms of improved effectiveness and transparency, would also need to be fully investigated in terms of the resource implications for the Office of the ESR. Such resources may include access to subject area experts, both internal and external to the Assembly.

CLG Recommendations

In reaching its recommendations and considering how they might be implemented the CLG would emphasise that its recommendations are not only in keeping with the purpose of the CLG, but they also aim to deliver on both the implementation of the recommendations relevant to committees contained in the RHI Inquiry Report as well as the Northern Ireland Assembly Commission's Annual Plan for 2022-23 in relation to "Designing Assembly specific models of legislative scrutiny and support based on relevant international best practice".

The CLG is of the opinion that the following recommendations will go some way to achieving these objectives.

Scrutiny of subordinate legislation

Recommendation 1

To enhance transparency, SL1s and SRs should be published on the committee website upon receipt. In addition, social media platforms should be used to advise the general public and stakeholders of key subordinate legislation being considered by the committee.

Recommendation 2

CLG recommends and expects that departments will adhere to an agreed timeframe for scrutiny of subordinate legislation in accordance with recommendation 5. Where this is not possible the Minister should write to the chair explaining why the scrutiny of an SL1/SR must be expedited.

Recommendation 3

It is important that the time taken from receipt of the SR by committee to the committee receiving the ESR's report is strictly adhered to. Unless otherwise advised by the ESR in writing, CLG expects the ESR to report within two weeks of the ESR's office receiving an SR.

Recommendation 4

In order to clarify the level of scrutiny required by a committee, CLG recommends that Assembly officials and Executive officials undertake a review of the existing arrangements for scrutiny of subordinate legislation with a view to enabling

committees having, where appropriate, greater time and opportunity to carry out more effective scrutiny of both SL1s and statutory rules. CLG recommends the basis for this approach should be a 'traffic light' system to categorise the level of scrutiny required for a particular SL1/SR, as discussed in paragraph 17.

Recommendation 5

CLG recognises that the timelines for scrutiny of subordinate legislation is a potential barrier to detailed scrutiny where engagement with stakeholders and/or external expertise is required. CLG therefore recommends that where a committee identifies the requirement to engage with stakeholders or avail of external expertise (e.g. following consideration of the SL1) it will advise the department following the committee meeting at which this is decided and agree a timeframe for consideration of the SL1 and subsequent SR.

Recommendation 6

Consideration should be given to the development of a 'legislation tracker'. This would enhance transparency and provision of information on the passage of legislation. Such increased outward engagement would assist in delivering the CLG's objective to "identify, evaluate and assess options for improving the collective effectiveness of Assembly Committees".

Recommendations 7

CLG considers there to be potential in the proposal for committees to be given amending powers in relation to subordinate legislation and recommends that the Assembly and Executive Review Committee considers how this could be facilitated.

Recommendation 8

CLG recommends that subordinate legislation should be given more time and higher priority during committee meetings and that references to it as secondary legislation should be avoided to not diminish from its importance.

Recommendation 9

CLG agrees that the current SL1 is potentially outdated and should be reviewed to ensure that it fully meets the needs of committees. CLG recommends that Assembly Officials review the SL1, in conjunction with departmental officials, for consideration and approval of CLG early in the 2022-2027 mandate.

Pre-legislative scrutiny of primary legislation

Recommendation 10

CLG recommends that departments, following the initial consultation on proposed primary legislation, should produce a draft bill for further public consultation that it presents to the relevant committee for consideration before Introduction and that preparations to implement this approach should be taken forward within the Assembly and in discussions with departmental officials.

Recommendation 11

CLG recommends that the Committee on Procedures considers bringing forward a standing order requiring an annual debate on the Executive legislative timetable.

Recommendation 12

CLG also recommends that each department provide the relevant statutory committee with a legislative work programme for the year ahead at the beginning of each Assembly year.

Recommendation 13

CLG recognises that departmental plans in respect of the development of legislation may be delayed. Therefore, each department should provide in-year updates as to the progress of the development of bills to facilitate ongoing prioritisation of the committee work programme.

Scrutiny of the passage of primary legislation

Recommendation 14

CLG notes that the committee stages of a number of bills have not progressed as quickly as planned due to delays in information being provided by departments. CLG recommends that Ministers ensure that such requests are given priority in order to expedite them through internal departmental processes. Where delays occur the Minister should write to the committee providing an explanation as to the cause of the delay and a date by which the information will be provided.

Recommendation 15

CLG notes that a number of committees in this mandate have had to consider multiple bills concurrently. This is simply not good practice and increases the risk of committee scrutiny being impacted. CLG recommends that, in the development of the legislative timetable, Ministers ensure that this is not repeated in future mandates.

Recommendation 16

Under SO 33(2) the committee stage is defined as 30 working days from the date of referral to the committee. It is possible to extend this period under SO33(4) until a date specified in the motion to extend.

Of the 19 Executive bills introduced since January 2020 which have not been subject to the accelerated passage procedure, there have been motions to extend the committee stage of 17.

CLG recommends that the Committee on Procedures considers whether SO33(2) and SO33(4) are still appropriate.

Recommendation 17

CLG is aware that some committees produce an 'Issues log' during consideration of a bill. This allows a contemporary record of issues raised, clarification sought, amendments received etc., and is often based on a traffic light system. CLG recommends that this is adopted by all committees as a means of tracking issues raised in written and oral submissions and during committee stage by members. This will help monitor the department's actions in respect of recommendation 14.

Recommendation 18

While stakeholders and the wider public assist committees in their scrutiny of legislation committees do not provide direct feedback as to how their input has helped the committee. In the interests of transparency CLG therefore recommends that the issues log is used to help committees provide feedback to stakeholders on how their input assisted the committee.

Recommendation 19

While committees seek the views of stakeholders who provide a certain level of expertise to inform the committee stage CLG recommends, as with subordinate

legislation, that where necessary committees consider availing of independent external expertise. CLG also recommends that Assembly officials consider how the identification and appointment of an external expert can be done in an expeditious way conducive to the timeframe of the committee stage.

Recommendation 20

There have been 18 Private Members' Bills (PMB) introduced in this mandate since January 2020. While this has been a positive development it has contributed to huge pressure on committees and their support teams, already considering Executive legislation. CLG understand that the Committee on Procedures has agreed a number of proposals to help streamline the PMB process and provide clarity to members on their role and responsibility as well as the support provided by Assembly officials. CLG recommends that the Committee on Procedures brings forward these proposals as soon as possible to ensure they are in place for the beginning of the new mandate.

Post-legislative scrutiny of primary legislation

Recommendation 21

CLG recommends that consideration be given to possible approaches to post-legislative scrutiny, as detailed on paragraphs 67 and 68 but, *at a minimum*, post-legislative scrutiny should include a report by the relevant department on the implementation of the legislative proposals 18 months after the commencement date of the legislation.

Recommendation 22

CLG notes that the level of scrutiny decided upon should be determined by an objective process. CLG recommends officials develop a system to select legislation for different levels of post-legislative scrutiny based on criteria agreed by committee. In each case this should be presented to the committee for agreement.

Recommendation 23

As part of its committee stage considerations a committee will decide on the level of post-legislative scrutiny required by the department and determine an appropriate means to ensure this is carried out i.e. amendment to bill, assurance by the Minister.

CLG is of the view that post-legislative scrutiny should not be used as an attempt to reopen arguments made at previous stages of the legislative process but rather, in general, focus on the implementation and impact of the legislation.

Availability of staff and member resources

Recommendation 24

CLG recommends that the staffing complement of statutory committees should be enhanced to include an additional senior member of staff with specific responsibility for supporting committees in carrying out their scrutiny functions. This would include committee scrutiny in relation to all aspects of a department's work including scrutiny of primary and secondary legislation, budget scrutiny and scrutiny in relation to new work streams arising from EU exit.

Recommendation 25

CLG notes that Assembly committee staff, when available, have been willing to help colleagues in other committees which are under greater pressure. However, it can also be the case that, on occasion, additional staff are simply not available to help. CLG recommends that senior officials consider the potential for flexible working arrangements where staff are not assigned to a particular committee but are able to move between committees on the basis of workload.

Recommendation 26

CLG recommends that appropriate training in all areas of legislative scrutiny is provided to members as a priority in the Members' Induction and Development Plan for the 2022-27 mandate. This would assist in delivering Recommendation 38 of the RHI Inquiry Report in relation to steps needed to improve effective scrutiny.

Engagement and Innovation

Recommendation 27

CLG recommends that committee staff are offered training in the use of Citizen Space to enhance their digital skills, to ensure there is expertise across the committee team and to maximise use of the facility offered by this platform.

Recommendation 28

CLG recommends that a key task for the Engagement Unit should be to support committees in engagement activities with stakeholders. CLG recommends that committees should be assured of the appropriate support needed from the Engagement Unit when undertaking engagement activities with stakeholders. CLG also recommends that committees, working with the Engagement Unit, continue to trial, review and implement innovative approaches to engagement to underpin the scrutiny role of committees.

Recommendation 29

The CLG recommends that a review is carried out by Clerk Assistants early in the new mandate to how best facilitate the provision of evidence in alternative formats such as braille, audio/video clips, sign language etc. This will increase accessibility to committee proceedings, provide greater opportunities for potentially 'hard to reach' groups to engage with committees and therefore help contribute to more effective committee scrutiny.

Recommendation 30

CLG recognises the innovation in video-conferencing brought about by the Covid-19 pandemic which allowed committee meetings to continue in either a hybrid or fully virtual format. It also acknowledges this approach obviates the need for witnesses to travel to Parliament Buildings to give evidence. This potentially increases the range of witnesses available to committees, increases accessibility to stakeholders and cuts down on CO2 emissions as a result of travelling to Parliament Buildings. CLG therefore recommends that appropriate video-conferencing facilities are maintained for committee proceedings to be used by committees as required.

Recommendation 31

CLG recommends that resources are made available to committees to avail of external expertise and that clerk assistants and committee clerks routinely advise committees of the opportunity to avail of such expertise to further strengthen the scrutiny process. This recommendation will assist in delivering recommendation 1 of the RHI Inquiry report.

The role and powers of the ESR

Recommendation 32

CLG recommends that the Committee on Procedures gives consideration to conducting a review of the current ESR/Committee arrangements with the overall aim of determining if they still facilitate the effective passage of legislation, or if an alternative model for consideration of delegated legislation should be adopted.

Recommendation 33

CLG recommends that the Committee on Procedures considers the appropriateness of including, in Standing Orders, the role of the ESR in relation to the scrutiny of delegated powers in bills, including those subject to accelerated passage procedure, and that advice provided to committees by the ESR in this regard is published. Any such proposals would require thorough investigation and, if deemed appropriate in terms of improved effectiveness and transparency, would also need to be fully investigated in terms of the resource implications for the Office of the ESR. Such resources may include access to subject area experts, both internal and external to the Assembly.



Northern Ireland
Assembly

Appendix A – Relevant Extracts from the RHI Report

Chapter 56 - Summary and Recommendations

Summary

[...]

16. The Enterprise, Trade and Investment (ETI) Committee, whose role on behalf of the elected Northern Ireland Assembly included independent scrutiny of DETI, did not operate as an effective check against departmental error in the case of the RHI scheme. Aside from limitations inherent in its role, reasons for this included its own limited resources and its dependence on the Department for information and analysis to allow it to perform its challenge function robustly – information and analysis which was not always sufficient for this purpose.

Recommendations

- R.1** A new policy at its earliest stage should be subject to a rigorous process to determine whether the Northern Ireland devolved administration has (or is prepared to assign) the necessary skills and resources to deliver the policy safely and competently. The scope for economies of scale through working in partnership with another administration (for example a Westminster Department, another of the devolved administrations or city-regions within the UK or, in appropriate circumstances, the Republic of Ireland) should be thoroughly examined and the assessment of joint working options made visible to Ministers and the relevant Assembly Committee.
- R.36** The Northern Ireland Civil Service should develop a better process to learn from past failures, one that goes beyond the traditional method of revising and circulating internal guidance. Leaders within the Senior Civil Service must be more systematic, persistent and proactive in explaining to staff what changes are needed and supporting staff to adapt their working practices. A tougher level of external scrutiny, such as from the nonexecutives on the boards of Departments and from strengthened Assembly Committees, while no guarantee of success, would increase scrutiny and help ensure that systematic changes are made and sustained.
- R.38** The Northern Ireland Assembly should consider what steps are needed to strengthen its scrutiny role, particularly as conducted by Assembly Committees, in the light of lessons from the RHI. While it will be for the Assembly itself to decide, the Inquiry recommends that such a consideration might include significantly increasing the resources available to statutory committees and, generally, identifying what steps are needed to improve the effective scrutiny of Departments and their initiatives, whether in Assembly Committees or in the Assembly Chamber itself.



Northern Ireland
Assembly

Appendix B – Minutes of Proceedings

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 5 MAY 2020

THE SENATE, PARLIAMENT BUILDINGS

Present: Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Ms Sinéad Ennis MLA (present by videoconference)
Mr Colm Gildernew MLA
Mr William Humphrey MLA
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Mr Colin McGrath MLA
Ms Michelle McIlveen MLA
Ms Emma Sheerin MLA (present by videoconference)
Mr Mervyn Storey MLA

Apologies: No apologies

In Attendance: Mr Keith McBride (Assembly Clerk)
Mr Trevor Allen (Senior Assistant Clerk)

5. RHI Inquiry Report recommendation on strengthening the scrutiny role of Assembly Committees

Chairpersons considered a paper on the implementation of the recommendations of the RHI Inquiry Report in relation to increasing and strengthening the scrutiny function of Assembly Committees.

Agreed: The Group agreed the paper's Terms of Reference and that CAMS Office prepares a timetable for consideration at the next meeting.

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 2 JUNE 2020

THE SENATE, PARLIAMENT BUILDINGS

Present: Dr Steve Aiken OBE MLA
Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Ms Sinéad Ennis MLA, Deputy Chairperson (present by videoconference)
Mr Colm Gildernew MLA
Mr Paul Givan MLA
Mr William Humphrey MLA, Chairperson
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Mr Colin McGrath MLA
Ms Michelle McIlveen MLA
Ms Carál Ní Chuilín MLA (present by videoconference)
Ms Emma Sheerin MLA
Mr Mervyn Storey MLA

Apologies: No apologies

In Attendance: Mr Keith McBride (Assembly Clerk)
Mr Trevor Allen (Senior Assistant Clerk)

5. CLG Priorities – Project timelines

The Group noted papers on Strengthening Committee Scrutiny and Innovative Practices in Committees.

2:04pm Mr Humphrey declared an interest as Chairperson to the Public Accounts Committee.

Agreed: The Group approved the timelines for both pieces of work and agreed to extend the Strengthening Committee Scrutiny scope to include the Public Accounts Committee and the Audit Committee.

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 15 SEPTEMBER 2020

THE SENATE, PARLIAMENT BUILDINGS

- Present: Dr Steve Aiken OBE MLA
Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA (present by videoconference)
Ms Linda Dillon MLA
Ms Sinéad Ennis MLA, Deputy Chairperson
Mr Paul Givan MLA
Mr William Humphrey MLA, Chairperson
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Mr Colin McGrath MLA
Ms Michelle McIlveen MLA
Ms Emma Sheerin MLA
- Apologies: Mr Colm Gildernew MLA
Mr Mervyn Storey MLA
- In Attendance: Mrs Lesley Hogg (Clerk to the Assembly/Chief Executive)
Dr Kevin Pelan (Clerk Assistant)
Mr Keith McBride (Assembly Clerk)
Mr Trevor Allen (Senior Assistant Clerk)
Mrs Bronagh Irwin (Assistant Clerk)
Mr Peter Hall (Assembly Clerk) (Agenda Item 7)
Miss Angela Kelly (Examiner of Statutory Rules) (Agenda Item 8)

8. RHI Inquiry Report recommendation on strengthening the scrutiny role of Assembly Committees – Subordinate Legislation

Chairpersons noted a research paper on parliamentary scrutiny of delegated legislation and received a briefing from Miss Angela Kelly, Examiner of Statutory Rules, on the scrutiny of secondary legislation, including areas of best practice in other jurisdictions and how her team can input in terms of strengthening the scrutiny role of committees.

Mr P Givan left the meeting at 14:14

The briefing was followed by a question and answer session.

The Chairperson thanked Miss Kelly for the briefing.

Agreed: Chairpersons agreed that the committee office should take forward further scoping work on the examples of best practice in secondary legislation scrutiny and this will inform the ongoing work of the group on strengthening the scrutiny role of Assembly Committees.

Chairpersons noted that the Assembly Commission's Corporate Plan 2019-23 has a key action to develop proposals to strengthen the Assembly's legislative, scrutiny, financial and budgetary oversight and representative roles and that there would need to be liaison between the Commission and Chairperson's Liaison Group to take this action forward.

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 6 OCTOBER 2020

THE SENATE, PARLIAMENT BUILDINGS

Present: Dr Steve Aiken OBE MLA
Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Mr Colm Gildernew MLA
Mr Paul Givan MLA
Mr William Humphrey MLA, Chairperson
Mr Chris Lyttle MLA
Mr Colin McGrath MLA
Ms Michelle McIlveen MLA
Ms Emma Sheerin MLA
Mr Mervyn Storey MLA

Apologies: Ms Sinéad Ennis MLA, Deputy Chairperson
Mr Declan McAleer MLA

In Attendance: Mrs Lesley Hogg (Clerk to the Assembly/Chief Executive)
Dr Kevin Pelan (Clerk Assistant)
Mr Keith McBride (Assembly Clerk)
Mr Trevor Allen (Senior Assistant Clerk)
Mrs Bronagh Irwin (Assistant Clerk)
Mr Ray McCaffrey (Research Officer)

5. RHI Inquiry Report recommendation on strengthening the scrutiny role of Assembly Committees

Chairpersons agreed to defer the research briefing on this agenda item to the next meeting.

Chairpersons noted that the Assembly Commission is taking forward a peer-review exercise in relation to scrutiny and the Chairpersons' Liaison Group will be kept informed of progress on this workstream.

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 2 FEBRUARY 2021

THE SENATE, PARLIAMENT BUILDINGS

Present: Dr Steve Aiken OBE MLA
Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Ms Sinéad Ennis MLA, Deputy Chairperson
Mr Paul Givan MLA
Mr William Humphrey MLA, Chairperson
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Mr Colin McGrath MLA
Miss Michelle McIlveen MLA

Apologies: None.

In Attendance: Mrs Lesley Hogg (Clerk to the Assembly/Chief Executive)
Mr Gareth McGrath (Director of Parliamentary Services)
Dr Kevin Pelan (Clerk Assistant)
Mr Jim McManus (Assembly Clerk)
Mr Trevor Allen (Senior Assistant Clerk)
Mrs Bronagh Irwin (Assistant Clerk)
Mrs Diane Bergeron (Clerical Supervisor)
Mr Ray McCaffrey (Research Officer)

5. Strategic Priorities

Research Briefing on Committee Scrutiny

Chairpersons received a briefing from Mr Ray McCaffrey, Research Officer, on Committee scrutiny and engagement: areas of good practice and innovation in other legislatures.

The Chairperson thanked Mr McCaffrey for his briefing.

Agreed: Chairpersons agreed that the paper should be included in the Group's work-stream on strengthening committee scrutiny.

Strategic Priorities Briefing on Improving Scrutiny in Committees

Chairpersons received a briefing from Mr Trevor Allen, Senior Assistant Clerk to the CLG, on the Group's considerations to date and next steps on its work-stream in relation to improving scrutiny in committees.

Due to technical difficulties, conclusion of this briefing was deferred to later in the meeting.

[...]

5. Strategic Priorities (Continued)

Strategic Priorities Briefing on Improving Scrutiny in Committees (continued)

Chairpersons discussed the next steps in the work-stream.

Agreed: Chairpersons agreed that the Clerking and Member Support Office should request a further research paper on the issues raised in the briefing and that the office would take forward consultation with members, party support staff and secretariat staff and report back at the CLG meeting in April 2021.

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

THURSDAY 27 MAY 2021

MEETING LOCATION: VIRTUAL MEETING VIA STARLEAF

Present by Video or Teleconference:

Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Ms Sinéad Ennis MLA (Chairperson)
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Ms Emma Sheerin MLA

Apologies:

Mr Colm Gildernew MLA
Mr Paul Givan MLA
Mr William Humphrey MLA
Miss Michelle McIlveen MLA

In Attendance by Video or Teleconference:

Mrs Lesley Hogg, Clerk to the Assembly/Chief Executive
Dr Gareth McGrath, Director of Parliamentary Services
Dr Kevin Pelan, Clerk Assistant
Ms Stella McArdle, Clerk
Mr Trevor Allen, Senior Assistant Clerk
Mrs Bronagh Irwin, Assistant Clerk
Mrs Diane Bergeron, Clerical Supervisor
Ms Aisha O'Reilly, Senior Programme Officer

6. Strengthening Committee Scrutiny

This agenda item was deferred until the next meeting.

7. Correspondence

Chairpersons considered correspondence received from Mr Jim Allister MLA in response to the distribution of its questionnaire on proposals for strengthening Committee scrutiny.

Agreed: Chairpersons agreed to write to Mr Allister to highlight Standing Order 48(2).

[EXTRACT]

CHAIRPERSONS' LIAISON GROUP

MINUTES OF PROCEEDINGS

TUESDAY 28 SEPTEMBER 2021

MEETING LOCATION: VIRTUAL MEETING VIA STARLEAF

Present by Video or Teleconference:

Dr Steve Aiken OBE MLA
Dr Caoimhe Archibald MLA
Ms Paula Bradley MLA
Mr Jonathan Buckley MLA
Mr Colm Gildernew MLA
Mr William Humphrey MLA
Mr Chris Lyttle MLA
Mr Declan McAleer MLA
Ms Carál Ní Chuilín MLA (Chairperson)
Ms Emma Sheerin MLA
Mr Mervyn Storey MLA
Mr Peter Weir MLA

Apologies: Ms Linda Dillon MLA

In Attendance by Video or Teleconference:

Mrs Lesley Hogg, Chief Executive/Clerk to the Assembly
Dr Kevin Pelan, Clerk Assistant
Ms Stella McArdle, Committee Clerk
Mr Trevor Allen, Senior Assistant Clerk
Mrs Bronagh Irwin, Assistant Clerk
Dr Frank Geddis, Clerk Assistant (agenda item 4)
Mr Ray McCaffrey, Research Officer (agenda item 5)
Miss Angela Kelly, Examiner of Statutory Rules (agenda item 5)
Mr Paul Gill, Clerk Assistant (agenda item 7)

5. Strengthening Committee Scrutiny

Chairpersons received a briefing from Mr Ray McCaffrey, Research Officer, on pre- and post-legislative scrutiny, specifically the consideration of approaches in other legislatures.

The briefing was followed by a question and answer session.

The Chairperson thanked Mr McCaffrey for the presentation.

Dr Archibald left the meeting at 1:55 pm

Mr Gildernew left the meeting at 1:59 pm

Chairpersons received a briefing from Miss Angela Kelly, Examiner of Statutory Rules (ESR), on the role and remit of the ESR.

The briefing was followed by a question and answer session.

The Chairperson thanked Miss Kelly for the presentation.

Agreed: Chairpersons agreed that, based on the work undertaken to date, that a proposal paper be brought forward in the autumn, for consideration by CLG, outlining potential practical solutions that could be adopted within Assembly Committees to strengthen pre-and-post legislative scrutiny.

[EXTRACT]



Northern Ireland
Assembly

Appendix C – Correspondence

Correspondence from Mr Jim Allister MLA dated 19 March 2021

E-mailed to: committee.procedures@niassembly.gov.uk

Ref: JA/PM/Assembly/9682

Trevor Allen
Senior Assistant Clerk
Room 284A Parliament Buildings
Stormont

19th March 2021

Dear Mr Allen,

I am in receipt of your Questionnaire on strengthening committee scrutiny.

I am disappointed that the Questionnaire and the covering correspondence does not address at all whether the statutory provisions relating to scrutiny are adequate.

Though the Belfast Agreement at paragraph 9 of Strand One promised a scrutiny role for committees, when it came to the implementing legislation, the Northern Ireland Act 1998, this was dropped! Instead of being afforded the statutory function of scrutiny, Section 29 limply defines the function of committees as "to advise and assist" ministers!

Herein is a fundamental flaw which I'm disappointed the Chairmans' Liaison Group shows no interest in addressing. Maybe that is not surprising since all Chairs come from Executive parties, but, nonetheless if there is any appetite for scrutiny, then, I'd have expected this issue to be at least noted and addressed.

The need for rigorous scrutiny and related powers is, of course, all the more imperative in a system of mandatory coalition where almost every MLA comes from a governing party.

So, in my view there is little point in the CLG professing interest in the operation of "scrutiny" if they have no interest in seeking an adequate statutory basis as an essential starting point.

Yours sincerely

Jim Allister MLA

Response to Mr Jim Allister MLA dated 1 June 2021

Emailed to: Karen.cameron@party.niassembly.gov.uk

Ref: JA/PM/Assembly/9682

Mr Jim Allister MLA
38 Henry Street
Harryville
Ballymena
Co Antrim
BT42 3AH

1st June 2021

Dear Mr Allister,

CLG Questionnaire on Strengthening Committee Scrutiny

I write, on behalf of the Chairpersons Liaison Group (CLG), in relation to your correspondence to Trevor Allen of 19th March, and the response from Nick Henry of 24th March, regarding the questionnaire issued on behalf of the CLG to help inform how the scrutiny function of statutory committees at the Assembly may be strengthened.

The CLG noted your correspondence, and the concerns you raised on the scrutiny role of committees not being included in the Northern Ireland Act 1998, at its meeting of 27th May and agreed to respond to your letter advising that it noted that Standing Order 48(2) provides for the scrutiny role as described in paragraph 9 of Strand One of the Good Friday Agreement.

The CLG is progressing its review and will take your comments on board as it reports on its findings.

Yours sincerely,

Sinéad Ennis, MLA
Chairperson, Chairpersons' Liaison Group

**Response from the Committee for Agriculture, Environment and Rural Affairs
dated 24 February 2022**



**Northern Ireland
Assembly**

Committee for Agriculture, Environment and Rural Affairs

Room 242

Parliament Buildings

Tel: +44 (0) 28 905 21475

From: Nick Henry, Clerk, Committee for Agriculture, Environment and Rural Affairs
To: Stella McCardle, Clerk, Chairperson's Liaison Group
Date: 24 February 2022
Subject: CLG Report on Strengthening Committee Scrutiny

Dear Stella,

I write following the meeting of the Committee for Agriculture, Environment and Rural Affairs on 24 February 2022 at which the Committee considered the report and recommendations of the Chairperson's Liaison Group (CLG) on Strengthening Committee Scrutiny.

The Committee was broadly content with the proposals and makes the following observations:

- **Recommendation 1:** the Committee is content with the proposal to have the SL1/SR published on the relevant Committee's website, but would question the efficacy of posting on social media given that, in the main, regulations are technical in nature and this is an aspect of Committee work which may not be as interesting or engaging for the general public (relatively)
- **Recommendation 26:** the Committee welcomes the proposal to provide appropriate training in respect of scrutiny activities for Members as part of the induction for the 2022-27 and considers that it would be useful to include:
 - An overview of the various aspects of scrutiny work, i.e., primary legislation, regulations, policy, inquiries etc.
 - An explanation of the range of legislative vehicles Committee Members will engage with, e.g., Statutory Instruments, Regulations, Legislative Consent Motions
- The Committee values highly the input and work of the Assembly's Research and Information Service and considers it important that RaISe has sufficient staffing resource and capacity to respond to Committee requests to aid scrutiny work.

I trust that this is of use to the CLG when finalising its report.

Yours sincerely,

Nick Henry

Clerk, Committee for Agriculture, Environment and Rural Affairs

Response from the Committee for the Economy dated 28 February 2022



Northern Ireland
Assembly

Committee for the Economy
Room 371
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX
Tel: +44 (0)28 9052 1799

From: Peter Hall
Clerk to the Committee
Date: 28th February 2022
To: Stella McArdle
Clerk to the Chairpersons' Liaison Group
Subject: CLG Report on Strengthening Committee Scrutiny

Dear Stella,

Your memo of 16th February regarding the CLG Report on Strengthening Committee Scrutiny refers.

The Committee for the Economy Considered the Report at its meeting on 23rd February 2022, and agreed that I write offering the Committee's thanks to CLG for its work on the Report. Members noted the recommendations made in the Report and will consider the application of those recommendations that they see as relevant and appropriate to the Committee's function.

Regards,

Peter Hall
Committee Clerk

Response from the Committee for the Executive Office dated 1 March 2022



COMMITTEE FOR THE EXECUTIVE OFFICE

Room 375a

Parliament Buildings

Tel: 028 90521830

Email: Committee.Executive@niassembly.gov.uk

FROM: Michael Potter
Clerk to the Committee for the Executive Office

DATE: 1 March 2022

TO: Stella McArdle
Clerk to the Chairpersons' Liaison Group

DRAFT REPORT ON STRENGTHENING COMMITTEE SCRUTINY

Dear Stella,

At its meeting on 23rd February 2022, the Committee considered the draft report on Strengthening Committee Scrutiny and agreed that it was content with the 33 recommendations contained within.

Best regards,

Michael Potter

Clerk to the Committee for the Executive Office

Response from the Committee on Procedures dated 1 March 2022



Northern Ireland
Assembly

Committee on Procedures

Room 247

Parliament Buildings

Tel: +44 (0) 28 9052 1678

Email : committee.procedures@niassembly.gov.uk

From: Emer Boyle, Clerk to the Committee on Procedures
To: Stella McArdle, Clerk to the Chairperson's Liaison Group
Cc: Paul Gill
Date: 02 March 2022
Subject: CLG Report on enhancing Committee Scrutiny – distributed in Committee Packs

1. At its meeting on 23 February 2022, the Committee on Procedures considered the CLG correspondence and Report on Strengthening Committee scrutiny.
2. At the meeting, Members were requested to come back to the Clerk if they wished to make and comments with regard to the report and its recommendations.
3. Whilst the Committee on Procedures did not raise any issues with the recommendations in the report, the Sinn Fein members wished to take the opportunity to "*put on record their position in respect of CLG and the report*", which is as follows:
 - As raised at both the CLG and at Committee on Procedures...[the party has] no issue with greater scrutiny at Committees.
 - The CLG report does contain some useful suggestions and recommendations which should be considered by a more appropriate Statutory Committee.
 - Of the opinion that because the CLG is not recognised in standing orders and therefore has no official status that the work contained in the report will not have any formal status.
 - This report should be referred to a Statutory Committee and given the status that is due, which will not happen in the CLG.
 - The CLG itself should be reviewed in the new mandate and a decision taken on its value and effectiveness.

Emer Boyle

Response from the Business Committee dated 2 March 2022



**Northern Ireland
Assembly**

Business Committee
Room 33
Parliament Buildings
Tel: +44 (0) 28 9052 1534

From: Alex McGarel, Clerk to the Business Committee
To: Stella McArdle, Clerk to the Chairpersons Liaison Group (CLG)
Cc: Paul Gill, Clerk Assistant
Date: 02 March 2022
Subject: CLG Report on Strengthening Committee Scrutiny

1. At its meeting on 22 February 2022, the Business Committee considered your correspondence seeking views on the CLG report on strengthening committee scrutiny.
2. Members noted that you have also brought the report to the attention of parties and whips and agreed that, as the Business Committee does not usually get involved in the work of Committees, they would consider the report within their parties rather than provide a Business Committee response.
3. Please do not hesitate to contact me if you have any queries.

Kind regards,
Alex McGarel

Response from the Committee for Finance dated 4 March 2022



**Northern Ireland
Assembly**

Committee for Finance

Room 373

Parliament Buildings

Tel: 028 9052 1230

From: Peter McCallion, Clerk to the Committee for Finance

Date: 4 March 2022

To: Stella McArdle, Clerk to the Chairpersons' Liaison Group (CLG)

CLG Report on Strengthening Committee Scrutiny

At its meeting on 2 March 2022, the Committee for Finance considered the CLG Report on Strengthening Committee Scrutiny. Members had no comments to make on the report.

I should be grateful if you would bring this to the attention of the Chairpersons' Liaison Group

Yours sincerely,

Peter McCallion

Clerk to the Committee for Finance

**Response from John O'Dowd MLA, on behalf of Sinn Féin, dated 18 February
2022**

Thank you for forwarding me the CLG report in relation to the scrutiny of legislation by statutory committees.

The report contains some useful suggestions and recommendations which should be considered, where appropriate, by the relevant Assembly Committees.

I am content that the report is sent to the relevant committees and on the very clear understanding that the report itself has no formal status.

Is mise le meas

John

Response from the Committee for Health dated 4 March 2022



**Northern Ireland
Assembly**

Committee for Health

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From: Keith McBride
Clerk to the Health Committee

Date: 4 March 2022

To: Kevin Pelan, Clerk Assistant

Subject: CLG Report Strengthening Committee Scrutiny

Kevin,

The Committee for Health considered the CLG Report on Strengthening Committee Scrutiny at its meeting on 24 February 2022, the Committee agreed that I should write to you to advise that it had noted the recommendations contained within the Report.

Committee Members did outline that they are supportive of the need for extra resource for Committee teams given the additional pressures that have been placed on Committees.

Thanks

Keith



Northern Ireland
Assembly

Appendix D – Responses to Questionnaire

Andrew Muir MLA

Scrutiny of subordinate legislation

- What works well and should be encouraged in how we currently scrutinise subordinate legislation?
Thinking in terms of effectiveness and efficiency of how we currently do things.

Officials attending at Committee and opportunity for Questions

- What could/should be done differently to deliver improved, more effective, scrutiny?
What are the quick wins, and what are the longer-term or 'ideal world' goals?

Briefing paper which is concise

Opportunity for one to one briefings with officials including Researchers

More information and advance notice before legislation tabled at Assembly Plenary. Sometimes get very short notice and no papers never mind an explanatory briefing.

- Any other comments...

Pre-legislative Scrutiny

- Pre-legislative scrutiny is undertaken in some other legislatures but is limited in the Assembly. What do you see as appropriate pre-legislative scrutiny? Should it happen and what might it look like for committees?

This would be useful especially if opportunity for both informal and formal engagement

- Any other comments...

Committee involvement throughout the passage of legislation

- To what extent does the current approach of referral to a committee for committee stage work or should committees be involved more at other stages? Thinking in terms of whether there is potentially a meaningful role for committees at amending stages, or even at introduction?

Informal workshop with officials would be useful off camera with researchers able to attend

Opportunity for one to one briefings including Researchers

Formal Question and Answers session also

Focus needs to be kept on overall Objectives and Aims of legislation

- How might scrutiny throughout the Stages be improved? Thinking in terms of both process and resources.

Context of Amendments needs detailed, rather than just the formal legal wording of the amendments. Need to explain why amendment being proposed and impact.

- Any other comments...

Post-Legislative scrutiny

- Given the limited degree of post-legislative scrutiny currently undertaken, how might post-legislative scrutiny be improved and how would the degree to which the legislation delivered its policy objectives be measured and assessed; and what could be done to address any shortcomings of the legislation?

High level strategic review one year following commencement should be standard

- Thinking in terms of the added work for committee members and staff, would the additional resource implications be justified in terms of value added?

Additional resources yes but only if real interaction with members, researchers and tangible outputs

- Any other comments...

Assembly Officials should have a role in Independent briefings beyond just Departmental personnel

Kellie Armstrong MLA, Alliance Party Chief Whip

Scrutiny of subordinate legislation

- What works well and should be encouraged in how we currently scrutinise subordinate legislation?
Thinking in terms of effectiveness and efficiency of how we currently do things.

- What could/should be done differently to deliver improved, more effective, scrutiny?
What are the quick wins, and what are the longer-term or 'ideal world' goals?

More training needs to be provided to the MLA's on subordinate legislation and access to legal advice for committees.

Committee Packs should include a link to the original legislation.

Not enough time is allocated to subordinate legislation compared to draft legislation this makes it too easy for things to slip through.

So more time to scrutinise, more access to a legal briefing, maybe even extra committee meetings.

There also needs to be a standardised approach across all committees.

- Any other comments...

In Scotland they have a separate committee which looks at statutory instruments and then reports back to the lead committee and Parliament, this could be something to explore.

Pre-legislative Scrutiny

- Pre-legislative scrutiny is undertaken in some other legislatures but is limited in the Assembly. What do you see as appropriate pre-legislative scrutiny? Should it happen and what might it look like for committees?

This is a difficult area as if we went to more pre-legislative scrutiny it could hold things up. The Assembly is not the quickest at getting legislation done. However but it could make for better legislation.

- Any other comments...

Pre legislative scrutiny for legislation that is cross departmental could work better.

There is concern the Assembly doesn't have the capacity or resources to do pre legislative scrutiny properly

Committee involvement throughout the passage of legislation

- To what extent does the current approach of referral to a committee for committee stage work or should committees be involved more at other stages? Thinking in terms of whether there is potentially a meaningful role for committees at amending stages, or even at introduction?

Committees do not need to be involved in other stages of the Bill other than committee stage.

Committees should be kept abreast of what stage a bill it is at and if they see something they think is going to cause issues at committee stage could call Department officials and the Minister ahead of committee stage.

- How might scrutiny throughout the Stages be improved? Thinking in terms of both process and resources.

If a Minister / Department want to get certain aspects through, they need to work with the committee on that.

It would help if Legal and Assembly Researchers were available a lot earlier.

Added resources could be that legal and researchers were available for individual MLAs to ask questions and to be briefed.

More of the scrutiny to be done in public not private sessions to show constituents and stakeholders who is actually engaging with the process.

- Any other comments...

All papers relating to the passage of a bill need to be published and available to all MLAs.

Indeed all Committee papers should be published on the day the Committee meeting takes place.

Post-Legislative scrutiny

- Given the limited degree of post-legislative scrutiny currently undertaken, how might post-legislative scrutiny be improved and how would the degree to which the legislation delivered its policy objectives be measured and assessed; and what could be done to address any shortcomings of the legislation?

This is more important than pre-legislative scrutiny.

There are Acts that parts have never been enacted e.g. Steven Agnews PMB and the Shared Education Act where schools should be open to the community after school hours.

Proposers of Bills want someone to scrutinise the resulting Act to make sure that the Department is meeting its policy objective and actually implementing the strategy and action plans.

A committee could then call the department officials and the Minister to answer why things haven't been done. Would this be a standalone committee meeting or one meeting a month to look at legislation passed in either in the last or current Mandate.

- Thinking in terms of the added work for committee members and staff, would the additional resource implications be justified in terms of value added?

The added resources would match the added value.

This exercise would actually make MLA's and staff think differently about legislation and actually might make better legislation as an outcome.

Sometimes it can seem a bit abstract if the Bill you are passing isn't really going to affect your everyday life or you don't think it will but by doing post legislative scrutiny it changes that.

- Any other comments...

To reiterate, in order to improve scrutiny, all bill papers, including Committee papers, should be available to all MLAs and publicly published to enable review of the original intention and any amendments. This would improve post legislative scrutiny.

Steven Gordon on Behalf of David Hilditch MLA

Scrutiny of subordinate legislation

- What works well and should be encouraged in how we currently scrutinise subordinate legislation?
Thinking in terms of effectiveness and efficiency of how we currently do things.

Often zero minutes are assigned to SR and SL1 agenda items, this discourages scrutiny and perpetuates the impression that they aren't important compared to other items.

- What could/should be done differently to deliver improved, more effective, scrutiny?
What are the quick wins, and what are the longer-term or 'ideal world' goals?

Quick wins – encourage chairs to assign a meaningful amount of time to subordinate legislation

Longer term – departmental staff provide oral briefings, almost like pitches, for any subordinate legislation on the agenda

Getting a pair of independent eyes to look over subordinate legislation proposals at committee sittings.

- Any other comments...

Nope.

Pre-legislative Scrutiny

- Pre-legislative scrutiny is undertaken in some other legislatures but is limited in the Assembly. What do you see as appropriate pre-legislative scrutiny? Should it happen and what might it look like for committees?

Like to see:

Committee questioning of departmental officials (or private members for PMBs) as regards the need for the legislation, lessons taken from other jurisdictions or past interventions, and the perceived benefits/costs of the legislation.

- Any other comments...

Committees must regularly have the responsibility of their committee positions impressed upon them. They aren't just there to ask the odd question of invited guests, they're there to ensure the output of their meetings and departmental work is something they are happy to put their name to.

"With great power..."

Committee involvement throughout the passage of legislation

- To what extent does the current approach of referral to a committee for committee stage work or should committees be involved more at other stages? Thinking in terms of whether there is potentially a meaningful role for committees at amending stages, or even at introduction?

Committees could have a role to weed out non-starters at introduction, they could also offer tweaks to make the legislation more effective from the outset. Industry shows that the earlier corrective action is taken the more cost effective it is, in Stormont terms we could consider that the earlier corrective actions are taken the less time is wasted.

- How might scrutiny throughout the Stages be improved? Thinking in terms of both process and resources.

Perhaps introducing a standard scoring rubric on cost, problem solving, time to implementation, and ease of compliance could be introduced for committees to have a standard benchmarking process for legislation.

- Any other comments...

Nope.

Post-Legislative scrutiny

- Given the limited degree of post-legislative scrutiny currently undertaken, how might post-legislative scrutiny be improved and how would the degree to which the legislation delivered its policy objectives be measured and assessed; and what could be done to address any shortcomings of the legislation?

Introducing mandatory one-year reviews of legislation post-implementation (although sooner reviews may be merited in some cases) for which evidence is sought from the relevant department, the public, public services, industry etc on the impact the bill has had. To this end measures of success should be agreed at the drafting stage of the legislation, along with projected costs and resource requirements for implementation. This would then enable comparison with actuals at the one year review.

Ministers could then be charged with a statutory requirement to present a corrective plan (with measures of success, costs, and timescales) for approval by the committee and implantation – subject to the a one year (or sooner) review for its efficacy.

- Thinking in terms of the added work for committee members and staff, would the additional resource implications be justified in terms of value added?

Yes, the committee is there to scrutinise and lead to better legislation and implementation. Increasing the proportion of legislation that we 'get right first time' would ultimately reduce wasted time and resource of ad hoc fixes and corrections after the fact.

Again, in industry early intervention and investing the effort up front is almost always preferable in terms of cost, time, and resource consumption.

- Any other comments...

Thanks for allowing us to air our thoughts.

Ernest Purvis, Researcher, Rachel Woods MLA

Scrutiny of subordinate legislation

- What works well and should be encouraged in how we currently scrutinise subordinate legislation?
Thinking in terms of effectiveness and efficiency of how we currently do things.

The current approach is efficient but not necessarily as effective as it could be with regard to scrutiny. In terms of what works well, the process is clear; from the receipt of an SL1, right through to the relevant approval procedure. Committee members know what to expect at each stage of the scrutiny of subordinate legislation. The report from the Examiner of Statutory Rules provides crucial evidence and analysis. Generally speaking, the procedure adopted to approve specific subordinate legislation matches how significant or wide-ranging its implications will be.

- What could/should be done differently to deliver improved, more effective, scrutiny?
What are the quick wins, and what are the longer-term or 'ideal world' goals?

Increase transparency and accessibility. With regard to quick wins, the Assembly should consider how it makes information about subordinate legislation available and accessible to the public. For example, Members are not notified when a Statutory Rule is laid; and they are not provided with a clear, authoritative explanation of the purpose and meaning of legislative provisions. This information is reserved for Members of the relevant Statutory Committee, often buried in correspondence with the Department. As a researcher, it is a time-consuming and onerous task to constantly review the various Committee Agenda items and search for Explanatory Memoranda online when subordinate legislation comes up. All Members of the Assembly, and their staff, should be provided with an easily digestible and accessible repository of subordinate legislation; which also provides regular updates, reviews and communications. This could be achieved through a weekly email, in the style of a blog post or newsletter; and a dedicated space on the Assembly website where information related to subordinate legislation can be easily accessed.

Set out formal steps for all Committees to follow, before and after the SR is laid. Before a Statutory Rule is laid, a Committee will consider the proposals and communicate its views with the Department. How it proceeds with consideration is a matter for the Committee to decide. Similarly, after the SR has been laid, it is up to the Committee to decide how it will scrutinise it. In terms of longer-term or 'ideal world' goals, the Assembly should implement a formal set of instructions for all Committees to follow at each stage. This would aid scrutiny by ensuring that all legislation is assessed and analysed by the same standard, and not according to the particular strengths and weaknesses of a Committee. This could be achieved by developing a protocol of legislative standards, where all subordinate legislation is critically appraised against a set of criteria or principles. All Committees would follow the same basic approach to conducting this work and make their findings available to both the Assembly and the public. There would be nothing to prevent a particular Committee going above and beyond the steps in the protocol if it wished to strive for a more detailed and comprehensive level of scrutiny pre or post the subordinate legislation being laid.

- Any other comments...

Committees cannot amend subordinate legislation. There are pros and cons to giving them such powers, but the Assembly should consider how to improve the process so that government officials are not tempted to simply view the Committee as just another consultee and legislative scrutiny as just another box to be ticked along the way to delivering policy outcomes. In my view, this could partly be achieved through greater Pre-legislative Scrutiny (see below) if it was deemed to be complex and unwieldy to grant Members powers to amend subordinate legislation. Perhaps a formalised procedure, prior to the Statutory Rule being laid, where the Department has a responsibility to consider the Committee's views would suffice.

Other recommendations to consider. The CLG should note some pertinent suggestions from the Reform UK think-tank with regard to the scrutiny of Secondary Legislation (from a Westminster perspective): that committees should be given the power to call hearings and propose amendments on

statutory instruments laid before the House; that committees should be able to refer legislative scrutiny to a subcommittee of itself to be chaired by the committee's deputy chair; and that Joint legislative subcommittees should be established where needed to scrutinise cross-departmental legislation.

Pre-legislative Scrutiny

- Pre-legislative scrutiny is undertaken in some other legislatures but is limited in the Assembly. What do you see as appropriate pre-legislative scrutiny? Should it happen and what might it look like for committees?

As noted by the Law Commission, there are many benefits to Pre-legislative Scrutiny: it provides an opportunity for those in Opposition to have a real input into the form of the actual legislation that emerges because Ministers are likely to be more receptive to suggestions for change before a Bill is published; it opens up the legislative process to those outside the institution, especially those affected by the proposed law; and it should, in theory, benefit the Executive by resulting in less time being required at later stages of the legislative process, with better legislation and less likelihood of amendments (see: http://www.lawcom.gov.uk/app/uploads/2015/03/cp178_Post-legislative_Scrutiny.pdf).

In my view, it is imperative that the Assembly improves Pre-legislative Scrutiny. Especially if, as argued by the Hansard Society report 'Making Better Law', the recent trend of governments to increase the volume of legislation before parliaments is driven by the view that it is increasingly perceived as "a sign of action and therefore...a powerful public relations measure and communications tool; a heavy legislative programme suggests a breathless pace of reform, energy and endeavour" (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). In the current Assembly Mandate, I would point to the example of the Minister of Justice, who has (at the time of writing) introduced four pieces of primary legislation and intends to bring forward a fifth. As of March 2021, three of these Bills are being scrutinised by the Justice Committee, which has put significant pressure on staff workloads. Time pressures affect the quality of legislative scrutiny.

The House of Lords, in its report on Parliament and the Legislative Process have noted that if a Bill is only published upon introduction, so much political capital is invested in the bill that officials and Ministers "often consider it their task to defend their legislation, as drafted, regardless of the merits of arguments for improvement" (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). Again, here I would point to the example of the Justice Minister, and her rejection of amendments tabled by Rachel Woods MLA at the Consideration Stage and Further Consideration Stage of the Domestic Abuse and Civil Proceedings Act.

Put simply, to continue with this trend of more and more Bills, with less time for scrutiny, and a strong reluctance to accept amendments and changes is not only unsustainable, but it will lead to less optimal legislative outcomes.

At its most basic level, Pre-legislative Scrutiny would mean the publication of Bills in draft form, followed by a comprehensive consultation exercise. The relevant Committee could assist with this process by conducting a pre-legislative inquiry of the Bill and the issues to which it pertains. Essentially, a similar but more in-depth exploration of the legislative proposals to that which normally happens at committee stage. Similar in the sense that this would involve a call for evidence, witnesses, presentations, deliberations, and a report with recommendations and so on; but more in-depth and far-reaching in terms of covering tangential topics and not limiting inquiry and scrutiny by the proposed scope of the Bill. The Assembly should compel Ministers and Departments to publish Bills in draft form and fulfil a comprehensive pre-legislative process where appropriate. I accept that this will not be needed for a lot, possibly even the majority, of legislation; but it will significantly improve scrutiny of large, complex Bills.

- Any other comments...

The Modernisation Committee of the UK Parliament recommended pre-legislative scrutiny by committees in 1997, but analysis of government bills in Westminster demonstrates the reluctance of departments to publish bills in draft (see:

<https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>).

The House of Lords notes that “many committees and groups over the years have recommended an increase in the amount of pre-legislative scrutiny, but such recommendations have had little effect in overcoming Government resistance.” They accept that it would be unfeasible to publish all bills in draft, but argue that it should be the norm, rather than the exception, for many of the reasons already discussed. The suggested exceptions include emergency legislation, Finance Bills, and technical legislation. For others, especially those that embody important policy changes, if the government does not publish the Bill in draft, then it should formally explain and justify its approach to the House.

Above all, pre-legislative scrutiny aims to dilute some of the politics of law-making and legislative procedure in return for better legislation. It will take political will and a leap of faith from government departments to make it work effectively.

Committee involvement throughout the passage of legislation

- To what extent does the current approach of referral to a committee for committee stage work or should committees be involved more at other stages? Thinking in terms of whether there is potentially a meaningful role for committees at amending stages, or even at introduction?

In my view, the Justice Committee’s scrutiny of the Domestic Abuse and Civil Proceedings Act at committee stage is an exemplar of how a Committee should approach this stage of a Bill. The experience of the Clerk and the Chair is noteworthy in this regard. The work of the Committee staff and the commitment of Members should also be highlighted. As a researcher for a new MLA, and a new member of the Committee, I was surprised that no specialist training or induction to legislative scrutiny was provided. The Assembly should address this urgently. Nevertheless, the time and effort that myself and the Member invested in committee stage of the Bill resulted in significant and important changes to the legislation. I feel that the Committee’s role at Consideration Stage was appropriately respected and relevant, and I do not see any clear changes required in that regard.

However, there may be an important function for Committees (or a Committee) to fulfil at introduction. In my view, the Assembly should consider how to improve legislative standards; and in order to make its own scrutiny of legislation more effective, the Assembly should be more assertive in ensuring that Bills meet minimum standards. As noted elsewhere there is already a degree of consensus on what such standards could be, such as the “principles of good legislation” published by the Better Government Initiative (see: <https://www.bettergovernmentinitiative.co.uk/wp-content/uploads/2013/06/Good-government-17-October.pdf>).

The House of Lords has recommended the UK Parliament create a “Legislative Standards” Committee, to assess all Government legislation against agreed criteria, and to make its findings available to both Parliament and the public (see:

<https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). In their view, the Committee’s role would not be to consider the underlying policies or the drafting, but rather to ensure the Bill’s technical and procedural compliance with agreed standards of best practice in bill preparation. They suggest that this could be achieved simply through developing a legislative standards form, which departments would be required to complete and present at the same time as publishing a bill. As noted, “much of the required information is already available, but across a range of places and formats. The form would bring the key information together in one place, forming a reference point - in essence, a “business case” - for the proposed legislation.”

In my view, this kind of scrutiny could be achieved without the creation of a new Committee; and it should apply to all Bills, both from the Executive and Private Members. Essentially, the relevant Statutory Committee would have to be given sufficient notice of the Bill to be introduced, a copy of the text, Explanatory and Financial Memorandum, and a completed Legislative Standards form. They would review the latter form only, prior to the Bill being introduced. Then at First Stage, after the Proposer has moved, the Committee Chair would deliver a short statement to certify compliance (or not) with the Legislative Standards of the Assembly. The criteria should be developed according to best practice in other legislatures. This kind of exercise would shine a light on key issues such as: lack of consultation; failure to

accurately estimate financial implications; whether pre-legislative scrutiny occurred or not; how the Bill fits within the current legal framework; failure to consult statutory equality and human rights bodies etc. This will improve scrutiny and better inform Members prior to the Second Stage debate.

- How might scrutiny throughout the Stages be improved? Thinking in terms of both process and resources.

The Assembly should commission research similar that conducted by the Institute for Government in 2015 that looks in detail at how Committees are functioning (see: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Under%20scrutiny%20final.pdf>). This will provide an accurate picture of the breakdown of a Committee's time and workload, and how much emphasis is placed on legislative scrutiny, inquiries, policy development etc. The research should also examine who the Committee is engaging with, and the sorts of witnesses they call to provide evidence. For example: Departmental officials; academics; NGOs etc.

Following such a review, the Assembly can then implement any recommendations and changes required to optimise Committee work and improve scrutiny.

From my experience, Committee's need to engage more with leading academics in their field and government officials in other jurisdictions. This is part of an overall shift that I feel is required to increase the diversity of those with whom the Committee chooses to engage. Generally speaking, Committees have developed strong connections and relationships with relevant sector organisations. Yet, with regard to legislation, they rarely engage with the scientific community (who often set the foundations for policy changes through research) or civil servants in other legislatures (that have already implemented something that we are seeking to pass into law). To support the Member I work for, and to inform my own research, these were two avenues that I focused on during scrutiny of the Domestic Abuse and Civil Proceedings Act; and they proved instrumental in developing key amendments to our legislation.

I feel it goes without saying that Committee staff need urgently reinforced. Staffing levels are insufficient, and much more could be done to further strengthen the quality of their work in scrutinising legislation and policy implementation. The staffing complement of committees is very stretched and this should be increased. Again, as an example, I would point to the Justice Committee and the Clerk's assessment (on the public record) of March 2021 that the sheer amount of legislation coupled with current staff limits would result in less scrutiny if the Minister's suggested timeframe for the committee stage of the Damages (Return on Investment) Bill was followed. With increased staff numbers, a balance must also be struck between administrative support and more specific roles. I would suggest that each Committee should rely on its own dedicated researcher and/or statistician. Such roles would require staff with relevant expertise, skills and knowledge to be able to critically examine, investigate and report on Departmental work.

- Any other comments...

Prior to any changes or improvements in Committee staffing arrangements, a full audit should be carried out, which clearly outlines current roles/functions and demonstrates the case for additional resources by showing relevant gaps in skills/knowledge and expertise.

Post-Legislative scrutiny

- Given the limited degree of post-legislative scrutiny currently undertaken, how might post-legislative scrutiny be improved and how would the degree to which the legislation delivered its policy objectives be measured and assessed; and what could be done to address any shortcomings of the legislation?

The Assembly needs to address the dearth in Post-legislative Scrutiny, which is now widely acknowledged as a key factor in improving the law-making process. In response to a 2006 report by the Law Commission that listed relevant benefits, the UK government proposed that “henceforth the department currently responsible for a particular Act should in most cases – generally [when] between 3 and 5 years have elapsed after Royal Assent – publish a Memorandum, for submission to the relevant departmental select committee”; to establish “a formal and automatic process” so the committee “could assess the state of play in relation to the Act and could decide on what further action to take or propose” (see:

<https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). The Law Commission had recommended a new Parliamentary Joint Committee on Post-legislative Scrutiny, but this was rejected by the UK government who argued that there would be too much crossover and replication of work with departmental committees. However, as noted by the Hansard Society, “the current ad hoc approach to post-legislative scrutiny, although valuable for what it may reveal about specific pieces of legislation, is insufficiently embedded into formal procedures in Westminster and Whitehall to truly make an impact” (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>).

In my view, government departments should bring forward reporting requirements and mechanisms already built into Bills where appropriate. I accept that not all legislation will require a comprehensive review. I am also convinced by the arguments put forward by the Law Commission that Post-legislative Scrutiny might best be improved through new structures. A balance needs to be struck in terms of additional pressures on Committees and what outcomes can be achieved. In an ideal world, and specifically in relation to large, complex Bills, I would envisage a process that begins with a departmental report or review, followed by a Post-legislative Scrutiny Committee inquiry, which leads to a report with recommendations referred to the relevant Statutory Committee and government department. I believe that this would be the best way to manage the additional resources required for Post-legislative Scrutiny without overloading current Committees.

- Thinking in terms of the added work for committee members and staff, would the additional resource implications be justified in terms of value added?

Post-legislative scrutiny will require significant resources; but the outcomes would justify the investment in my view. It would facilitate a process that identifies problems, costs, savings and advantages associated with new legislation much sooner than what is available at present; and it would lead to legal issues being dealt with much quicker.

The additional workload for the Committee needs to be carefully managed. New structures may be required (e.g. subcommittees or a new Committee); and forward work programmes may need to be much more clearly defined.

- Any other comments...

There is bigger issue at play when discussing Post-legislative Scrutiny: that is the reliance on government departments to review their own work and implementation of legislation. In the Westminster context, it has been suggested 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” (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). Yet, the issue remains that the substance of such a report will be determined by those who have been tasked with implementing the law. In my view, this is far from ideal. Either relevant committees or a stand-alone Post-legislative Scrutiny Committee (as recommended by the Law Commission) should carry out this work precisely because, as noted by the Hansard Society, “they can be more candid than government-led or government sponsored reviews, and more responsive to the views of stakeholders” (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>).

Rachel Woods MLA

Scrutiny of subordinate legislation

- What works well and should be encouraged in how we currently scrutinise subordinate legislation?
Thinking in terms of effectiveness and efficiency of how we currently do things.

The current approach is efficient but not necessarily as effective as it could be with regard to scrutiny, given the actual process that we are dealing with. The absence of the Assembly for 3 years meant that there was a backlog of subordinate legislation to be passed, much of which was already in place. I am aware that this is an exceptional circumstance given the context, but whilst the process was efficient when the committees were functioning, there was limited scrutiny, if any available.

The report from the Examiner of Statutory Rules provides crucial evidence and analysis which members could not do without.

- What could/should be done differently to deliver improved, more effective, scrutiny?
What are the quick wins, and what are the longer-term or 'ideal world' goals?

The Assembly should consider how it makes information about subordinate legislation available and accessible to the public, and to other MLAs. This should be available in real time. There should also be an 'explainer' available online for the public too to understand the SR processes and what it means/the powers of MLAs and committees to scrutinise them.

Members are not notified when a Statutory Rule is laid; and they are not provided with a clear, authoritative explanation of the purpose and meaning of legislative provisions.

This information is reserved for Members of the relevant Statutory Committee, often buried in correspondence with the Department. This is incredibly difficult, if impossible, for political parties who do not have representation on every committee of the Assembly.

All Members of the Assembly, and their staff, should be provided with an easily digestible and accessible repository of subordinate legislation; which also provides regular updates, reviews and communications from all committees. This could be achieved through a weekly email, in the style of a blog post or newsletter; and a dedicated space on the Assembly website where information related to subordinate legislation can be easily accessed.

Set out formal steps for all Committees to follow, before and after the SR is laid.

All committee members should be given regular training on SRs and the subordinate legislative process. It is complex to understand, and whilst training is available when an MLA is elected, or replaces another, a refresher or reminder of the process would be of assistance for committee members.

Before a Statutory Rule is laid, a Committee will consider the proposals and communicate its views with the Department. How it proceeds with consideration is a matter for the Committee to decide. Similarly, after the SR has been laid, it is up to the Committee to decide how it will scrutinise it. In terms of longer-term or 'ideal world' goals, the Assembly should implement a formal set of instructions for all Committees to follow at each stage. This would make it easier for MLAs who may be moved around committees, or sit on different ones depending on the mandate.

All Committees would follow the same basic approach to conducting this work and make their findings available to both the Assembly and the public. There would be nothing to prevent a particular Committee going above and beyond the steps in the protocol if it wished to strive for a more detailed and comprehensive level of scrutiny pre or post the subordinate legislation being laid.

- Any other comments...

There are pros and cons to giving Committees powers to amend subordinate legislation, but consideration needs to be given on how to improve the process so that actual scrutiny can take place and avoid a box ticking exercise in the process. I agree that Pre-legislative Scrutiny could be utilised (see below) if it was deemed to complex and unwieldy to grant Members to powers to amend subordinate legislation. Perhaps a formalised procedure, prior to the Statutory Rule being laid, where the Department has a responsibility to consider the Committee's views would suffice. I appreciate the workload that this may bring – however it is the committee's job to scrutinise all legislation passing through it.

The CLG should note some pertinent suggestions from the Reform UK think-tank with regard to the scrutiny of Secondary Legislation (from a Westminster perspective): that committees should be given the power to call hearings and propose amendments on statutory instruments laid before the House; that committees should be able to refer legislative scrutiny to a subcommittee of itself to be chaired by the committee's deputy chair; and that Joint legislative subcommittees should be established where needed to scrutinise cross-departmental legislation.

Pre-legislative Scrutiny

- Pre-legislative scrutiny is undertaken in some other legislatures but is limited in the Assembly. What do you see as appropriate pre-legislative scrutiny? Should it happen and what might it look like for committees?

In the current Assembly Mandate, which was cut short because of the Assembly being down for 3 years has increased the pressure and workload of committee members, committee staff and those consultees that are required to be spoken to and part of the process. As of March 2021, in the Justice Committee, three of the five proposed Bills (one has been dealt with and received Royal Assent) are being scrutinised by the Justice Committee at the same time, which has put significant pressure on staff workloads. Time pressures affect the quality of legislative scrutiny and the ability to get to know an issue or react when say, the consultees bring up a matter that has not been considered and the committee or an individual member may wish to address or bring amendments on.

The House of Lords, in its report on Parliament and the Legislative Process have noted that if a Bill is only published upon introduction, so much political capital is invested in the bill that officials and Ministers "often consider it their task to defend their legislation, as drafted, regardless of the merits of arguments for improvement" (see: <https://publications.parliament.uk/pa/ld201012/ldselect/ldspeak/136/13606.htm>). This has been clear to me as a Justice Committee member through my experience of the Domestic Abuse Bill, and also in informal conversations on the Committal Reform Bill too. Whilst I appreciate that there may be merit in keeping some bills 'tight' and addressing only the issues it seeks to – the very nature of scrutiny brings up other issues that are not related to the scope of the bill for example, but that need to be explored and bottomed out – or become an integral part of the bill and it is the job of the committee to provide that scrutiny and have that lee-way. Given members of committees are from different backgrounds and have different experiences, there may be merit in their positions or coming from a matter from a different angle that has not been considered, or bring direct experience of a matter to the table. There may be unintended consequences, but this is the role of the committee and members to consider.

To continue with a trend of more and more Bills, with less time for scrutiny, and a strong reluctance to accept amendments and changes is not only unsustainable, but it will lead to less optimal legislative outcomes – ultimately not allowing for ‘good law’.

At its most basic level, Pre-legislative Scrutiny would mean the publication of Bills in draft form, followed by a comprehensive consultation exercise. The relevant Committee could assist with this process by conducting a pre-legislative inquiry of the Bill and the issues to which it pertains. Essentially, a similar but more in-depth exploration of the legislative proposals to that which normally happens at committee stage. Similar in the sense that this would involve a call for evidence, witnesses, presentations, deliberations, and a report with recommendations and so on; but more in-depth and far-reaching in terms of covering tangential topics and not limiting inquiry and scrutiny by the proposed scope of the Bill. The Assembly could compel Ministers and Departments to publish Bills in draft form and fulfil a comprehensive pre-legislative process where appropriate. I accept that this will not be needed for a lot, possibly even the majority, of legislation; but it will significantly improve scrutiny of large, complex Bills, especially those with far reaching consequences.

- Any other comments...

The suggested exceptions by the Modernisation Committee of the UK Parliament and House of Lords include emergency legislation, Finance Bills, and technical legislation. For others, especially those that embody important policy changes, if the government does not publish the Bill in draft, then it should formally explain and justify its approach to the House. Whilst I have some sympathy in this – finance bill and emergency legislation also require scrutiny and we have seen through this last year of the Assembly sitting that this has not always been the case. I appreciate emergency legislation had to be passed to deal with COVID-19 however the way in which scrutiny has occurred has jarred with the role of committees – indeed most have had no role or opportunity. Regulations are debated retrospectively. Accelerated passage has been somewhat commonplace.

Above all, pre-legislative scrutiny aims to dilute some of the politics of law-making and legislative procedure in return for better legislation. It will take political will and a leap of faith from government departments to make it work effectively.

Committee involvement throughout the passage of legislation

- To what extent does the current approach of referral to a committee for committee stage work or should committees be involved more at other stages? Thinking in terms of whether there is potentially a meaningful role for committees at amending stages, or even at introduction?

The experience and expertise of the Clerk and the committee staff is crucial to the committee involvement throughout the passage of legislation. The experience of the chair too cannot be overlooked given the volume of work, and at times, incredible complexity. The commitment of Members should also be highlighted.

As a new member of the Committee and new MLA, having never sat in a committee before in the Assembly, I was surprised that no proper training or in-depth induction to legislative scrutiny was provided for me and my team. I agree with my researcher (who has submitted a response to this too) that this should be addressed urgently.

I luckily had a research background and have a researcher who is exceptionally good but to understand the details of the scrutiny processes and committee roles, we relied on the committee staff at length. Perhaps if new MLAs and teams come on board, this specialised training could be considered.

Committee could engage prior to second stage if the mechanisms were in place as above for pre-legislative scrutiny as a start.

- How might scrutiny throughout the Stages be improved? Thinking in terms of both process and resources.

Research could be commissioned on the processes of committees in other jurisdictions and share feedback and pros/cons from learning. I know as part of the justice committee there were issues over devolved powers and the Sewel Convention over pieces of legislation that we were dealing with. A comparison to how other legislatures dealt with this could be done and if any changes could be made for committees to have a greater role in scrutiny of these and what it means for NI.

Committee's need to engage more with leading academics in their field and government officials in other jurisdictions. This is part of an overall shift that I feel is required to increase the diversity of those with whom the Committee chooses to engage. Committees have developed strong connections and relationships with relevant sector organisations, depending on the issue at hand. For example, during the Domestic Abuse Bill, it was clear that the relationships that individual members had with a number of organisations was good, and engagement on such an important issue was clear.

However, with regard to legislation, they rarely engage with the scientific community (who often set the foundations for policy changes through research) or civil servants in other legislatures (that have already implemented something that we are seeking to pass into law). This is something that my researcher and myself brought to the conversation, engaging with others who had experience in this field, looking at academic reports, research from other countries and spoke to those who had been through the process and were given the time to reflect. This was incredibly useful in the context of lobbying for amendments and for the committee and myself to look at areas which could be put in the bill and were not, for example, review periods and training.

Committee staff complement holds the committee together and without them, members would not be able to do any of the scrutiny that is required to the level that is required. The staffing complement of committees is very stretched to deal with the level and volume of legislation, as well as the 'regular' workload of the committee, and this should be increased. Again, as my researcher has indicated in his own response, I would point to the Justice Committee and the Clerk's assessment (on the public record) of March 2021 that the sheer amount of legislation coupled with current staff limits would result in less scrutiny if the Minister's suggested timeframe for the committee stage of the Damages (Return on Investment) Bill was followed. With increased staff numbers, a balance must also be struck between administrative support and more specific roles. I would suggest that each Committee should rely on its own dedicated researcher and access to a statistician, or another member to fulfil this role. Such roles would require staff with relevant expertise, skills and knowledge to be able to critically examine, investigate and report on Departmental work. This would assist members in their scrutiny and to pinpoint issues if and when required.

Again, consideration as to what happens in other jurisdictions and the provision and resources available

- Any other comments...

Accelerated passage and use of this mechanism undermines the roles of committees and its members. I do not agree with its use in the majority of occasions.

The budget setting process and budget bills is also an area of concern for me, given the complexity of it and its importance in the allocation and spend of public money. I have not been through a 'normal' budget process given the Assembly was down for 3 years, and the effects of COVID-19 on the budgets, perhaps the experience is skewed, but there could be budget training for individual committees reflecting the Departmental responsibilities in order to fully appreciate the information that is given to committees by the Departments, and what the role of the committee is in the budget setting process, and what extent changes can be made. I would see this training as a collective for members, not for parties or MLAs on their own, but from a committee viewpoint.

Post-Legislative scrutiny

- Given the limited degree of post-legislative scrutiny currently undertaken, how might post-legislative scrutiny be improved and how would the degree to which the legislation delivered its policy objectives be measured and assessed; and what could be done to address any shortcomings of the legislation?

The Assembly needs to address the dearth in post-legislative scrutiny, which is now widely acknowledged as a key factor in improving the law-making process.

Departments should bring forward reporting requirements and mechanisms already built into Bills where appropriate. I accept that not all legislation will require a comprehensive review, however, new laws, especially new criminal offences such as the Domestic Abuse Act and the future Stalking Bill should have review mechanisms built in. These are new offences, and will require changes in the way things are done which would necessitate training, knowledge etc, and new ways of working. If after a period of time things have not changed and say for example, prosecutions are not forthcoming or behaviour has not changed much, then reviews are crucial to see where the gaps are. It could be the way in which the offence is worded in the legislation, its roll out or training and knowledge thereof, for example. Committees, given their role in formulating the legislation and asking the questions at the start, should have a scrutiny role in this too.

A balance needs to be struck in terms of additional pressures on Committees and what outcomes can be achieved. However, it seems beneficial for everyone involved – the Minister, the Department, Committee and public to know if legislation passed is reviewed and ensuring it meets the purpose, and there is a role for committees in that, as I have said above. This point also applies to guidance produced

- Thinking in terms of the added work for committee members and staff, would the additional resource implications be justified in terms of value added?

Yes, it will require significant resources, but these resources would be justified given what they seek to achieve. This is the fundamental role of the committee members.

The additional workload for the Committee needs to be carefully managed. New structures may be required and forward work programmes and focus may need to be much more clearly defined at the start of the term or mandate. There is a lot of work that committees are expected to deal with which say are not committee matters, and this can be clearly defined at the start of the term but if relevant issues arise there does need to be some flexibility there too. For example, it would have not been expected that committees would have to deal with COVID-19 regulations but they have adapted their workload to address the emergency situation.

- Any other comments...

N/A

Appendix E – Research Papers



Northern Ireland
Assembly

Research and Information Service Briefing Paper

30 January 2020

NIAR 118-19

Parliamentary Scrutiny of Delegated Legislation – A Comparative Review

Claire Milliken and Tim Moore

1 Introduction

This paper presents the findings of comparative research on the scrutiny procedures for delegated legislation²⁵ undertaken by other legislatures within the UK and more widely. The paper was commissioned by the Examiner of Statutory Rules (the ESR) from RaISe, which provides evidenced based research support to both the Assembly and the secretariat. Given that the ESR may wish to share the paper with others, it may be useful to say something about delegated legislation and the role of the ESR.

Delegated legislation refers to law made by ministers or certain public bodies under powers conferred on them in a parent Act, such as a UK Act of Parliament or an Act of the Northern Ireland Assembly. Delegated legislation exists in a variety of forms (such as Regulations, Orders or Rules) all of which are categorised as Statutory Instruments (SIs). A parent Act will set out what form of SI should be produced and which parliamentary process it should follow. Concern over the use of delegated legislation is

²⁵ Whilst delegated legislation is often called secondary or subordinate, the Hansard Society advises that use of the former term is preferable, as it does not misleadingly suggest lesser importance in relation to primary legislation.

long-standing.²⁶ Critics say that it involves ‘a diffusion of law-making authority’ away from parliamentarians to ministers and executive bodies. This shift, some argue, undermines the constitutional values of representative democracy and creates the potential for abuses of power.²⁷

In Northern Ireland, pieces of delegated legislation are commonly known as ‘Statutory Rules’ with the body of legislation being known as the ‘Statutory Rules of Northern Ireland.’²⁸ The position and remit of the ESR are provided for under Standing Order 43. Broadly speaking, the role of the ESR, as provided for under Standing Order 43 is to assist committees of the Assembly undertake technical scrutiny of such certain statutory rules. Technical scrutiny is distinct from policy/merits scrutiny. However, whilst the former function can be easily broken down in a number of component parts, the latter cannot. It has been, noted that policy/merits scrutiny:

...is not about ranging over the whole *raison d’être* for subordinate legislation, but, nevertheless, it is an opportunity to probe into the background in terms of the policy that the secondary legislation is intended to implement, and whether it achieves its objectives. In that sense, it is a valuable addition to the scrutiny process.¹³

Standing Order 43 prevents the ESR, when carrying out scrutiny provided for under that same provision, from considering any ground which impinges on the merits or the policy behind the relevant delegated legislation.

2 Review of literature

One of the aims of the research conducted by RaISe was to identify best practice processes for the scrutiny of delegated legislation. A review of academic literature and a wide range of other material, including parliamentary inquiry reports and think tank commentary, was conducted as the initial phase of the research.

The initial review of the literature found a significant amount of commentary on problems relating to the scrutiny process but no one system emerged as an example of

²⁶ For example, in an article published in 1944 it was observed that - “John Citizen may not know it but he is confronting a problem which has for a long time past engaged the attention of many wise learned men, and bids fair to become an active issue of practical politics - the problem of Ministerial powers by delegated legislation and of judicial or quasi judicial decision”. *Delegated legislation*, The Round Table, 34:135, 204-210. Key texts date back almost a century to C.T. Carr, *Delegated Legislation; Three Lectures* (Cambridge University Press, 1921); G. Hewart, *The New Despotism* (Ernest Benn, 1929); R. Fox and J. Blackwell, *Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014); E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Hart, 2001); A. Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in A. Horne and G. Drewry (eds), *Parliament and the Law* (Hart, 2018).

²⁷ Reid, L. (2010) “Oversight of Regulations by Parliamentarians” *Canadian Parliamentary Review*. Vol.33 Iss. 7.

²⁸ The Statutory Rules (Northern Ireland) Order 1979 lists the public authorities which can make rules, if given the authority to do so an enabling clause in the primary legislation. While this includes a wide range of administrative and legal authorities, most delegation is conferred on the Department responsible for the relevant policy area.

best practice. It may be that best practice is context specific.²⁹ The initial examination of literature did, however, reveal a growing interest in the nature and scrutiny of delegated legislation.³⁰

The literature review revealed a renewed interest in the need to develop more efficient and effective scrutiny mechanisms. Three factors appear to have contributed to this interest:

- Firstly, the growing volume of delegated legislation due to the increasing inclusion within primary legislation of delegated law-making powers.³¹
- Secondly, the growing concern in relation to the range and scope of delegated powers and delegated legislation.
- Thirdly, delegated legislation has featured in some high profile court cases at both the UK and NI level.

The following sections of the paper provide further information relating to each of these factors.

2.1 Volume

As is shown in Chart 1 below, since 1950 there has been a slow decline in the number of Acts passed by the UK parliament. However, whilst the number of SIs considered remained broadly stable between 1950 and 1980, the number increased significantly over the next three decades. The annual average of 2,100 SIs from 1950 to 1980 period rose to a peak annual average of 4,200 in the 2000s and then fell to around an average of 3,000 a year during the last decade.

²⁹ A significant research project, which may identify best practice, is currently being undertaken by Dr Lorne Neudorf. Dr Neudorf has identified the following design features as part of his research: • when the scrutiny is applied (delegation provisions in draft legislation, draft regulations, promulgated regulations); • scope of the scrutiny in terms of what can be scrutinised (only regulations subject to a certain procedure, all regulations one time, all regulations on an ongoing basis); • *criteria* of the scrutiny to be applied (technical considerations, broader policy questions); • *resourcing* including budget, staff and the number of members; • *powers* (reporting, calling witnesses, revocation); • *composition* of the committee (joint committee, expertise of members, government representation); and • *procedures* of the committee (public or private hearings, decision-making process by consensus or majority).

³⁰ An annotated reading list of useful information is provided in Annex 1 of this paper.

³¹ Volume encompasses not just the number of SIs but also their length and, regarding the latter, the House of Lords Secondary Legislation Scrutiny Committee has expressed concern about the length of some SIs, including the draft Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, which runs to 619 pages. House of Lords, Secondary Legislation Scrutiny Committee (Sub-Committee B), Seventeenth Report of Session 2017/19, 21 February 2019, [Source IfG Monitoring Report]

Chart 1. UK Acts and Statutory Instruments, 1950–2016³²

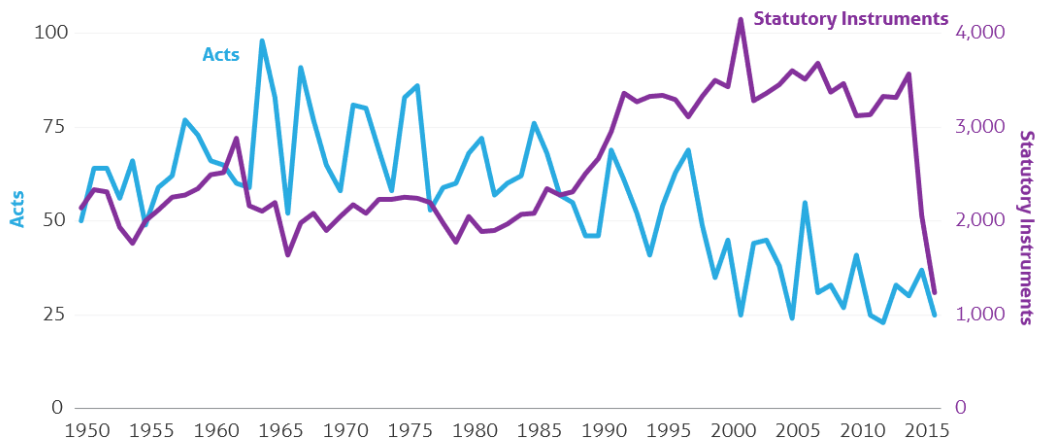
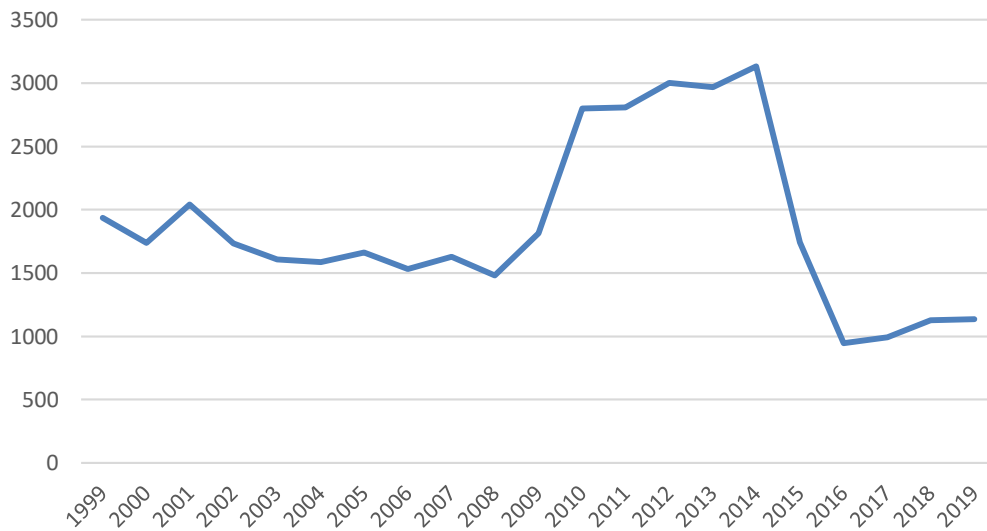
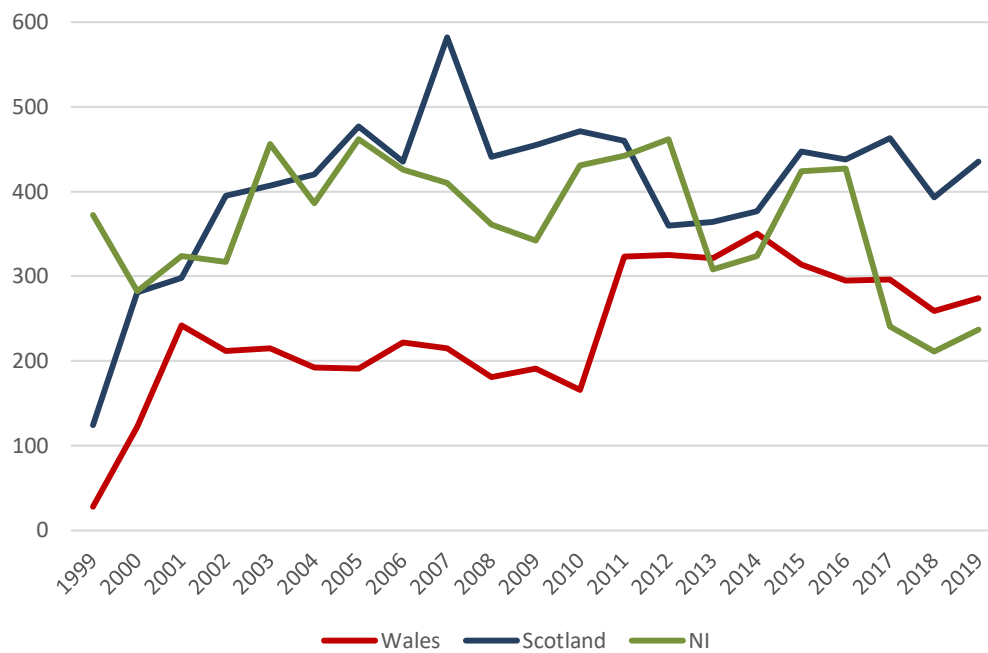


Chart 2. UK Statutory Instruments, 1999-2019 [source: legislation.gov.uk]



³² Institute for Government - Parliamentary Monitor 2018

Chart 3. Wales/Scotland/NI Statutory Instruments, 1999-2019 [source: legislation.gov.uk]

2.2 Range and scope of delegated powers and of delegated legislation

The literature examined indicated a common concern across a number of jurisdictions regarding the growing use of broad delegated powers and skeleton bills. These concerns, however, have been particularly acute in the UK, given the broad nature of the powers (including Henry VIII powers)³³ contained in key pieces of primary legislation providing for the UK's exit from the European Union (Brexit).³⁴

In addition to these three broad concerns, there is also a growing evidence base regarding the use of delegated legislation. Research has shown, for example, that in the UK substantial numbers of criminal offences are created in delegated legislation, the majority passed under the negative resolution procedure, which offers very limited opportunity for scrutiny and does not involve a parliamentary vote.³⁵

2.3 Litigation

Given its creation by administrative process, delegated legislation can be subject to judicial review on procedural and substantive grounds. These include:

³³ 'Henry VIII clauses' are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.

³⁴ EU(W)A and the European Union (Withdrawal Agreement) Act 2020

³⁵ Chalmers, J. and Leverick, F. (2018) "Criminal law in the shadows: creating offences in delegated legislation" *Legal Studies*, vol. 38, pp. 221-224

- where it was not made within the scope of the power of the enabling primary legislation;
- if irrelevant considerations were taken into account or relevant considerations were not taken into account when it was made;
- irrationality;
- procedural impropriety,
- human rights grounds.

Brexit related delegated legislation has received high profile examination by the Courts. Furthermore, the use and adequacy of scrutiny of delegated legislation has received further attention in Northern Ireland through the RHI inquiry and judicial review.³⁶

3. The ESR in a comparative context

Whilst the initial review of the literature did not identify what might be considered best practice, it did show that there was no body of evidence to suggest that the complex division of scrutiny functions that exists in bicameral legislatures is more effective than those found in the unicameral systems found in the devolved legislatures. Indeed the former have been criticised as “woefully inadequate” by the House of Commons Select Committee on Liaison.³⁷ Similarly, but in relation to operation of the Australian parliament, it has been observed that:

Australia was once a world leader in parliamentary oversight of delegated legislation. Today, parliamentary scrutiny has been undermined by a number of factors, including overly wide delegations, uncritical bi-partisan support for measures, party discipline restraining oversight, abuse of the disallowance procedure and parliamentary recesses to avoid parliamentary scrutiny, and interest-group capture within government. (Appleby)

In addition to the apparent weaknesses of complex bicameral systems, the volume of delegated legislation considered by national parliaments provides a further limit to their utility as comparators, in relation to the work of the ESR is limited. In terms of volume, the scrutiny demands in the Scottish Parliament and the National Assembly for Wales are more likely to reflect those of the Northern Ireland Assembly. In addition, the demands placed by Brexit on the scrutiny systems in these legislatures are more likely

³⁶ Judicial remedies are limited. In Neudorf, L. (2019) Parliamentary Scrutiny of Delegated Legislation Inquiry, Submission 8, 31 January it is noted that judicial review is not a comprehensive, robust scrutiny mechanism for delegated legislation. A court challenge to a particular regulation depends upon an aggrieved party initiating and funding litigation.

³⁷ In addition, the 18 variants of processes for making SIs involve scrutiny have been described as 'negligible; entirely theoretical', 'palpably unsatisfactory' and 'woefully inadequate'. (Select Committee on Liaison, Liaison—First Report (TSO, 2000), para.24, <https://publications.parliament.uk/pa/cm/199900/cmselect/cmliaisn/300/30003.htm#a1>)

to reflect those of the Northern Ireland Assembly and consequently the ESR. The Scottish Parliament and the National Assembly for Wales scrutiny systems, therefore, are the focus of the following section of this paper.

4. Delegated legislation and scrutiny in the Scottish Parliament and National Assembly for Wales

This section provides information relating to the design of the scrutiny systems in the Scottish Parliament and the National Assembly for Wales.

4.1 Scottish Parliament

In the Scottish Parliament, delegated legislation is referred by the Clerk to both the Delegated Powers and Law Reform Committee (DPLRC) and the lead committee. The lead committee is the committee within whose remit the subject matter of the delegated legislation falls.

The DPLRC has five Members of the Scottish Parliament (MSPs) and three substitute MSPs. The DPLRC is responsible for, amongst other things, the technical scrutiny of delegated legislation laid before the Parliament. In considering the delegated legislation, the DPLRC decides whether the attention of the Parliament should be drawn to the instrument on one or more of ten specific grounds listed in standing orders.

4.1.1 Merits/Policy

The committee is not involved in scrutinising the policy merits of subordinate legislation – Standing Orders prevent it from addressing any ground that impinges on the substance of, or on the policy behind it, delegated legislation. This scrutiny is the domain of/reserved to the relevant lead committee.

4.1.2 Recent trends

In 2018-19, the third year of the fifth session of the Scottish Parliament, the DPLRC met 36 times and considered 243 SSIs.³⁸ This compares with 279 considered in 2017-18. DPLRC staff have reported that numbers of SIs can peak ahead of recess periods. They also report a pre-dissolution ‘bulge’ of Bills and SIs as the Scottish Government tries to get all remaining legislation passed.

4.1.3 EU Exit SIs

³⁸ The Scottish Parliament Delegated Powers and Law Reform Committee (2019) *Work of the Delegated Powers and Law Reform Committee in 2018-19* SP Paper 633 60th Report, 2019 (Session 5)

A significant number of instruments have passed through the Scottish Parliament to address deficiencies in legislation that would arise on the UK's exit from the European Union. These have been made under delegated powers in the European Union (Withdrawal) Act 1998 and fall into two categories:

- SSIs laid by the Scottish Government; and
- SIs laid by the UK Government which relate to devolved matters.

Two protocols set out how these are scrutinised by the Scottish Parliament. The SSI protocol adds an extra element to normal procedure by allowing committees to take a view on the categorisation of instruments (as high or low significance) and which procedure they should be subject to (either negative or affirmative). The protocol also establishes a role for the DPLRC to “flag” instruments to lead committees where it holds a contrary view to the Scottish Government on the significance of an instrument. The DPLRC's involvement in the protocol is shown in Annex 2.

4.1.4 SI Reporting

The DPLRC produces weekly SI reports. It also issues quarterly reports and an annual report that highlights trends. The DPLRC produces the Scottish SI tracker. This shows the SIs currently laid before Parliament. Committee staff update the tracker on an ad-hoc basis but aim to do it at least once per week.

The reports listed above are publicised via the Scottish Parliament website, twitter, news releases, calls for evidence and speaking at information sessions on the work of the parliament.

4.1.5 Delegated powers

The DPLRC's remit, as provided for in the standing orders of the Scottish Parliament, includes the consideration of delegated powers provisions in bills. The DPLRC engages with a bill at two stages of legislative passage (at Stage 1 and Stage 2). Over 2018-19, the Committee considered and reported 14 bills at Stage 1 and seven bills after Stage 2.

Standing orders also provide the DPLRC with the power to consider and report on:

- general questions relating to powers to make subordinate legislation;
- Scottish Law Commission Bills;
- Legislative Consent Motions; and
- proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

4.1.6 Resourcing

The DPLRC meets in public session once a week. It is supported by a team comprising of one committee clerk, one clerk assistant, and one support manager. Six lawyers, based within the Legal Services Legislative team, provide the committee with technical scrutiny support. A lawyer prepares a briefing for every SI laid. It receives legal advice privately. Although the DPLRC is not involved in scrutinising the policy merits of subordinate legislation it does, at times, gets help from SPICe researchers, as there can sometimes be a fine line between the technical reason for delegating a power and the policy behind the approach.

Any money spent by the DPLRC comes from a wider office budget. Generally, the Committee's non-staff costs are considerably less than other committees which are more public facing.

4.2 National Assembly for Wales

In the National Assembly for Wales Constitutional and Legislative Affairs Committee (the CLAC) is responsible for the technical scrutiny of delegated legislation – it considers and reports on all SIs or draft SIs laid before the Assembly. The ten technical issues which the CLAC must consider are detailed in standing orders. The committee comprises of four Assembly Members.

4.2.1 Merits/Policy

In 2009, the National Assembly of Wales's Subordinate Legislation Committee's Inquiry into the Scrutiny of Subordinate Legislation and Delegated Legislation recommended it should undertake merits scrutiny of affirmative SIs. It looked to the merits scrutiny undertaken in the House of Lords by the then Merits of Statutory Instruments Committee and agreed that scrutiny of the merits of SIs is an important and beneficial function to ensure the right level of checks and balances of the use of Ministers delegated powers. The Merits Committee usually reported in neutral way, rather than taking a stance on the policy. Although it may identify areas where the House may wish to make further inquiries. The Committee concluded this approach may help improve transparency and highlight to National Assembly of Wales Members and the public when delegated legislation of not has been laid and any potential areas of concern.

SOs state that the CLAC *may* consider and report on whether an instrument:

- imposes a charge on the Welsh Consolidated Fund or contains provisions requiring payments to be made to that Fund;
- is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly;
- is inappropriate in view of the changed circumstances since the enactment;
- inappropriately implements European Union legislation; or

- imperfectly achieves its policy objectives.

Examples of where the CLAC has raised issues of political or legal importance to the Assembly (merit points) include:

- ***The Electricity (Offshore Generating Stations) (Miscellaneous Amendments) (Wales) Regulations 2019***

the CLAC queried whether “national” newspaper meant a Welsh newspaper or a UK-wide newspaper. The Welsh government (WG) responded by amending the regulations, changing “national newspaper” to “a newspaper circulating in Wales, England and Northern Ireland”.

- ***The NHS (Welsh Language in Primary Care Services) (Miscellaneous Amendments) (Wales)***

the CLAC noted that the regulations impose a light-touch Welsh language regime in this new area. WG responded by saying these were the first Welsh language duties in this area.

- ***The Plant Health (Fees) (Forestry) (Wales) Regulations 2019***

the CLAC noted the increase in fees contained in these regulations (because it is a reporting point under SO21.3(i)).

- ***The Sea Fishing (Penalty Notices) (Wales) Order 2019***

- the CLAC noted that the Order did not allow penalties to be paid in cash, despite some people still preferring to use cash. WG responded to say that cash payments are more onerous to check for fraud, and that not all WG officials are able to accept cash payments.

4.2.2 Recent trends

The the CLAC is busiest in the build-up to and following recess, particularly the summer recess because of reporting on SIs.

4.2.3 EU Exit SIs

The European Union (Withdrawal) Act 2018 provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation. It also provides for a committee in the National Assembly of Wales to sift certain regulations that the Welsh Ministers propose to make under the negative

procedure known as 'proposed negative regulations'.³⁹ The sift committee will then consider the appropriate procedure to be followed, either negative or affirmative.

The National Assembly of Wales's Standing Orders require that, for regulations in devolved areas made or to be made by UK Ministers acting alone under sections 8 and 9 of the European Union (Withdrawal) Act 2018, the Welsh Government must lay a statement (30C Written Statement) notifying the it of the regulations in question. Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum (SCIM) under Standing Order 30A. Any member may then table a motion to require the National Assembly of Wales to formally give consent to the regulations, provided they lay their own memorandum. The flow chart in Annex 3 illustrates this process.

4.2.3 Delegated powers

The the CLAC is also empowered to report on:

- the appropriateness of powers granted by Bills to permit the Welsh Ministers to make delegated legislation,
- Legislative Consent Memoranda referred by the Business Committee;
- Statutory Consent Memoranda; and,
- European legislation.

It also undertakes policy inquiries such as the ongoing inquiry into Wales' changing constitution.

4.2.4 Resourcing

The the CLAC meets on a weekly basis, either in public or private session,⁴⁰ and has a team of staff comprising of one clerk, one second clerk, one deputy clerk and one team support (undertaking administrative work). An integrated team, which incorporates representatives of legal services, research, translation and communications and engagement, supports the work of the committee staff. Legal advisers are responsible

³⁹ Paragraph 4 of schedule 7

⁴⁰ Under Standing Order 17.42, the public may be excluded where matters to be discussed include: international relations, national security, the investigation of alleged illegality, the effectiveness of law enforcement or the proper administration of justice requires it; *a particular item of business cannot be discussed without disclosing personal information relating to identified or identifiable individuals; discussion in public would be likely to cause harm to commercial or economic interests; discussion in public would be likely to cause harm to the health or safety of an individual, the public, or the environment; reference to material would be likely to be considered defamatory of any person; the committee is deliberating on the content, conclusions or recommendations of a report it proposes to publish; legal advice or information, given in confidence, could be disclosed; a particular item of business cannot be discussed without reference to a document or documents which would be excluded or exempted from disclosure under legislation, or, any matter relating to the internal business of the committee, or of the Assembly.

for checking all SIs that come before the Committee, with a specific focus on constitutional and legislative aspects as set out in Standing Order 21. Researchers assist with briefings ahead of scrutiny sessions and throughout inquiries.

The budget is held at a service level. However, the CLAC staff undertake forecasting with other clerking teams to help identify and manage spend within a financial year. The committee incurs costs through visits to other parliaments and large-scale evidence sessions and/or stakeholder events.

The Welsh Government's legislative programme and the number of Bills brought forward at any one-time influence reporting trends.

5 Commentary

This concluding section draws on the information presented above, together with the body of literature considered, to consider the role of the ESR in a comparative context. The comparisons are made under the following headings.

- Technical scrutiny
- Merits/Policy
- Scrutiny of EU Exit related SIs
- Scrutiny of delegation of powers
- Outward engagement of the ESR

5.1 Technical scrutiny

The grounds which the ESR considers when undertaking technical scrutiny are broadly similar to those contained in SOs of National Assembly of Wales and Scottish Parliament. Unlike these legislatures, however, the practice in the Assembly has been for committees to delegate technical scrutiny to the ESR rather than exercise this function themselves. Indeed the Assembly appears unique in having an individual rather than a committee carry out this function. Those committees which conduct technical scrutiny, however, do so as part of a wider remit relating to delegated legislation and, in some cases, other functions.

The only formal review of the ESR/committee arrangement was undertaken by the Procedures Committee as part of its 'Review of the Legislative Process in

the Northern Ireland Assembly'.⁴¹ As part of this review, the Procedures Committee considered, amongst other things, establishing a separate committee to consider delegated legislation. In its January 2002 report, however, the committee concluded that the existing standing orders, subject to minor amendments, facilitated the efficient passage of legislation through the Assembly. It is now almost two decades since this review was undertaken.

5.2 Merits/Policy scrutiny

The role of the ESR, as currently set out in Standing Orders, provides only for technical scrutiny of delegated legislation and it is out with her delegation to consider any ground which impinges on the merits or the policy behind an instrument. In the Assembly, the relevant statutory committee should, therefore, conduct policy/merits scrutiny. Standing Orders do not address any input which the ESR may have into this consideration.

Mirroring these boundaries, the standing orders in the Scottish Parliament similarly prevent the committee charged with technical scrutiny from addressing merits/policy scrutiny grounds. The arrangement is that lead committee considers any policy issues raised by an instrument and then makes a recommendation to Parliament about whether the instrument should become law, informed by both policy considerations and the report of the technical scrutiny committee.

The National Assembly of Wales is notable as the CLAC is required to undertake technical scrutiny but is also free to address issues relating to policy, although lead committees also carries out this function.

In the UK Parliament, the SLSC considers the policy merits and implications of all SIs subject to parliamentary scrutiny. Further information may be found in Annex 1 of this paper.

In the literature considered, there were differing views as to whether merits-policy scrutiny should be carried out by a committee. While the evidence from Wales would suggest there may be benefits to locating technical and policy scrutiny within the same committee, a leading academic cautions against the politicisation of scrutiny that this might produce.⁴²

5.3 Scrutiny of Brexit related SIs

⁴¹ Northern Ireland Assembly Procedures Committee (2002) *Review of the Legislative Process in the Northern Ireland Assembly* Belfast: Northern Ireland Assembly.

⁴² Neudorf, L. (2019) Parliamentary Scrutiny of Delegated Legislation Inquiry, Submission 8, 31 January

The Brexit process has created new scrutiny demands in Westminster and the devolved legislatures. In each legislature these demands, including new sifting of proposed negative instruments, have been incorporated into the functions of existing committees. In line with the general point observed earlier in this paper, the arrangements in the National Assembly for Wales and the Scottish Parliament may be of more comparable value to the Northern Ireland Assembly, than the complex arrangements at Westminster, which span committees in both houses. Clearly, the ability to absorb new demands, such as those arising from Brexit related legislation, is a strength of the relevant scrutiny committee systems in the other devolved legislature and it would seem unlikely that the ESR is sufficiently resourced to enable her to absorb these demands. Furthermore, scrutiny of the use of the regulation making powers in connection with the Ireland/Northern Ireland Protocol, which forms part of the UK/EU Withdrawal Agreement, is likely to create greater demands in the Assembly than in other devolved legislatures. So too is the requirement to ensure that relevant delegated legislation does not ‘...diminish any form of North-South cooperation provided for by the Belfast Agreement’ or ‘create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature physical infrastructure, including border posts, or checks and controls, that did not exist before exit day and are not in accordance with an agreement between the United Kingdom and the EU’.

5.4 Scrutiny of delegation of powers

Effective scrutiny of delegated legislation is underpinned by effective scrutiny of delegating powers contained in primary legislation, as a Bill makes its way through the legislative process. In the Scottish Parliament, the DLPRC scrutinises delegations of power to make subordinate legislation in particular Bills or other proposed legislation and considers whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

In the National Assembly of Wales, the CLAC considers the appropriateness of provisions in Assembly Bills and Acts of the United Kingdom Parliament that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General. Whilst the Standing Orders of the National Assembly of Wales refer only to the ‘appropriateness of the provisions’ in Bills, a review of relevant CLAC reports indicates that it considers:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;

- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation;
- any other matter it considers relevant to the quality of legislation.

The role of the ESR in relation to scrutiny, during the legislative passage, of the delegation of powers contained in bills is not specified in the Assembly's Standing Orders. It has, however, been stated that:

...the Assembly began to consider delegated powers in legislation (against criteria similar to those used by the [House of Lords] Delegated Powers and Regulatory Reform Committee) in 2007. This function is also generally delegated to the ESR, who reports to the appropriate committee.⁴³

If this scrutiny is carried out in practice, there may be merit in providing for it more formally, perhaps in Standing Orders. It is also worth observing that, whilst the Delegated Powers Memorandum accompanying a bill is published, the relevant report from the Examiner is not. A member of the public trying to follow the consideration by a committee of delegating provisions will, therefore, find it difficult to do so.

5.5 Outward engagement of the ESR

Reporting is one of the most important tools available to the ESR. Frequently published reports can encourage departmental responsiveness and identify systemic issues. In the context of the Assembly, where there is a high reliance on one individual, legacy reports build collective memory.

Information resources can also be used promote the awareness and understanding of the scrutiny of delegated legislation among MLAs, their staff, and the Assembly Secretariat may be very beneficial. The UK Parliament has a number of different resources for accessing information about the status of SIs. The House of Lords Business and Minutes of Proceedings includes a section on motions relating to delegated legislation. Each entry includes a link to relevant scrutiny reports by the SLSC. The UK Parliament is also testing a webpage that lists the current procedural activity for SIs. Instruments can be searched by name or portfolio. The page outlines the procedural timeframes for SIs that follow both affirmative and negative procedure, as well as scrutiny committees' findings regarding the instruments. The webpage follows the format of the Hansard Society's SI Tracker which allows users to track SIs in Parliament. Similarly, the Scottish Parliament's DPLRC produces the Scottish Statutory Instrument Tracker. This shows the SIs currently laid before the Scottish

⁴³ House of Commons Political and Constitutional Reform Committee (2013) Ensuring standards in the quality of legislation: Government Response to the Committee's First Report of Session 2013-14 HC 611 London: The Stationery Office

Parliament. It is updated on an ad-hoc basis, but staff aim to do it at least once per week.

As an individual, the ESR is not in a position to drive education and awareness which have been addressed by technical scrutiny committees in other legislatures. Building a 'fit for purpose' team with the necessary specialist skills, procedural knowledge and experience to deliver robust scrutiny will facilitate knowledge exchanges/transfers with Assembly Secretariat colleagues (such as clerks in statutory committees and the Bills Office); other legislatures; departments and other government bodies.

The Scottish Parliament's DPLR Committee has sought to develop public understanding and awareness of secondary legislation with videos, infographics and improved guidance for the website. The Committee has also held engagement events on secondary legislation, targeted at groups who have an interest in and regularly engage. Similarly, the National Assembly of Wales CLA has held stakeholder events. The Assembly lacks a mechanism to flag to Assembly Members and the public, when delegated legislation of note has been laid and any potential areas of concern.

In relation to engagement, it is worth noting that the scrutiny performed by the ESR is not limited to statutory rules. It has been noted, for example, that she supports scrutiny of delegation of powers during legislative passage of a bill. To articulate the ESR's scrutiny role to a wider audience and facilitate better understanding of the use of delegation of power, it may be desirable to change the title of the ESR to more accurately reflect this role. In 2009, the National Assembly of Wales Subordinate Legislation Committee's Inquiry into the Scrutiny of Subordinate Legislation and Delegated Legislation recommended it changed its name to the Delegated Powers and Subordinate Legislation Committee. The scrutiny committees in the Scottish Parliament and UK Parliament are named in accordance with their scrutiny functions.

6 Concluding comments

When comparing the role of the ESR with the committee scrutiny systems that exist in the NAW and the Scottish Parliament, a number of observations can be made.

Firstly, the reliance on one person to conduct technical scrutiny carries with it potential risks arising from that person's absence. Secondly, whilst the functions of the ESR extended beyond technical scrutiny and include consideration of delegation of powers, it is unclear what consideration, if any, was given to resourcing this function. Thirdly, the committee structures in the other devolved legislatures, together with their associated resources, are better placed than the ESR to respond to new scrutiny demands, such as those arising from Brexit.

Finally, it is worth highlighting that the additional resources, in terms of both Member time and committee support, enable the relevant scrutiny committees in the other devolved legislatures to play a proactive role in citizen engagement and in driving forward improvements in the law making process.



Northern Ireland
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APPENDICES

Scrutiny of delegated powers and secondary legislation

Suggested Reading

PARLIAMENTARY REVIEW

- 1. National Assembly for Wales Subordinate Legislation Committee (2009) Inquiry into the Scrutiny of Subordinate Legislation of Delegated Powers**
This report provides useful information about structure.
- 2. Neudorf, L. (2019) Submission to the Senate Standing Committee on Regulations and Ordinances Inquiry into the Parliamentary scrutiny of delegated legislation, 31 January**
This submission provides good background to the issue. Its conclusion (page 8) provides a good benchmark and deals with additional issues.
- 3. Neudorf, L. (2016) “Rule by Regulation: Revitalizing Parliament’s Supervisory Role in the Making of Subordinate Legislation” *Canadian Parliamentary Review* Vol. 39(1), pp.29-33**
This article proposes that Canada adapt the UK model, by dividing the existing Joint Committee for the Scrutiny of Regulations into two separate committees to facilitate new merits-based review.
- 4. Office of the Leader of the House of Commons (2019) *Government response to the Lords Constitution Committee Report: The Legislative Process: The Delegation of Powers*, 25 January**

5. Parliament of Australia Senate Standing Committee on Regulations and Ordinances (2019) *Parliamentary Scrutiny of Delegated Legislation* Canberra: Parliament of Australia

The Senate Standing Committee on Regulations and Ordinances conducted an inquiry into its role and future direction and, more broadly, into the adequacy of the existing framework for parliamentary scrutiny and control of delegated legislation.

TRENDS IN DELEGATED LEGISLATION

6. Angus, C. (2019) “Delegated legislation: Flexibility at the cost of scrutiny?” NSW Parliamentary Research Service

An up-to-date RaISe style briefing which deals with the volume of delegated legislation (page10), scrutiny measures and safeguards.

7. Argument, S. (2011) *Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation*, paper presented at the Australia – New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011

Concluding remarks on page 22 are helpful.

8. Fox, J. and Korris, M. (2010) *Making Better Law: Reform of the legislative process from policy to Act* London: Hansard Society

Notes the upwards trend in statutory instruments and endorses the Scottish and Welsh approach of a dedicated committee to consider delegated legislation.

9. House of Lords (2009) *Looking at the small print: delegated legislation* (Briefing) London: House of Lords

This paper deals with levels of delegation and committee functions.

10. Loft, P. (2019) *Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019* (Briefing Paper) London: House of Commons Library

This up-to-date briefing paper provides comparative figures for the volume of UK legislation using legislation.gov.uk as a source. While this source is not comprehensive, it does provide an overview of trends. The figures pertaining are incomplete but are provided in the accompanying RaISe paper.

BREXIT

11. House of Lords Secondary Legislation Scrutiny Committee (2019) *Accessing the scrutiny work of the Committee and information resources relating to secondary legislation* (HL 2017-2019 (312)). London: The Stationery Office

This report states in paragraph 1: "Preparations for leaving the European Union have required Parliament to consider, in a short period of time, an extraordinary volume of secondary legislation, much of it complex, lengthy and making provision for the significant consequences of a 'no deal' exit from the EU." Furthermore, it links the Committee's role and functions to Brexit and provides a summary of information sources in Appendix 2.

12. Pywell, S. (2019) "Something old, something new: busting some myths about Statutory Instruments and Brexit" *Public Law* pp.102-120

This interesting and up-to-date article considers the use of statutory instruments in the context of Brexit.

13. Witness Statement of Joe Tomlinson of the Public Law Project in *R (on the application of Gina Miller) v The Prime Minister* [2019] EWHC 2381 (QB)

Provides some useful background on Brexit impetus and the development of procedures.

ACCESSIBILITY AND DISSEMINATION OF INFORMATION

14. Doteveryone (2018) *Helping Parliament respond to Brexit: Knowledge, engagement and collaboration in the digital age* London: Doteveryone

This interesting paper focusses on engagement and communication of work. The appendices are helpful particularly with regards the interview notes and information sharing tools.

15. Linklaters (2019) *Brexit SI Tracker*

This Tracker helps users to identify SIs relevant to their needs. Users can:

- link to the full text of SIs and the government's explanatory notes
- see at a glance which UK legislation or retained EU legislation an SI amends. You can also filter the Tracker to see all SIs that amend a particular piece of UK or retained EU legislation.
- check the current status of an SI and when it will come into force
- view commentary on key changes or issues.

It is understood that the Assembly's IS Office can develop a similar product.

16. Scottish Parliament Delegated Powers and Law Reform Committee (2019) *Referendums (Scotland) Bill: Stage 1* (SP Paper 577)

This example of scrutiny of powers in a Bill shows how to develop understanding through the dissemination of information.

17. Speer, A. (2017) “Legislative scrutiny of regulations in the Anglosphere” *R Street Policy Study No.87*

Provides a good example of setting out the scrutiny powers and remit in table form. For example, please see table 2, which describes Canada’s criteria to evaluate a statutory instrument.

FURTHER READING

18. Chalmers, J. and Leverick, F. (2018) “Criminal law in the shadows: creating offences in delegated legislation” *Legal Studies*, vol. 38, pp. 221-224

This article is particularly interesting as it questions preconceived notions/ideas about statutory instruments.

19. Law Society of Scotland (2017) Written Evidence House of Lords Constitution Committee Inquiry: The Legislative Process

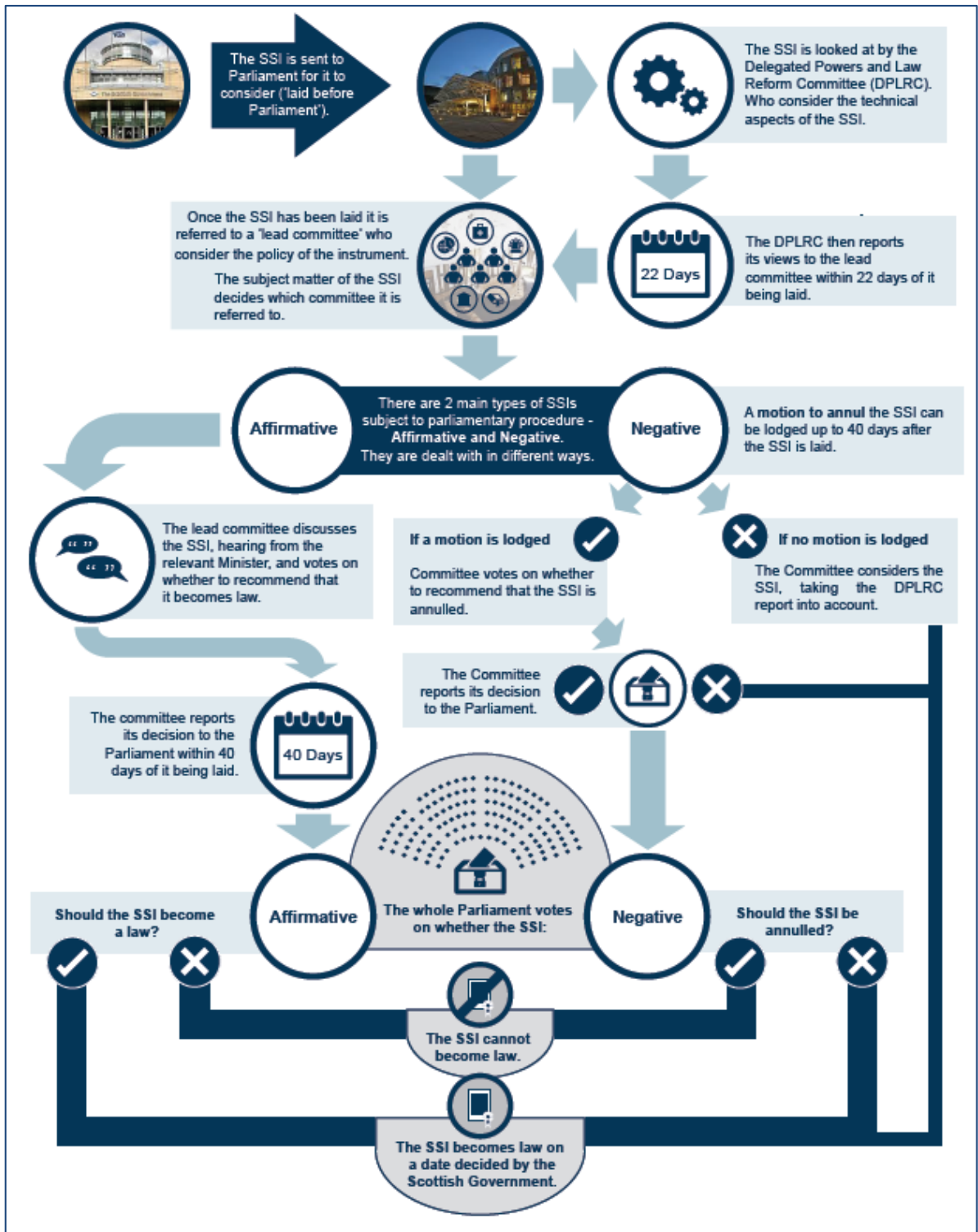
This evidence deals with broader issues regarding delegated legislation. It touches on both Brexit and information provision.

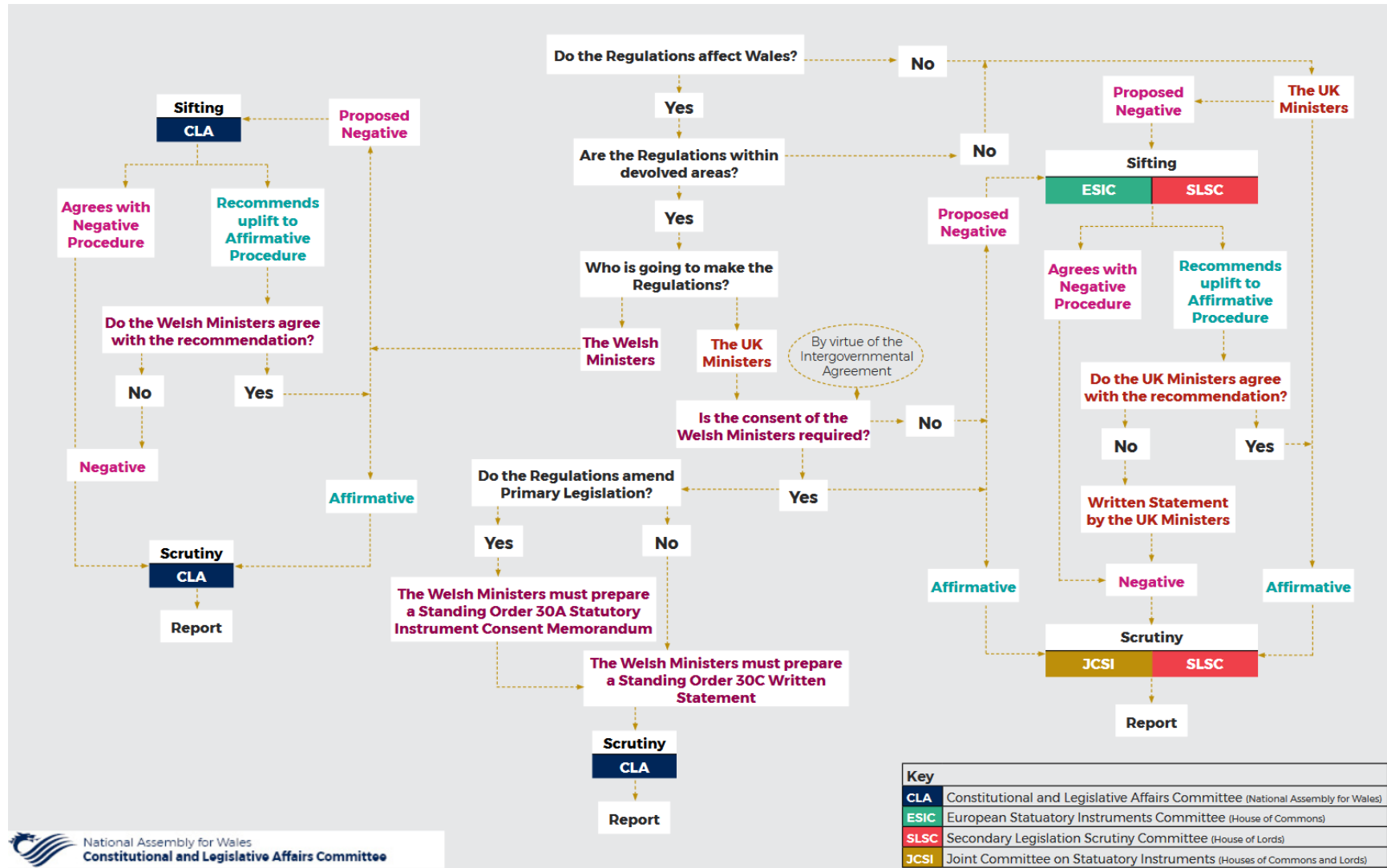
20. Rakar, I. (2017) “Public participation and democratic legitimacy of rulemaking – a comparative analysis” *Law, Economics and Social Issues Review*, Vol.8 Iss. 2, pp. 57-77

Although academic in style, this article addresses public participation in the scrutiny process.

21. Tudor, P. (2000) “Secondary Legislation: Second Class or Crucial” *Statute Law Review*, Vol. 21 (3), pp. 149-162

This is an example of the previous impetus to consider review of the secondary legislation. This seems to happen periodically.







Northern Ireland
Assembly

Research and Information Service Research Paper

October 2020

Committee scrutiny and engagement: areas of good practice and innovation in other legislatures

NIAR 134-20

A comparative paper on innovative and good practice approaches of scrutiny committees in selected legislatures.

Paper XX/XX

xx xxxxxxxx 2010

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Executive Summary

Legislative committees play a central role in the effective scrutiny of policy and legislation. This work is carried out in many legislatures by what might be termed 'dual-purpose' committees, where a committee has a remit to scrutinise the work of one or more departments along with relevant legislation. This is the case in the Northern Ireland Assembly, Scottish Parliament and Welsh Parliament. The House of Commons has separate departmental select committees and ad hoc public bill committees.

There are a number of factors that can impact on the ability of a committee to effectively carry out its scrutiny functions. The first factor to consider is the extent to which committee members have the capacity to fully engage with the work of the committee. In the devolved legislatures, members are usually required to sit on multiple committees, which are further stretched by the requirement for many elected members to fill ministerial positions.

Committees in the Scottish Parliament and Welsh Parliament are involved in the consideration of legislation at an earlier stage than their counterparts in the Northern Ireland Assembly. In the Scottish and Welsh Parliaments, once a Bill is introduced it is assigned to an appropriate committee for scrutiny. This involvement at an earlier stage may not automatically equate to 'better' legislation, but could be worthy of more detailed consideration.

The administrative support that committees can call on also impacts on their scrutiny role. Adequate staffing and the level of assistance provided by, for example, research and legal services can enhance the effectiveness of committee inquiries and scrutiny of legislation. This support can be embedded within the committee structure or may sit separately within the parliamentary secretariat.

Beyond this, outreach and engagement activity can be supplemented by dedicated teams that facilitate events, such as mini-publics, that serve to inform the work of committees. Engagement and/or scrutiny units can play an important role in witness diversity, allowing committees to reach beyond the 'usual suspects'.

Pre- and post-legislative scrutiny play increasingly important roles in enhancing the quality of legislation, but legislatures vary in the extent to which they undertake this work. This again comes back to issues of capacity and, in the case of pre-legislative scrutiny, the willingness of departments to publish draft bills. The Commission on Parliamentary Reform in Scotland recommended that additional stages be factored into committee scrutiny of bills to accommodate pre- and post-legislative scrutiny, while the committees in the Swedish Riksdag are constitutionally obligated to undertake follow-up and evaluation work.

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1 Introduction

1.1 Background

This research paper has been prepared following a request from the Chairpersons' Liaison Group (CLG). The CLG is taking forward a programme of work aimed at strengthening the scrutiny function of Assembly committees. This work will be informed by the report into the Renewable Heat Incentive Scheme. That report made recommendations around the capacity of Assembly committees to undertake scrutiny and considered that there could be scope for "significantly increasing the resources available to statutory committees and, generally, identifying what steps are needed to improve the effective scrutiny of Departments and their initiatives, whether in Assembly Committees or in the Assembly Chamber itself".⁴⁴

This paper provides an analysis of how committees carry out their scrutiny functions in other legislatures and covers a number of areas including:

- capacity of committees to undertake scrutiny;
- diversity of witnesses, including gender diversity;
- engagement with stakeholders and the public to inform scrutiny;
- measures to regulate and enhance the quality of legislation; and
- pre- and post-legislative scrutiny.

The literature on how committees undertake their scrutiny functions is primarily focused on the UK Parliament with two recent external reviews of the Scottish Parliament and Welsh Parliaments also providing valuable comparative information. These have been particularly useful as those institutions experience similar issues to the Assembly in terms of, for example, the capacity of members sitting on multiple committees.

International examples of good or innovative practice have been referenced where appropriate.

Although comparisons between legislatures are useful, they should be approached with caution. The powers and political contexts of institutions differ and the design of the Northern Ireland Assembly in particular reflects an attempt to address competing political views in a deeply divided society, which does not apply to other UK legislatures.

⁴⁴ The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme, March 2020: <https://www.rhiinquiry.org/report-independent-public-inquiry-non-domestic-renewable-heat-incentive-rhi-scheme>

1.2 Structure of the paper

Section 1 provides an introduction and background to the paper.

Section 2 examines the committee structure, scrutiny and remit in the Scottish Parliament and Welsh Parliament. It provides an overview of recommendations made by recent external reviews in respect of those institutions and the role of those committees in the passage of legislation.

Section 3 looks at examples of how effective public engagement and evidence gathering can complement and enhance scrutiny. It considers issues such as witness diversity and the support given to committees from other parts of the legislature.

Section 4 discusses the value of pre- and post-legislative scrutiny.

Section 5 provides an overview and conclusion.

1.3 Previous research

RaISe has undertaken previous research on issues around committee capacity/size (NIAR 24-2020) and scrutiny of delegated legislation (NIAR 118-2019). This paper has drawn on information contained in NIAR24-2020 where appropriate.

2 Committee structure, remit and scrutiny in the Scottish Parliament and Welsh Parliament

The Scottish Parliament and Welsh Parliament are obvious comparators with the Northern Ireland Assembly as they too are unicameral legislatures with strong party discipline. Furthermore, committees in those legislatures are also dual purpose committees in that they scrutinise both policy and legislation.

2.1 Scottish Parliament

The Consultative Steering Group (CSG) on the Scottish Parliament, which was established to report on how a Scottish Parliament might work in practice, made a number of recommendations as to how committees of the new institution might function.⁴⁵ Broadly, the CSG envisioned strong committees combining both policy and legislative scrutiny and which had the power to initiate inquiries. Standing Orders would set out basic criteria including size and quorum. This is essentially the model that was followed once the Scottish Parliament was established in 1999.

⁴⁵ Report of the Consultative Steering Group on the Scottish Parliament, December 1998

In June 2017 the Commission on Parliamentary Reform published its Report on the Scottish Parliament. As part of its work it examined the role of committees in the Parliament, including their remit and size, with the benefit of almost 20 years of continuous operation.

Drawing on evidence from a range of sources, the Commission noted that although committees had on occasion been robust in their scrutiny of government, a number of factors inhibited their effectiveness. These included:

- party discipline used to co-ordinate votes on legislation has been enforced during inquiries on non-legislative issues; some suggest this has hindered a committee's ability to develop cross-party consensus;
- some committees have seen so much legislation they have been unable to develop their own agenda with fewer opportunities to hold inquiries or focus on long-term or cross-cutting issues; and
- committees have also undertaken little pre- or post-legislative scrutiny; and
- turnover of membership has been too high and prevented the realisation of the CSG's ambition that members would develop an expertise in their subject area over the course of a parliamentary session.⁴⁶

The Commission went on to make a number of recommendations aimed at strengthening the scrutiny function of committees. Not all of these may be appropriate or practicable in the context of the Northern Ireland Assembly, while others may already be in place. The recommendations included:

- the election of convenors (committee chairs) from the start of the next session;
- possible remuneration and/or increased resources for convenors. This is in recognition that the role of convenor is more intensive than being a committee member;
- committees should normally have a maximum of seven members, even though this would mean smaller parties missing out on representation. The Commission also recommended that the Parliament agree a set of principles to inform decisions taken about the size of committees, for example where larger committees might be desirable to obtain more views on certain issues, such as constitutional issues; and
- the Convenors' Group⁴⁷ should take a greater role in developing a more strategic approach to scrutiny across committees.

⁴⁶ Commission on Parliamentary Reform, *Report on the Scottish Parliament*, June 2017:
<https://test123582.files.wordpress.com/2016/10/commissiononparliamentaryreformreport-june20171.pdf>

⁴⁷ The equivalent to the Northern Ireland Assembly's Chairpersons' Liaison Group.

The commentary on the size and remit of committees was underpinned by a recognition that committees can benefit from increased resources to better inform their scrutiny, including: “greater flexibility to incorporate external expertise and advice [which] could balance the technical evidence provided by officials and policy professionals with a more personal view about how legislation or policy impacts ‘on the ground’ at an individual or community level”.⁴⁸

It suggested that “the Scottish Parliament’s ability to exercise meaningful scrutiny is influenced by the depth, expertise and capacities of those available to support parliamentarians, impacting on committees’ overall capacity for scrutiny” and that additional resources could benefit committees by way of:

- enhanced business planning capacity and greater support to members on scrutiny options;
- enabling committees to interrogate more effectively the evidence cited as underpinning and supporting policy and legislation;
- enabling committees to undertake their own research to inform their views and to identify particular issues for further scrutiny; and
- legal advice to support committees to understand the nuances of bills and the effect of amendments, primary and secondary legislation.⁴⁹

The Commission recommended “that the Parliament should review the dedicated resources available to committees to determine whether they are able to meet the future needs of parliamentary business and support more effective scrutiny”.⁵⁰

2.2 Welsh Parliament

In December 2017 the Expert Panel on Assembly Electoral Reform published its report, *A Parliament that Works for Wales*. The Panel was tasked with examining and making recommendations on the following:

- the number of Members the Assembly needs;
- the most suitable electoral system; and
- the minimum voting age for Assembly elections.

As part of its work, the Panel looked at the size and capacity of committees in the National Assembly for Wales. The Panel “considered whether the Assembly’s overall capacity issues could be alleviated by reducing the size of committee

⁴⁸ Commission on Parliamentary Reform, *Report on the Scottish Parliament*, June 2017

⁴⁹ As above

⁵⁰ Commission on Parliamentary Reform, *Report on the Scottish Parliament*, June 2017

memberships...”.⁵¹ It referenced evidence supplied to it by the Sir Bernard Crick Centre for the Public Understanding of Politics which argued that:

*What makes an effective scrutiny committee cannot be reduced down to the number of members but it can be related to having sufficient members with sufficient time and energy to really commit to an area of policy and to forge meaningful relationships with other members.*⁵²

The Panel nevertheless raised concerns that committees that are too small may have issues around achieving quorum on a consistent basis, while large committees might struggle to reach consensus.

The Expert Panel also commented on the impact of members sitting on multiple committees. It highlighted the views of the Richard Commission (officially known as the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales) which had recommended that Members should sit on just one major subject committee in order to develop subject expertise and facilitate better scrutiny.

The Panel commented on the commitments expected of AMs:

*The size of the Assembly makes membership of two, sometimes three, demanding committees inevitable for most backbench Members. This is damaging to the effectiveness of the Assembly. It constrains the time available for Members to read, research and prepare and has a corresponding effect on the capacity of Members to undertake high quality scrutiny, develop alternative policy thinking, and engage effectively with stakeholders and the public.*⁵³

Table 1 provides a comparison of committee membership across the three devolved legislatures, highlighting the requirement of members to sit on multiple committees.

Table 1: Comparison of committee membership in the Northern Ireland Assembly (2020), National Assembly for Wales and Scottish Parliament (2017).

| | No. of committees | No. of Members | Number of Members sitting on: | | |
|------------------------------------|-------------------|----------------|-------------------------------|----------------|------------------|
| | | | One Committee | Two Committees | Three Committees |
| Northern Ireland Assembly | 14 | 90 | 33 (37%) | 40 (44%) | 3 (3%) |
| National Assembly for Wales | 12 | 60 | 12 (20%) | 25 (42%) | 7 (12%) |

⁵¹ The report of the Expert Panel on Assembly Electoral Reform, *A Parliament that Works for Wales*, December 2017:

https://www.assembly.wales/en/abthome/about_us-commission_assembly_administration/panel-elec-reform/Pages/Assembly-Electoral-Reform.aspx

⁵² The report of the Expert Panel on Assembly Electoral Reform, *A Parliament that Works for Wales*, December 2017

⁵³ As above

| | | | | | |
|----------------------------|----|-----|----------|----------|--------|
| Scottish Parliament | 16 | 129 | 51 (40%) | 37 (29%) | 5 (4%) |
|----------------------------|----|-----|----------|----------|--------|

Source: Information for Scotland and Wales taken from *A Parliament that Works for Wales*.

Note: Figures for the Scottish Parliament and National Assembly for Wales are from **July 2017**. Figures for Wales exclude the Business Committee and the Scrutiny of the First Minister (which is chaired by the Deputy Presiding Officer and of which all committee chairs are members in an ex officio capacity). Figures for Scotland include one subcommittee, and exclude its equivalent of the National Assembly for Wales' Business Committee and committees established to scrutinise Private Bills. Figures for Northern Ireland are from **January 2020** and exclude the Business Committee, Chairpersons Liaison Group and Assembly Commission.

The report on the National Assembly for Wales considered the issue of members sitting on multiple committees from an overall membership of 60 Members and suggested that membership of more than one committee can undermine the ability of members to perform their duties effectively. The report on reform of the Scottish Parliament reflected the pros and cons of larger committees while recognising that the actual numbers on committees had fluctuated over the life of the Parliament, but that the trend has been towards smaller committees. It also recognised the particular pressures of MSPs who sit on multiple committees.

In comparison, the Northern Ireland Assembly committee structure has been largely consistent, albeit there has been a recent reduction to nine members from 11 for most committees. The prospect of additional committees provided for in the *New Decade, New Approach* document may bring the current structure into sharper focus.

2.3 The role of committees in the passage of legislation: Scottish Parliament and Welsh Parliament

Committee involvement in the scrutiny of public bills begins earlier in the Scottish Parliament and Welsh Parliament compared to the Northern Ireland Assembly.

Scottish Parliament

- In the Scottish Parliament, bills are referred to a lead committee at stage 1. This committee's report will then inform a debate at stage 1 on the general principles of the bill.
- At stage 2, the Parliamentary Bureau may refer the Bill back to the stage 1 lead committee for stage 2 or propose by motion that a different committee or committees take that Stage. The stage 2 committee can be a Committee of the Whole Parliament, of which all MSPs are members and the Presiding Officer is the convener.
- The Bureau may also propose that the Bill be divided among two or more committees for Stage 2 consideration – preferably with each committee being allocated whole Parts or Chapters to deal with.

- Stage 2 proceedings may be dealt with at one committee meeting, or may require two or more meetings and be spread over a number of weeks. The principal role of the Stage 2 committee is to consider and dispose of amendments. Any member may attend the committee to participate in Stage 2 proceedings. Any member who has lodged an amendment, the member in charge and (if different) any Government Minister present is entitled to speak on the amendment. However, only members of the committee (or committee substitutes attending as such) can vote on amendments at Stage 2.⁵⁴

Welsh Parliament

- In the Welsh Parliament, the first stage involves consideration of the general principles of a Bill by a committee (or committees), which can involve gathering evidence and hearing from witnesses. The Senedd is then asked to debate and vote on the Bill's general principles in the stage 1 debate.
- At the end of its Stage 1 scrutiny, the responsible committee must publish a report, which may contain a recommendation that the Senedd either agrees or does not agree to the general principles of the Bill. The report may also contain recommendations for amendments to the Bill, based on the information the committee has received, or on any other relevant matter on which the committee wishes to comment.
- If the Bill passes stage 1, it is then referred to a responsible committee for consideration at stage 2, or be referred to a committee of the Whole Senedd. The role of the responsible committee at Stage 2 is to consider the text of the Bill in detail and dispose of any amendments which are tabled. 'Disposal' of an amendment means that a decision has been taken on that amendment. This could include agreement, rejection, withdrawal etc.
- Amendments are tabled with the clerks who support the responsible committee. The clerks can also provide or arrange confidential procedural, legal and tabling advice to Members in relation to amendments.
- After they have been tabled, amendments are published on the relevant Bill's webpage on a daily Notice of Amendments. Each amendment is given a unique number according to the order in which the amendments were tabled.

⁵⁴ The Scottish Parliament's Guide to the legislative process provides more detail and is available at:
<https://www.parliament.scot/parliamentarybusiness/Bills/15707.aspx>

- There is no selection of amendments at Stage 2, so any admissible amendment that has been tabled can be moved in committee.⁵⁵

The Northern Ireland Assembly's process for the consideration of public bills has a debate on the general principles of a Bill at second stage, followed by committee stage. Committees cannot amend bills but in their report can propose amendments to a bill.

There is clearly more involvement and at an earlier stage by committees in the Scottish Parliament and Welsh Parliament, including the disposal of amendments. This is not to say that the approach in those legislatures results in better quality legislation, but it is a marked difference in approach compared to the Assembly's procedure.

2.4 Committee staff

The research sought information from the Scottish and Welsh Parliaments on the committee staffing support. The response from the Welsh Parliament stated:

Committees in the Senedd are supported by a clerking team comprising four officials: the Committee Clerk (or team leader); a Second Clerk; a Deputy Clerk; and a Team Support officer. The Committee Clerk is responsible for working with the committee and its chair to establish the work programme and ensure that all necessary support is provided to that programme by colleagues (including the integrated team, see below). The Second Clerk shares the practical work of clerking meetings and drafting reports, etc with the Committee Clerk. Whilst the Committee Clerk retains overall responsibility for the committee and the team, these two officials should be able to work to the same standard, and thus be interchangeable. This arrangement is designed to provide capacity for weekly committee meetings, and for our committees' dual role in scrutinising both policy and legislation.

The integrated team for each committee comprises members from other services – legal, research, communications and translation – which develop subject specialisms through their attachment to the committee, but also continue to work within their respective services. The Committee Clerk is responsible for leading this team to ensure effective support for the committee's work programme.⁵⁶

The Scottish Parliament provided the following information:

⁵⁵ The Welsh Parliament's guide to the legislative process provides more detailed information on the process:

https://senedd.wales/NAfW%20Documents/Assembly%20Business%20section%20documents/Guide%20to%20the%20Stages%20of%20Public%20Bills%20and%20Acts/Guide_to_the_Stages_of_Public_Bills_and_Acts-eng.pdf

⁵⁶ Information provided by the Welsh Parliament

Most committees are headed up by a clerk, usually assisted by a senior assistant clerk and an assistant clerk and one committee assistant [performing an administrative role]. Some committee teams are headed up by a senior assistant clerk, reporting to a clerk. Committee clerks work closely with research/library staff but not together in the same teams. Committee Office and SPICe have, however, recently joined to form a Scrutiny Unit, so the links between research and clerks may change over the next few months.⁵⁷

Committees in the Northern Ireland Assembly are currently supported by a Clerk, Assistant Clerk and clerical staff. Committees can also draw on the services of research and legal staff, although these staff are not embedded within the committee structure.

3 Evidence gathering, public engagement and enhancing scrutiny

3.1 Submission of evidence

Effective public engagement by committees raises the question of the methods used by committees to gather evidence to inform inquiries. This is an issue addressed by the House of Commons Liaison Committee in a 2019 report which recognised the fundamental importance of evidence gathering to the work of committees:

The flow of information into committees is central to their scrutiny work. This information is largely gathered through written and oral submissions, which is then evaluated to form conclusions and recommendations. Through engaging with diverse voices, listening to experts and those with lived-experience and by gathering public opinion, we are able to engage with the public as well as produce well-evidenced reports. The weight and influence of committees' findings is largely due to this process.⁵⁸

The Liaison Committee considered the format in which evidence had to be submitted for consideration. It contrasted the strict requirements used by committees⁵⁹ with the varied ways in which people choose to communicate in everyday life. It noted that the Welsh Parliament had amended its Standing Orders in 2012 to remove reference to “written”:

⁵⁷ Information provided by the Scottish Parliament

⁵⁸ <https://publications.parliament.uk/pa/cm201719/cmselect/cmliaison/1860/1860.pdf>

⁵⁹ Currently, written evidence must be submitted in Microsoft Word, be under 3000 words and contain as few pictures as possible. These requirements have been in place for over 20 years.

As a result, all material submitted to committees— including video and audio clips and images—is privileged and the public is invited to submit “digital evidence” in response to calls for evidence. Accordingly, the views of the public gathered through audio and video recording by their Outreach team is also formal evidence.⁶⁰

The requirement for evidence to be submitted in written format can also disadvantage people with lower levels of literacy. The Liaison Committee referenced the Commons’ Web and Publications Unit which had told the Committee that:

Requiring written documents assumes a level of literacy that many in the UK [...] do not possess [...] For many people a long, written document will be an extremely daunting task, and an insurmountable barrier to entry. Microsoft’s software packages start at £59.99 per year [...] Parents, carers, and people in inflexible employment patterns may struggle to find time to compose a long, written document.⁶¹

In a 2019 report Nesta, which describes itself as an “innovation foundation”, reflected the views of UK parliamentary staff in relation to greater use of digital participation methods:

Figure 1: Digital participation methods and committees

Low diversity and reliance on usual suspects

A common concern among staff was that current evidence feeding into select committees relies disproportionately on some groups over others, namely men from in and around the south east.¹⁶ Staff therefore see high potential for crowdsourcing to help expand the pool of ideas and evidence that feed into select committee inquiries, as well as making committees less reliant on the ‘usual suspects’. As expressed by one clerk:

We’re talking about hundreds of thousands of people who are affected by things like Universal Credit, in very difficult situations, spread all over the country. How do we reach them? Often at speed. That’s the fundamental problem we have.

High barriers to entry

Invitations to submit evidence to committees are often framed around what are known as ‘terms of reference’, which help to describe the topics and scope of an inquiry. Many of our interviewees suggested that these can be framed in inaccessible language, or in ways that may be off-putting or unnecessarily complex to some audiences.

Low capacity

Resources are a key challenge and public engagement activities are thinly stretched. There’s a corresponding challenge that when staff do receive large volumes of written evidence (say, when the topic is highly popular or controversial) it can take weeks to sort through the evidence. Parliament has huge audiences, but select committees rarely find optimal ways to harness them.

⁶⁰ House of Commons Liaison Committee, *The effectiveness and influence of the select committee system*, September 2019 <https://publications.parliament.uk/pa/cm201719/cmselect/cmliaison/1860/1860.pdf>

⁶¹ As above

The implication here is that digital could help to improve efficiency and reduce some of the burden of large-scale public engagement, whether streamlining or automating existing approaches using technology; helping to filter, sort and summarise evidence more effectively; or inviting the public to do more of the work of scrutiny in collaboration with committee members.

The Northern Ireland Assembly's website provides guidance on submitting written evidence.⁶² The guidance states that:

Committee staff will make reasonable adjustments for people with disabilities to enable them to submit evidence in an alternative format. Organisations and individuals wishing to submit evidence in an alternative format should advise the committee office in advance.

There is also an accompanying video on the importance of committees hearing from stakeholders.

The Scottish Parliament provides specific written guidance along with a British Sign Language video on how to submit video evidence.⁶³

The Welsh Parliament advises that people wishing to submit evidence in audio or digital formats should contact the clerking team on the best way to do this.⁶⁴

3.2 Engagement and scrutiny units

One method of enhancing committee scrutiny is through effective public engagement. A recent article in Parliamentary Affairs outlined the potential of committees as mechanisms to engage with the public:

They focus on issues, they tend to work on a cross-party basis and they are constituted of a small number of members, which facilitates conversations, agreements and compromises more easily than within a whole parliament. Committees have more scope to delve deeply into policy areas and to examine the impact of legislation on citizens. In short, they are mini versions of parliament, but without some of the elements that hinder engagement with the whole institution, such as its adversarial nature. Highlighting the work of committees is therefore a useful way of explaining parliament's scrutiny function, but can also facilitate more effective engagement of the public with parliamentary business.⁶⁵

⁶² Northern Ireland Assembly, *Guide for witnesses appearing before Assembly committees*: <http://www.niassembly.gov.uk/assembly-business/committees/guide-for-witnesses-appearing-before-assembly-committees/>

⁶³ Scottish Parliament, *Submitting evidence to a committee*: <https://www.parliament.scot/help/106812.aspx>

⁶⁴ Welsh Parliament, *Preparing written or digital evidence*: <https://senedd.wales/en/bus-home/committees/gettinginvolved/Pages/Preparing-evidence.aspx>

⁶⁵ Walker et al., *How Public Engagement Became a Core Part of the House of Commons Select Committees*, Parliamentary Affairs, October 2019

Committees in the House of Commons have increasingly used public engagement to seek views, which has “resulted in innovative and wide ranging types of activities, reaching larger and more varied audiences”.⁶⁶

Commons committees have benefitted from a dedicated committees’ engagement team, which is based in the Education and Engagement Service.

Evaluation carried out by the Engagement Unit showed a high percentage of those who had taken part in a committee event had felt that their input had made a difference.

In 2016-17 21 such engagements had taken place, involving nine committees and reaching 46,886 people. In 2018-19 this had risen to 43 separate engagements, involving 19 committees and reaching 61,515 people.⁶⁷

Scottish Parliament

The Commission on Parliamentary Reform in Scotland recommended that a Committee Engagement Unit be established to provide support to committees. The Scottish Parliamentary Corporate Body approved funding for the Unit, which has been operational since the summer of 2018. The Unit comprises five staff including experienced members from the Parliament’s clerking and outreach teams and participation experts from third-sector organisations.

The CEU’s three aims are:

- increase effective public participation in the work of Committees to improve the quality of scrutiny for the benefit of the people of Scotland;
- help design engagement which lets people engage with their Parliament how and when they want; and
- support Scottish parliamentary service staff to try new engagement methods and improve their engagement practice.

The Scottish Parliament’s response to the Commission’s report sets out how the Committee Engagement Unit has approached its role based on innovating, improving and co-designing with under-represented groups.

Figure 2: Scottish Parliament’s Committee Engagement Unit approach

1. **Innovating**
- 2.
3. The CEU will design and test new engagement methods and evaluate them to see what benefit they add to Committee scrutiny. This will include looking at who participates, whether participants found the experience

⁶⁶ As above.

⁶⁷ Source: House of Commons Committee Engagement Unit. Includes reaching people by email and polling.

positive, and the value to Committee Members of the evidence gathered. New methods are being explored in three main areas:

4.

5. **Digital tools:** the CEU has supported a Public Petitions Committee inquiry into young people's access to mental health support. The tool used – Dialog – attracted a high level of engagement from young people and of those who responded to a request for feedback, and 92% agreed it provided a good way to get involved in the work of the Parliament.

6. **Mini-publics:** the CEU is working with the Environment, Climate Change and Land Reform Committee and the Health and Sport Committee to put together mini-publics on topics of interest to the Committees.

7. **Pop-ups:** the CEU is developing ways of contacting people in public spaces, such as shopping centres, both to gather snapshot views and point them towards more extensive involvement. The approach has been tested internally and used in community settings in relation to a Member's bill on lowering the default speed limit from 30mph to 20mph

8.

9. Improving

10.

11. Some Committee processes have been done in broadly the same way since the Parliament was established. The extra capacity in the CEU is allowing the Parliament to look at core inquiry activities, such as calls for evidence and how inquiries and reports appear on the website, and consider how these can be made more engaging to the target audiences. The CEU is also supporting Committee teams to find sustainable ways of feeding back to people who have contributed to inquiries about what happened as a result of their input and how they can continue to be involved with the Parliament.

12.

13. Co-designing

14.

15. The CEU is working with partners – including the Scottish Youth Parliament, Children's Commissioner and Young Women's Movement – to test different ways of involving young people in Committee consultations and to develop proposals that can be routinely built into Committees' work in future.

16.

17. During 2018, a group of young women under the age of 30 and from a wide variety of backgrounds met over the course of the year as a Committee to consider an issue of their choosing – sexual harassment in schools – gather evidence, and make recommendations. The project not only developed the knowledge and confidence of the participants, encouraging many of them to consider future roles in public life but it was so successful it went on to win a prestigious award at the Holyrood Magazine Public Services Awards.

18.

19. The report has also informed the Parliament's Equalities and Human Rights Committee, which used it to question the Deputy First Minister on government policy in this area. The project will be repeated with new cohorts of young women in 2019 and 2020, after which the Parliament will consider whether this is a model which could also be used with a different participant group.⁶⁸

The Committee Engagement Unit has organised two events for committees. Figure 3 contains the summary of the Primary Care Public Panels which were used to inform the Health and Sport Committee's Inquiry into the future of primary care.

Figure 3: Primary Care Public Panels

20. Between April and June 2019, three groups of randomly selected members of the public met in different parts of Scotland to learn about and discuss the question:

⁶⁸ Presiding Officer's Advisory Group Report on Parliamentary Reform, March 2019: https://www.parliament.scot/POandUKandIRO/POAG_Report.pdf

21.

22. What did the events involve?

23. These events brought together people from a wide range of backgrounds to discuss the future of primary care in Scotland. Participants learned about the issues and discussed them a group. At the end they considered everything they had heard and identified the most important themes and questions that they wanted the Health and Sport Committee to consider.

24.

25. Why hold these events?

26. We know that some people find it more difficult to become involved in our work than others. If you live a long way from the Scottish Parliament building, for example, then getting here can seem too time-consuming and expensive. We also know that the jargon we use, and the way that we work, can be off-putting for some people.

27. Events like these are designed to make it easier for everyone across Scotland to have the chance to get involved in our work and to overcome some of the barriers people have told us they have experienced in the past.

28.

29. How did you ensure that the events were accessible?

30. All transport and lunch costs were paid by the Scottish Parliament. After the event, participants also received £100 to thank them for their time.

31.

32. Who could apply?

33. In each area, invitations were sent to 2500 randomly generated households, drawn from the Royal Mail's address database. Any voting age (16+), permanent resident in Scotland living in a household that received an invitation could apply, with a few exceptions set out below:

34.

35. – employees of the Scottish Government

36. – employees of the UK Government

37. – Members of the Scottish Parliament

38. – Members of the UK Parliament

39. – Local Authority councillors

40.

41. From those who responded, a sample was selected at random to take part in the events. This random selection was weighted to make sure that there was a good mix of gender, age and background.

42.

3.3 Mini-publics

An article in *Parliamentary Affairs* explored the use of 'mini-publics' as a method for engaging with the public. It stated:

There are different types of mini-publics, but they have a number of features in common. They recruit participants through random or stratified sampling, give the participants balanced information and facilitate their discussions. Research suggests that mini-public participants have the capacity to

*deliberate complex issues and that their preferences become more public-regarding, informed and considered by the end of the process.*⁶⁹

Mini-publics come in different formats including “citizen juries, consensus conferences, deliberative polls and citizen assemblies”.⁷⁰ Whatever format is taken, they share some common principles:

- using a random selection of participants to underpin the legitimacy of the process;
- facilitated discussions;
- experts providing evidence and advocacy of relevant information; and
- the outcome of participants’ deliberations is reported.

The Commission on Parliamentary Reform in Scotland considered the potential effectiveness of mini-publics as a means of enhancing the effectiveness of committees:

Meaningful engagement has to be purposeful and relevant to participants so we recognise mini-publics may not be appropriate for committees to adopt in every circumstance. They take time and resources to deliver well but they do bring wider benefits such as encouraging long-term levels of civic engagement, developing the capacity of citizens and also reflecting more effectively how a policy or bill actually impacts on people. Mini-publics, when used well, can work against certain interests dominating scrutiny (through the random selection of participants) and can build trust and legitimacy in parliaments and their scrutiny outcomes, given a cross section of citizens is used to deliberate...

*We consider deliberative approaches would be well suited to bill scrutiny or to examining issues where it is important to understand the public’s views on a complex moral or social issue. They could be used as part of an inquiry into an issue where public opinion is divided. The mini-public report would demonstrate to the committee what happens when people with different views are invited to deliberate and report their conclusions.*⁷¹

3.4 Belgium - Joint deliberative committees

⁶⁹ Walker et al, How Public Engagement Became a Core Part of the House of Commons Select Committee, Parliamentary Affairs, Volume 72, Issue 4, October 2019

⁷⁰ Commission on Parliamentary Reform, Report on the Scottish Parliament, June 2017

⁷¹ Commission on Parliamentary Reform, Report on the Scottish Parliament, June 2017

Engagement and scrutiny units provide one method of ensuring that committees have access to a cross-section of views. It is possible to take this further and make public representation a permanent feature of committee deliberations.

The Parliament of the Brussels Region in Belgium has gone further in seeking the views of the public by instituting joint deliberative committees comprised of 15 elected members and 45 citizens. Their task will be to draft recommendations on issues chosen by the public. If a particular issue obtains the support of at least 1,000 citizens, it will be considered by the Bureau of the Parliament before being passed to one of the deliberative committees. It is anticipated that the committees will organise once a year, each meeting four times on one issue. Any citizen of Brussels aged 16 or over will have a chance to be randomly selected to participate on one of the committees.⁷²

3.5 Diversity of witnesses

An academic article from 2019 explored the impact of witness diversity on the effectiveness of parliamentary committees' scrutiny of government. Reflecting previous literature, the article highlighted that:

...there are arguments that a greater range of voices can provide different perspectives including from those who are responsible for implementing and who are affected by policy and legislation and that, in turn, may inform scrutiny by informing committees and helping committee members develop expertise. Similarly, it has been suggested that input from a wider variety of voices and interests can provide additional external challenges to policy and legislation leading to better and more transparent scrutiny and, in turn, can potentially lead to improved outcomes more effective policy implementation and evaluation and increased legitimacy including by providing greater awareness of society's views and increasing the ability of policy makers to respond to public concerns; emphasise the possibilities for enhancing the 'deliberative capacity' of committees.⁷³

It also referenced a recommendation from the Organisation for Economic Co-operation and Development (OECD), which was focused on the Canadian Parliament, on the importance of a broader range of views to inform committees:

Ensuring a degree of diversity among experts who give evidence to committees, in terms of gender, but also ethnicity, sexuality, disability, etc.,

⁷² Niessen and Reuchamps, *Designing a Permanent Deliberative Citizens Assembly*, Centre for Deliberative Democracy and Global Governance, 2019: <http://www.governanceinstitute.edu.au/magma/media/upload/ckeditor/files/Designing%20a%20permanent%20deliberative%20citizens%20assembly.pdf>

⁷³ Bochel and Berthier, *A Place at the Table? Parliamentary Committees, Witnesses and the Scrutiny of Government Actions and Legislation*, Social Policy and Society, 2019: http://eprints.lincoln.ac.uk/id/eprint/34653/3/place_at_the_table_parliamentary_committees_witnesses_and_the_scrutiny_of_government_actions_and_legislation.pdf

*helps to ensure that policy making is fully informed by the range of experiences facing Canadians, and that persistent policy gaps are highlighted and exposed to challenge.*⁷⁴

Committees in the House of Commons have taken steps in recent years to diversify their witnesses. These have included:

- adding statements on witness diversity to websites and communications with witnesses. For example: The Committee values diversity and seeks to ensure this where possible. We aim to have diverse panels of witnesses and therefore ask you to bear this in mind when choosing a representative;
- offering extra places on panels to organisations if they can provide a representative of both genders;
- using broader outreach events, social media and web fora to draw in a wider range of evidence and as a way of identifying potential oral evidence witnesses from broader backgrounds; and
- identifying potential witnesses in an organisation just below the top management tier (for example Finance or Operations Directors) and inviting them rather than the Chief Executive.⁷⁵

In addition, the House service has made it easier for witnesses to claim expenses for caring responsibilities and first time witnesses have been offered advance visits to committee rooms.

Previous research conducted as part of a MA in Legislative Studies at the Northern Ireland Assembly examined five committees in each of the Northern Ireland Assembly, National Assembly for Wales and Scottish Parliament. The research “found that in each legislature male witnesses typically outnumbered female witnesses by around two to one, with subjects such as agriculture and business having the smallest proportion of women, and education and health the smallest gaps in representation”.⁷⁶

3.6 Institute for Government report

A 2015 report from the Institute for Government, *Select committees under scrutiny: The impact of parliamentary committee inquiries on government*, examined the effectiveness of House of Commons committees. It identified constraints to effective

⁷⁴ As above

⁷⁵ House of Commons Liaison Committee, *Witness Gender Diversity*, May 2018:
<https://publications.parliament.uk/pa/cm201719/cmselect/cmliaison/1033/1033.pdf>

⁷⁶ Bochel and Berthier, *A Place at the Table? Parliamentary Committees, Witnesses and the Scrutiny of Government Actions and Legislation*, Social Policy and Society, 2019:
http://eprints.lincoln.ac.uk/id/eprint/34653/3/place_at_the_table_parliamentary_committees_witnesses_and_the_scrutiny_of_government_actions_and_legislation.pdf

scrutiny and offered possible methods to improve the impact of committee scrutiny. Some of the report's findings have general read across to committees in other institutions and these are summarised below:

Constraints to effective scrutiny

- **Focus on activities not outcomes:** The way committees are established and administered has led to a tendency for them to focus on what activity they should be undertaking rather than what they are trying to achieve in terms of impact.⁷⁷
- **Lack of institutional memory:** Within each committee silo, turnover of membership, generated in part by the inevitable lure of frontbench positions, has a negative effect on learning. Lack of institutional memory can be exacerbated by staff changes. Although the clerk of a committee would normally expect to remain in place for a whole parliament, other committee staff are replaced and circulated more frequently.
- **Absence of feedback:** The Commons committee system is remarkable for its lack of feedback mechanisms. The only means by which members can get a sense of how they are doing is through feedback from other members in the tea room, or via the media... the absence of any established expectation that committees should seek feedback from their primary audience – government – on the impact of their inquiries and working practices, is truly surprising.

Committees do not seem to have a clear idea about who their customers are or how they engage with their work, or how journalists use their reports for example. Nor do committees receive data on the number of times their reports are downloaded or their webpages are viewed.

- **Lack of evaluation of process:** In terms of self-evaluation [the research found] few attempts to identify how inquiry outcomes had been affected by the way inquiries had been conducted, or to apply such learning to future work.
- **Lack of meaningful evaluation of impact:** [the research] found no evidence of our case study committees evaluating the long-term outcomes of their work.

Enhancing scrutiny

The IfG also put forward possible solutions to the above perceived shortcomings in scrutiny.

Fundamentally, the IfG felt that the committee system needed to move its focus from tasks and outputs to an emphasis on impact and outcomes. This means a more

⁷⁷ Specific reference was made here to the core tasks that Commons committees are expected to carry out. These do not necessarily apply elsewhere.

“nuanced understanding of impact which recognises that long-term outcomes which may not be directly attributable to committee activity but still result in part from it, may be just as valuable, if not more so, than short-term measurable outputs”.⁷⁸

The IfG put forward two broad themes that could benefit the work of committees:

Feedback and evaluation

- Individual committees should, as a matter of good practice, seek feedback from their witnesses on their experience before the committee and the process of the inquiry. The results of this feedback should be collated by staff and presented to the committee regularly.
- Individual committees should undertake a short evaluation exercise on the impact of their inquiry six months (or another appropriate interval) after receiving a government response to a report. The evaluation process should involve commissioning a short memorandum from the department about progress in relation to the committee’s concerns, and seeking the views of other interested parties.
- Committee chairs should work together to identify an agreed mechanism for independently benchmarking and evaluating committee impact. Once agreed, evaluation of committee impact should take place on a rolling basis with each committee being subject to evaluation more than once in each parliament.

Learning and exchange of ideas

- Committee chairs should work together to create and embed mechanisms to recognise what effective practice looks like, and to identify and proactively highlight aspects of good practice – not just through annual reports but on a real-time basis. All committees should be required to engage with the benchmarking and sharing of good practice and promoting the development of the committee system as a whole. This responsibility could be the focus of a new impact-goal.
- This work on good practice by committee chairs should be used create resources for use in the induction of new committee members. Committees should continue to experiment with skills-based training on scrutiny techniques, to embed learning within the committee system.
- Committee chairs should work together to find mechanisms to drive cross-cutting committee work by actively identifying emerging issues which cut

⁷⁸ Institute for Government, *Select Committees under Scrutiny: The impact of parliamentary committee inquiries on government*, June 2015: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Under%20scrutiny%20final.pdf>

across the remit of several committees and to commission joint working by committees. This would have benefits in terms of scrutiny outcomes but also facilitate sharing of good practice.⁷⁹

4 Pre- and post-legislative scrutiny

The value of pre- and post-legislative scrutiny has gained prominence in recent years as methods to enhance and assess the quality of legislation.

4.1 Importance of post-legislative scrutiny

Lord Norton of Louth has commented on the importance of post-legislative scrutiny:

*Post-Legislative Scrutiny may be seen as a public good. It is designed to ensure that measures of public policy deliver on what the representatives of the people voted for. It means assessing the consequences against the purposes identified when the measures were introduced.*⁸⁰

Post-legislative scrutiny (sometimes referred to as ex-post evaluation) is generally considered to play an important role in determining if a law or regulation was sufficient and effective in its implementation, and to what extent any (un)expected impacts of the regulatory intervention were properly addressed at its conception.⁸¹

In a 2006 report, the Law Commission defined post-legislative scrutiny as referring to:

*...a broad form of review, the purpose of which is to address the effects of legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively. However, this does not preclude consideration of narrow questions of a purely legal or technical nature.*⁸²

That report also highlighted potential drawbacks of post-legislative scrutiny:

- **Risk of replaying arguments:** post-legislative scrutiny should concentrate on the outcomes of legislation. Unless self-discipline is exercised by the reviewing body, and those giving evidence to it, there is a clear danger of it degenerating into a mere replay of arguments advanced during the passage of the Bill.

⁷⁹ Institute for Government, Select Committees under Scrutiny: The impact of parliamentary committee inquiries on government, June 2015

⁸⁰ Westminster Foundation for Democracy, Post-Legislative Scrutiny in Europe: How the oversight on implementation of legislation by parliaments in Europe is getting stronger, 2020: https://www.wfd.org/wp-content/uploads/2020/02/WFD_DeVrieze_2020_PLSinEurope.pdf

⁸¹ OECD, Evaluating Laws and Regulations: The Case of the Chilean Chamber of Deputies, OECD Publishing, 2012.

⁸² The Law Commission, *Post-legislative scrutiny*, 2006: http://lawcommission.justice.gov.uk/docs/lc302_Post-legislative_Scrutiny.pdf

- **Dependence on political will:** the evolution of a more systematic approach to post-legislative scrutiny will depend on a combination of political will and political judgement.
- **Resource constraints:** post-legislative scrutiny will place demands on resources that could be used elsewhere.⁸³

4.2 Framework for effective post-legislative scrutiny

A submission by the Chartered Institute of Public Finance and Accountancy (CIPFA) to the Scottish Parliament's Standards, Procedures and Public Appointments Committee's 2013 inquiry on post-legislative scrutiny provides a number of useful principles for the design of a framework to undertake this work.

CIPFA recommended that post-legislative scrutiny should be part of a holistic approach to assessing the merits or otherwise of legislation. It also addressed the potential limitations as identified in the Law Commission's report and noted earlier in this paper. These are set out below but it should be noted that CIPFA was writing in the context of the Scottish Parliament, hence references to Members of the Scottish Parliament.

Figure 4: Mitigations identified by CIPFA in response to Law Commission report

| Risk identified by Law Commission | Mitigation identified by CIPFA |
|---|---|
| <p>The risk of replaying arguments: significant self-discipline will be required to prevent simply repeating and re-engaging on, the original arguments debated during legislative development. Such 'replay' does not directly contribute to the objectives of post-legislative scrutiny.</p> | <ul style="list-style-type: none"> • A clearly defined remit framework for post-legislative review for all participating individuals and bodies to adhere to; • Focus on the achievement of the original policy objectives and not on the appropriateness of the policy objectives in the current post-legislative environment; • An element of independent leadership, or oversight, of the review process; and • Clear and unbiased leadership by MSPs of each review. |
| <p>The dependence on political will: without political will and political belief in the benefits of post-legislative scrutiny, the development of an effective overall scrutiny regime is unlikely to occur.</p> | <ul style="list-style-type: none"> • Clear and unbiased leadership by MSPs of the review process; • Well-implemented legislation; and • Parliamentary leadership in communicating the lessons learned from each review. This is important not only to obtain political will but also to ensure that the lessons learned from any specific example (e.g. affecting one committee) are recognised in all future legislative development (e.g. by other committees). Feedback will also inform improvement of the post-legislative scrutiny process itself. |
| <p>Resource constraints: resources, including parliamentary committee time are limited. It will therefore be necessary to ensure that an appropriate framework should balance costs and benefits of post-legislative review.</p> | <ul style="list-style-type: none"> • Recognising that undertaking post-legislative scrutiny will require either additional resources or the re-direction of resources from existing activities • Prioritisation of the legislation that should be subject to review. This could be based on both quantitative and qualitative factors, such as: |

⁸³ Law Commission, *Post-Legislative Scrutiny*, October 2006.

| | |
|--|--|
| | <ul style="list-style-type: none"> ○ Scale - this will be related to cost, social impact, economic impact, environmental impact; ○ Political impact – where there was a high degree of debate, either politically or in a wider social context, review will be appropriate. Where general consensus existed this aspect would be less relevant but the other considerations (e.g. scale) could still apply; ○ Significant impact on specific social groups, individuals or bodies; ○ Significant successes or failures in implementation. This is relevant since the most extreme examples are likely to yield the most evident lessons for the future. ● Careful consideration of the cost-benefits of: <ul style="list-style-type: none"> ○ Establishing any new bodies, posts or responsibilities for post-legislative scrutiny; ○ Undertaking each proposed post-legislative review. |
|--|--|

4.3 Training for elected representatives

CIPFA also identified a training requirement for MSPs within an integrated approach to the scrutiny of legislation (pre and post). It made the following observations in relation to training:

- **Training:** It is unlikely that existing [members] will have had extensive experience of post-legislative review. An initial investment of time and resources in providing training for relevant [members] is therefore likely to be required...post-legislative scrutiny should be regarded as part of an overall scrutiny approach, rather than separated from other aspects of scrutiny.
- **Access to appropriate external skills:** Ensuring that [members] have access to appropriate external skills will be critical to the success of post-legislative review. In part this may be achieved through:
 - **Appropriate witnesses:** ensuring that a sufficient variety of relevant witnesses, presumably including service users where appropriate, are invited to provide evidence will assist. Consideration may be required on how to encourage potentially reluctant witnesses to participate.
 - **Additional external skills:** access to external skills may be desirable to direct [members'] attention to relevant question areas and evidence. Desirable support may include relevant expertise such as economists, statisticians, lawyers, financial analysts and cost experts, subject matter specialists and others. Some of this expertise may be available within the Scottish Parliament (e.g. Scottish Parliament Information Centre), or

the wider Scottish public sector, for example in scrutiny bodies..., government departments and bodies and local government...⁸⁴

4.4 Recommendations in respect of the Scottish Parliament

The Commission on Parliamentary Reform examined the viability of formally including pre- and post-legislative scrutiny in the passage of legislation. Commenting on a lack of post-legislative scrutiny in the early years of the Parliament, the report stated: “In the early years of devolution, this was to be expected, but the case for evaluating the impact and effectiveness of Scottish Parliament legislation grows as the Parliament develops and more legislation is enacted.”⁸⁵

The Commission’s starting point for its consideration of greater post-legislative scrutiny was that it was in keeping with the Parliament’s founding principles of openness, transparency and power sharing. It concluded that: “if a key purpose of parliament is to scrutinise legislation, then accountability to parliament for how those legislative powers are then enacted and delivered, and the outcomes they deliver, must be a key component.”⁸⁶

The Commission recommended that the current three stage legislative process be replaced with a five-stage process, with committees including pre- and post-legislative scrutiny in their work programmes. The Standards, Procedures and Public Appointments Committee supported the Commission’s objective of enhancing pre- and post-legislative scrutiny, but did not agree with the need for new formal stages:

*[the Committee] was not persuaded that additional formal stages to the legislative process were required on the basis that committees are currently able to undertake this scrutiny using existing procedures. In addition, a new Public Audit and Post-legislative scrutiny Committee has recently been established.*⁸⁷

4.5 Dáil Eireann

Recommendations made by the sub-Committee on Dáil Reform in June 2016⁸⁸ led to amendments to Standing Orders which require post-legislative scrutiny (referred to as post-enactment) of legislation. Standing Order 164A states:

Twelve months following the enactment of a Bill, save in the case of the Finance Bill and the Appropriation Bill, the member of the Government or

⁸⁴ CIPFA submission to Standards, Procedures and Public Appointments Committee, 2013

⁸⁵ Commission on Parliamentary Reform, *Report on the Scottish Parliament*, June 2017

⁸⁶ As above

⁸⁷ Commission on Parliamentary Reform, Scottish Parliament website:

<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/108084.aspx>

⁸⁸ Report of the sub-Committee on Dáil Reform, June 2016

Minister of State who is officially responsible for implementation of the Act shall provide a report which shall review the functioning of the Act and which shall be laid in the Parliamentary Library.

This places the onus on government-led review, as opposed to the Dáil taking the lead. However, Standing Orders further provide that select committees may consider any such report⁸⁹ and require the Minister responsible for the implementation of an Act to attend committee in respect of a report under Standing Order 164A.

4.6 Follow-up and evaluation in the Swedish Riksdag – a constitutional obligation

The Riksdag in Sweden is an example of a legislature with an advanced form of post-legislative scrutiny which is embedded within the Constitution. Since January 2011 the requirement for parliamentary committees to conduct this ‘follow-up and evaluation’ has been included in one of Sweden’s four fundamental laws, the Instrument of Government.⁹⁰

Committees have employed various methods to meet this constitutional obligation. It might comprise study visits or public hearings, while other committees take a more structured approach:

Some committees have special follow-up and evaluation groups comprising members of the Riksdag from the different parties. These groups can, for instance, consider project proposals, carry out follow-ups and submit a follow-up report to the committee with assessments and conclusions.⁹¹

Committees can also avail of specific resources to assist them in carrying out their statutory duty:

The Riksdag Administration has allocated resources to support follow-up and evaluation work by the Riksdag’s committees. This support is provided by officials of the committee secretariats and by the evaluation and research unit at the Committee Services Division. It is also possible to procure support externally.⁹²

It is essentially up to each individual committee to determine how it wishes to conduct the follow-up and evaluation.

The Evaluation and Research Secretariat in the Riksdag provides support to committees and their secretariats in conducting this post-legislative scrutiny. There are a number of ways that the Evaluation and Research Secretariat assist in this work:

⁸⁹ Standing Order 84A(4)(g) of Dáil Éireann.

⁹⁰ Follow-up and evaluation by the Riksdag’s committees - a constitutional obligation, publication by the Swedish Parliament.

⁹¹ As above.

⁹² Follow-up and evaluation by the Riksdag’s committees - a constitutional obligation, publication by the Swedish Parliament.

[the Secretariat] helps the committees to prepare, implement and conclude follow-up and evaluation projects, which includes formulation of a problem, methodology support, survey design, participation in the committees' working groups, presentation to the committees and preparing background data for committee reports. The Secretariat can also prepare documentation needed by the committees to take decisions on a possible evaluation and provide support regarding the development of the committees' ideas for a possible evaluation by, at an early stage, submitting proposals regarding clarifications and more specifically defining questions and methods. During the implementation of the projects, the Secretariat can contribute by, for example, carrying out interviews and surveys, collecting data, arranging study visits and compiling facts and observations in a draft report.⁹³

The role of post-legislative scrutiny is likely to continue to grow in importance, but this will put more focus on the capacity of committees to undertake such work, particularly in the devolved legislatures where committee members are likely to be stretched across multiple committees. Nevertheless, the potential benefits of post-legislative scrutiny make it worthy of further consideration. In evidence to the Expert Panel on Electoral Reform, Daniel Greenberg, former Parliamentary Counsel, commented:

...in many ways post-legislative scrutiny is a more important way of holding the Welsh Government to account in relation to legislation than is Committee scrutiny at the Bill stage, at which point predictions and concerns must largely be guesswork on both sides. Although the Assembly does have an emerging tradition of post-legislative scrutiny, there is considerable room for greater rigour and regularity, and pressure on Committees is one of the reasons why this is developing relatively slowly. [...]⁹⁴

4.7 Pre-legislative scrutiny

To date, the idea of pre-legislative scrutiny has not generated as much academic literature as post-legislative scrutiny. The ability of a committee to carry out pre-legislative scrutiny will again have resource implications, but also depends largely on the willingness of the Government to publish a draft Bill.

In a 2015 report, the then Constitutional and Legislative Affairs Committee at the National Assembly for Wales published its report *Making Laws in Wales*. The report noted the importance of such scrutiny, especially in a unicameral legislature. It referenced views it had received on the issue of draft bills and their potential benefits, including the arguments that they would:

⁹³ *Evaluation and Research Secretariat*, publication by the Swedish Parliament.

⁹⁴ The Expert Panel on Assembly Electoral Reform, *A Parliament that works for Wales*, December 2017

- indicate legislative intent;
- allow earlier engagement in the legislative process;
- highlight important or contentious issues early; and
- provide more opportunity to influence.⁹⁵

Such scrutiny would also provide “an opportunity for the Assembly to satisfy itself that the interests and concerns of stakeholders have been identified and reflected in the policy development”.⁹⁶

4.7 The quality of legislation

The examples of the Australian and New Zealand Parliaments provide examples where there is an explicit focus on committees improving the quality of legislation. Guidance on parliamentary practice from the New Zealand Parliament states that:

*The Standing Orders Committee has encouraged select committees to examine legislative quality issues when preparing their reports on bills. In particular, it has indicated that respect for the rule of law requires the avoidance of the arbitrary deprivation of rights and freedoms; and it has referred to the principles for good legislation-making expounded by the...Legislation Design and Advisory Committee.*⁹⁷

The reference to the Legislation Design and Advisory Committee is noteworthy. This body “advises departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared. It advises on basic framework/design issues and consistency with fundamental legal and constitutional principles”.⁹⁸ The guidance on parliamentary practice goes on to comment on how committees should adhere to the guidelines produced by the Legislation Design and Advisory Committee:

Attention by select committees to legislative quality may result in committees, in their consideration of bills, addressing wider constitutional and administrative law issues, along with the fundamental question of whether each piece of legislation is necessary and fit for purpose. In undertaking such legislative scrutiny, committees should ensure that any departures from the Legislation Design and Advisory Committee’s guidelines are justified. The guidelines were designed to help departments prepare draft legislation before

⁹⁵ National Assembly for Wales Constitutional and Legislative Affairs, *Committee Making Laws in Wales*, October 2015: <https://senedd.wales/laid%20documents/cr-ld10379/cr-ld10379-e.pdf>

⁹⁶ As above

⁹⁷ The Legislative Process in the New Zealand Parliament: <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/parliamentary-practice-in-new-zealand/chapter-26-the-legislative-process/>

⁹⁸ Legislation Design and Advisory Committee, New Zealand: <http://www.ldac.org.nz/>

*its introduction, but they are equally available to committees seeking subsequently to ensure legislation is easy to use, understandable, and accessible to those who are required to use it, that it integrates smoothly with the existing body of law, and that it achieves its underlying policy objective, but with proper respect for important legal principles. Committee staff may draw departures from the guidelines to the committee's attention, so that the committee can ask departmental officials to demonstrate the justification for them.*⁹⁹

The Scrutiny of Bills Committee in the Australian Parliament was established in 1981, with its functions at first carried out by the Legal and Constitutional Affairs Committee. The scrutiny principles applied by the Committee require it to consider whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.¹⁰⁰

A document produced by the Australian Law Reform Commission provides further information on the committee:

The Committee is comprised of six Senators, and is supported by a secretariat made up of a secretary, principal research officer and legislative research officer. The Committee is also supported by a legal adviser, who reviews all Bills against the scrutiny principles, and provides a report on whether and how the principles are breached. Based on this advice, the Committee publishes, on each Wednesday of a Parliamentary sitting week, an Alert Digest containing an outline of each of the Bills introduced in the previous sitting week, along with any comments in relation to a particular Bill.

If concerns are raised in the Digest, the Committee writes to the Minister responsible for the Bill, inviting a response to its concerns, and sometimes suggesting an amendment. The Minister's response may include a revised version of a section of legislation or explanatory memorandum, or may better

⁹⁹ The Legislative Process in the New Zealand Parliament:

¹⁰⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Role_of_the_Committee

*explain why the Bill has appeared in its current form. If the response does not allay the Committee's concerns, it will draw the provisions in question to the Senate's attention through its Report, and leave it to the Senate to determine the appropriateness of the relevant encroachment on rights and freedoms in the Bill.*¹⁰¹

As part of its work, the Commission on Parliamentary Reform in Scotland considered how a separate body might play a greater role in ensuring legislative standards:

*We believe the Parliament is well placed to lead collaborative working with the Government and other stakeholders as part of a standards body whose purpose is to develop guidance on the attributes of good legislation. This approach would enable all those involved with making law to establish a set of Scottish standards for designing, developing and drafting good quality and effective legislation from bill inception to introduction.*¹⁰²

The Legislative Design and Advisory Committee in New Zealand was recommended to the Commission as a model of good practice. The Commission was persuaded of such a body and recommended the establishment of a legislative standards body in Scotland.

Responding to the Commission's recommendation, the Standards, Procedures and Public Appointments Committee was not persuaded:

*the Committee considered the range of existing initiatives that are underway to promote good legislation in Scotland and agreed to monitor these initiatives to ensure that the objectives identified by the Commission on Parliamentary Reform in relation to the quality of legislation are implemented.*¹⁰³

5 Conclusion

This paper has provided an overview of some of the methods committees use to enhance scrutiny of policy and legislation. It has examined a broad range of issues beginning with the capacity of committees to effectively undertake scrutiny functions. This was primarily in the context of the Scottish and Welsh Parliament and Northern Ireland Assembly, all unicameral legislatures with members sitting on multiple committees. Recent external reviews of the Scottish Parliament and Welsh Parliament have highlighted capacity issues within the committees of those institutions and have

¹⁰¹ Australian Law Reform Commission, Scrutiny Mechanisms: https://www.alrc.gov.au/wp-content/uploads/2019/08/fr_129ch_3_scrutiny_mechanisms.pdf

¹⁰² Commission on Parliamentary Reform, *Report on the Scottish Parliament*, June 2017

¹⁰³ Commission on Parliamentary Reform, Scottish Parliament website

put forward recommendations on how those committees can more effectively carry out their scrutiny roles.

Effective and innovative approaches to public engagement and evidence gathering can enhance the work of committees and work towards ensuring a cross-section of society is able to communicate its views to committees. For example, the Committee Engagement Unit in the Scottish Parliament plays a key role in facilitating outreach events for committees. Innovative approaches can help committees to move away from reliance on the 'usual suspects', albeit some stakeholders will have accountability to committees and will be expected to attend regular evidence sessions.

The role of pre- and post-legislative scrutiny has grown in importance in recent years. This work will impact on committee capacity and work programmes, but it has been argued that post-legislative scrutiny in particular, and the evaluation the impact of legislation, may have potentially greater benefits than scrutiny of a bill as it progresses through a legislature.



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Pre- and post-legislative scrutiny – consideration of approaches
in other legislatures

1 Background

This paper has been prepared following a request from the Chairpersons' Liaison Group (CLG). It follows the CLG's consideration of RaiSe paper 134-20, which provided a broad overview of how committees in other legislatures undertake their scrutiny function.

That paper touched on the issues of pre and post-legislative scrutiny and the CLG subsequently commissioned this paper to explore those topics in greater detail. The CLG specifically sought information on the following:

- Based on approaches taken in other legislatures, if Assembly committees were to seek to play a role in the scrutiny of legislation from its introduction, or indeed prior to its introduction, in a form of pre-legislative scrutiny, what form might this additional scrutiny take?
- What benefits might the proposition of committee involvement in pre-legislative scrutiny, in advance of its introduction in the Assembly, bring to the effectiveness of the scrutiny process; and might there be any disadvantages to earlier involvement?
- What are the benefits and drawbacks of post-legislative scrutiny and do the extra resource implications justify the impact that committees can have in ensuring legislation delivers its intended purpose?
- Based on experiences in other legislatures, what might post-legislative scrutiny look like?

The paper is divided into two parts. Part 1 addresses pre-legislative scrutiny and part 2 examines post-legislative scrutiny.

Part 1: Pre-legislative scrutiny

1 Introduction

Pre-legislative scrutiny (PLS) is the detailed scrutiny of draft legislation by a parliamentary committee before it is formally introduced.

Pre-legislative scrutiny has not received the same level of consideration as post-legislative scrutiny, but there is increasing recognition of its potential benefits. Much of the existing literature focuses on the UK Parliament with limited study to date of the devolved legislatures. Indeed, recent research noted that: "With one or two notable

exceptions, there is little quantitative analysis or independent assessment of the effects of PLS".¹⁰⁴

However, detailed research has been undertaken in relation to pre-legislative scrutiny in Dáil Eireann, and this section of the paper has drawn extensively on that work.

2 Development of pre-legislative scrutiny in the UK

In the UK, draft Bills have been published since the 1990s, although they were not necessarily subject to structured parliamentary scrutiny. When it came to power in 1997, the Labour Party committed to "improve the quality of legislation by better pre-legislative consultation".¹⁰⁵ This was reflected in the first report of the Modernisation Committee, published in June 1997, which stated:

*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.*¹⁰⁶

Erskine May, the guide to Parliamentary Procedure and Practice, describes the evolution of pre-legislative scrutiny as follows:

Since 1997, following a report from the Select Committee on the Modernisation of the House of Commons, the Government has undertaken to work with Parliament to ensure a systematic approach to pre-legislative scrutiny with a view to improving legislation and reducing the need for subsequent amending legislation. As a result, each session, several public bills are published in draft form for pre-legislative scrutiny by a parliamentary committee.

This approach largely replaces a previous practice, whereby the introduction of legislation by Ministers had been preceded by some form of public consultation, including the publication of proposed clauses in draft for

¹⁰⁴ Jessica Mulley and Helen Kinghorn, *Pre-legislative scrutiny in Parliament*, in *Parliament: Legislation and Accountability*, 2016

¹⁰⁵ The Law Commission, *Post-legislative scrutiny: a consultation*, 2006: http://www.lawcom.gov.uk/app/uploads/2015/03/cp178_Post-legislative_Scrutiny.pdf

¹⁰⁶ Select Committee on Modernisation of the House of Commons, *The Legislative Process* (1997-98)

consultation with those likely to be affected by them, and in some cases publication of the entire text of a draft bill.

A select committee has been specifically appointed to examine a draft bill, but it is now more usual to establish a joint committee. Select committees may also on their own initiative conduct inquiries into a draft bill. The core tasks of departmental select committees include conducting pre-legislative scrutiny of draft bills.

When a draft bill is considered by a select or joint committee, the committee does not formally go through it clause by clause, but takes evidence on the merits of the draft bill and reports its conclusions and recommendations, to which the Government responds. When a bill is later introduced into one or other House, generally in a subsequent session, its passage through Parliament is not formally affected by its having undergone pre-legislative scrutiny, and it is required to pass through the same stages as any other bill.¹⁰⁷

House of Lords inquiry

In October 2017 the House of Lords Select Committee on the Constitution published its report *The Legislative Process: Preparing Legislation for Parliament*. The report addressed the issue of the effectiveness of pre-legislative scrutiny and reiterated the points made by its predecessor committee that:

- pre-legislative scrutiny of draft legislation by parliamentary committees has proven effective at improving such legislation;
- the reports published and evidence taken by pre-legislative committees contribute to parliamentarians' understanding of the legislation and enhances the quality of scrutiny during the formal legislative process;
- pre-legislative scrutiny can resolve potential points of conflict early on and save time during later legislative stages; and
- it provides ministers, who may well be largely dependent on civil servants who consider it their task to defend the legislation as drafted, with alternative views.

The Committee found continued support for the concept of pre-legislative scrutiny, but there was not consensus as to whether bills should routinely undergo such scrutiny. The Bar Council wished to see more widespread use, while an academic view stated that:

¹⁰⁷ Erskine May's treatise on the law, privileges, proceedings and usage of Parliament (25th edition, 2019):

<https://erskinemay.parliament.uk/section/4988/prelegislative-scrutiny-of-draft-bills/>

*...some process of pre-legislative scrutiny with strong parliamentary involvement either through Select Committees or Joint Committees ought to be the default setting for new legislation and the pathways for such scrutiny ought to be formalised.*¹⁰⁸

A more cautious view came from former and current ministers who highlighted that the effectiveness of pre-legislative scrutiny depended on the context within which the legislation was being considered. For example, where a department had made extensive efforts to engage and consult with stakeholders before publishing a draft bill, then the value that additional scrutiny by a committee might be limited.

Addressing the issue of resources, the 2017 report went on to say:

*There is a case for greater resources to be made available for committees undertaking pre-legislative scrutiny, in order to facilitate a detailed legal, policy and financial examination of the proposals in a draft Bill and its associated documents, including impact assessments.*¹⁰⁹

The process in the UK Parliament

Pre-legislative scrutiny can be carried out by departmental select committees or by dedicated PLS committees. Erskine May has commented on the increasing use of these latter committees:

*In recent years it has become common for the two Houses to appoint ad hoc joint committees to scrutinise government bills published in draft. Such committees function as investigative committees, taking oral and written evidence and then making an evidence-based report. It is a regular practice for the committees to invite the Delegated Powers and Regulatory Reform Committee to submit observations about the draft bill, and other committees have been consulted from time to time, or have made their own reports on the draft bill.*¹¹⁰

Research from 2016 examining pre-legislative scrutiny in the UK Parliament noted that:

Each committee either charged with or agreeing to scrutinise draft legislation is largely free, within parameters, to decide for itself how best to do that. This is a valuable freedom, but not one that is unconstrained...Convention almost as much as Standing Orders...impose practices and expectations on all parliamentary committees...

¹⁰⁸ House of Lords Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament, October 2017*: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf>

¹⁰⁹ As above

¹¹⁰ Erskine May, pre-legislative scrutiny committees: <https://erskinemay.parliament.uk/section/6164/prelegislative-scrutiny-committees/>

...those [committees] charged with PLS have to navigate more practical limitations as well, such as members' time, finite resources, deadlines and competing priorities...

A PLS committee usually starts its work by agreeing a 'call for evidence', inviting interested parties to submit their views on the draft Bill to the committee.

Although there are examples of departmental and other committees doing so, PLS committees frequently issue tight guidance or ask for responses to specific questions in their call for evidence to ensure that the evidence they receive is well targeted to the particular topics they wish to examine in detail. The call for evidence is usually followed by a series of public meetings at which the committee examines experts and interested parties.¹¹¹

The research drew a distinction between how departmental select committees processed evidence in comparison to dedicated PLS committees:

Departmental select committees often wait to commence their public examination of witnesses until they have a bulk of written evidence, so that it can be used to inform decisions on the selection of witnesses and priority areas for exploration. Tight deadlines mean that PLS committees can rarely afford to do this, and often they do not need to because...they often inherit a bulk of documentation. As a result, PLS committees tend to gather their written and oral evidence concurrently. In a practice largely exclusive to PLS, a committee may invite one or more officials from the team in charge of the Bill in the relevant government department to attend oral evidence sessions on a 'speak if spoken to' basis, enabling them to respond immediately to straightforward and factual queries about the draft Bill.

As well as gathering evidence formally, PLS committees use more informal means to inform their deliberations and frame recommendations, such as visiting relevant organisations, hosting or contributing to other events, or commissioning bespoke research. In the mode of other select committees (and unlike public bill committees), PLS committees usually publish at the end of their PLS a narrative report which typically contains reflections on the adequacy of the draft Bill and aspirations for any subsequent substantive Bill.

Ad hoc PLS committees cease to exist at the point at which they report their findings...¹¹²

It then went on to discuss the support available to PLS committees:

¹¹¹ Jessica Mulley and Helen Kinghorn, *Pre-legislative scrutiny in Parliament*, in *Parliament: Legislation and Accountability*, 2016

¹¹² As above

Although PLS can look and feel similar to their non-legislative, policy-driven work, committees conducting PLS may need to draw on particular skills and expertise...In-house staff include those with relevant specialisms, for example, in financial and legal areas. Staff with these skills make up a large part of the House of Commons Scrutiny Unit, which was established in 2002 with provision of support for PLS as one of its two primary purposes.

It is practice for a legally qualified and experienced staff from the Scrutiny Unit to be assigned to support each PLS exercise undertaken by a Commons or Joint Committee. The advice provided by the Legal Specialist is akin to non-litigious legal advice provided to clients in private practice...the Legal Specialist's role normally involves: statutory interpretation and legal research on case law, EU and European Convention on Human Rights law, international treaties and academic opinion; fact-checking of legal examples and precedents; and legislative drafting, perhaps of amendments or exemplar clauses.¹¹³

The research highlighted the pros of such scrutiny but also sounded a cautionary note as to when pre-legislative scrutiny may not have the desired impact. It cited examples of when draft Bills were too large or where portmanteau¹¹⁴ Bills put pressure on committee resources and deadlines. There is also the risk that government might publish a Bill that is far removed from the actual policy intentions.

The most significant problem faced by committees is a lack of time. The Cabinet Office's *Guide to Making Legislation* advises that three to four months should be allowed for pre-legislative scrutiny and several parliamentary committees have argued that 12 weeks should be the usual period, or even the minimum timeframe.

Use of pre-legislative scrutiny in the UK Parliament

Despite an increasing focus on pre-legislative scrutiny, its use remains limited. Lord Norton of Louth, who was Chair of the House of Lords Constitution Committee when it produced its 2017 report on the scrutiny of legislation, asked a parliamentary question on the number of bills that had received pre-legislative scrutiny since 2015.

The response revealed that from May 2015 to July 2019, 13 Government Bills were published in draft and referred for pre-legislative scrutiny by a joint committee or committee of either House; this constituted 14.43% of all Government Bills introduced in that period.¹¹⁵

¹¹³ Jessica Mulley and Helen Kinghorn, *Pre-legislative scrutiny in Parliament*, in *Parliament: Legislation and Accountability*, 2016

¹¹⁴ Large, multi-topic bills, also known as omnibus bills or Christmas tree bills.

¹¹⁵ The Norton View, *The need for more pre-legislative scrutiny*, July 2019: <https://nortonview.wordpress.com/2019/07/05/the-need-for-more-pre-legislative-scrutiny/>

Research from the House of Commons identified that it is within the purview of the government whether or not to publish bills in draft form and to which committee pre-legislative scrutiny should be assigned. It noted the Cabinet Office guidance which stated:

Pre-legislative scrutiny is normally carried out by the relevant Commons departmental select committee, or an ad-hoc joint committee of both Houses. This will be subject to negotiation with the usual channels¹¹⁶ but agreement in principle should be obtained before seeking final PBL (Parliamentary Business and Legislation) Committee approval to publish the bill in draft.¹¹⁷

There remains no formal obligation on committees to carry out pre-legislative scrutiny, nor is there is a defined process setting out why certain bills are selected and which type of committee will be assigned a bill for scrutiny: "...rather, the allocation of draft Bills to committees is done case by case and on the basis of discussion."¹¹⁸

4 Dáil Éireann

The Programme for Government 2011-16 contained proposals to introduce parliamentary reforms to improve the efficiency and effectiveness of the Oireachtas.¹¹⁹ This included a commitment to "enhance the democratic process by involving public representatives at an earlier stage of the legislative process, particularly before Bills are published".¹²⁰

Subsequently, in November 2013 Standing Orders were introduced to allow for formal pre-legislative scrutiny:

As a result, Ministers are now required to forward draft legislation – the General Scheme or Heads of a Bill -to the relevant Oireachtas Joint Committee for possible scrutiny except in exceptional circumstances.

Updated Oireachtas procedures view PLS as standard practice, unless otherwise agreed (save in exceptional circumstances and by permission of the Business Committee).¹²¹

Figure 1: Standing Order of Dáil Éireann – pre-legislative scrutiny

¹¹⁶ The 'usual channels' describes the working relationship of the whips from the different parties and the leaderships of the Government and opposition parties.

¹¹⁷ House of Commons Library, *Pre-legislative scrutiny under the 2015 and 2017 Conservative Governments*, November 2018: <https://researchbriefings.files.parliament.uk/documents/CBP-7757/CBP-7757.pdf>

¹¹⁸ Jessica Mulley and Helen Kinghorn, *Pre-legislative scrutiny in Parliament*, in *Parliament: Legislation and Accountability*, 2016

¹¹⁹ Irish Political Studies, Catherine Lynch and Shane Martin, *Can Parliaments be Strengthened? A Case Study of Pre-Legislative Scrutiny*, Volume 35, 2020

¹²⁰ Programme for Government 2011-16

¹²¹ Irish Political Studies, Catherine Lynch and Shane Martin, *Can Parliaments be Strengthened? A Case Study of Pre-Legislative Scrutiny*, Volume 35, 2020

SO 173 Pre-legislative consideration of Bill by Committee

(1) Prior to its presentation or introduction to the Dáil, the general scheme or draft heads of a Bill shall be given by a member of the Government or Minister of State to the Committee empowered under Standing Order 95 to consider Bills published by the member of the Government: Provided that the Business Committee may waive this requirement, in accordance with Standing Order 30, on foot of a request by the member of Government or Minister of State. Such a request for a waiver shall be in accordance with guidelines adopted by the Committee on Standing Orders and Dáil Reform, and subject to notice having been given to the Business Committee not later than 11 a.m. on the fourth day preceding its weekly meeting: Provided that, by permission of the Ceann Comhairle, a request for a waiver may be made on shorter notice

(2) A general scheme or draft heads which have been given under paragraph (1) shall be considered by the Committee empowered under Standing Order 95 to consider Bills published by the member of the Government: Provided that the Committee may decide in relation to a particular Bill that such consideration is not necessary, and in such cases, need not consider the general scheme or draft heads.

Research undertaken into pre-legislative scrutiny in the Dáil measured its impact on legislative outcomes by conducting a content analysis of pre-legislative scrutiny reports and subsequent Government bills introduced to the Dáil between 2011 and 2016. It identified 31 reports from joint committees which contained at least one recommendation in relation to a draft bill. These were matched against the content of the published bill and the findings indicated that “146 of 350 recommendations arising from PLS during this period were accepted by Ministers.”¹²² This equates to an acceptance rate of just over 40%.

Part of the research also examined the process followed by a committee during consideration of the Gender Recognition Bill. The key points from the case study are reproduced below:

43. Case study – the Gender Recognition Act 2014

44. On 29th August 2013, the Joint Committee invited interested individuals and groups to send written submissions on the General Scheme. Three individuals and eight groups responded to the call. Public Hearings on PLS were held on 23th October 2013 (lasting approximately 2.5 hours), and 24th October (lasting approximately 1.5 hours).

45.

46. It was noted in interviews that it can be challenging to find time in the parliamentary schedule for Committee business. The PLS process adds greatly to the work of some Committees, particularly

¹²² Irish Political Studies, Catherine Lynch and Shane Martin, *Can Parliaments be Strengthened? A Case Study of Pre-Legislative Scrutiny*, Volume 35, 2020

where the Committee is associated with a Department engaged with multiple legislative proposals. Dáil deputies noted in several interviews that it could be difficult to balance the policy-making and oversight demands with other work in the chamber and their duties and responsibilities to constituents.

47.

48. The Committee also had available expert opinion. In managing the PLS process, Committee members and parliamentary officials indicated they are mindful to seek a balanced perspective on the issues before the Committee.

49.

50. Identifying relevant actors can be challenging, including alerting potentially interested parties to the PLS process.

51.

52. In some cases, the Oireachtas Library & Research Service is called upon by committee clerks to identify relevant experts and interested groups. In other cases –as in this case –an open call is made to solicit submissions.

53.

54. Who gets to speak at PLS Committee hearings is important, in part because attendees can be very influential in shaping the content of the Committee's PLS report.

55.

56. The Committee's PLS report had such a significant impact on the General Scheme that it could no longer be employed to prepare the full draft of the Bill.

57.

58. There is clear evidence that significant changes were made to the substance of the proposed legislation as a direct result of the PLS process. However, the Ministers did not simply accept all seven recommendations from the Committee. From the Department's perspective, PLS -resulted in "a lot of learning" and this learning formed the basis for the changes to the General Scheme. These changes necessitated bringing the General Scheme back before Cabinet, with significant consequences for the content of the subsequent Bill.

59.

60. Interviews with parliamentarians and parliamentary staff suggest that the composition of the Committee, in terms of which individuals that serve, is very important for the success of PLS – and Committee activity in general. Where one or more members of the Committee have a pre-existing interest in the substance of the proposed legislation, the PLS process tends to be more active. This, it was suggested, was the case for the Gender Recognition Bill.

The research drew a number of conclusions around the efficacy of pre-legislative scrutiny in the Dáil, based on its wider examination of the process:

- attempts to strengthen the capacity of national legislatures can be effective, even in legislatures that tend to be dominated by the executive;
- given the overall rate of acceptance of PLS proposals (41.7%), and notwithstanding some individual cases where no recommendations were accepted or made, it appears that PLS in the Irish Parliament has had a direct impact on the content of Government legislation.
- where Committee amendments (at formal committee stage) were compared for Bills subject to PLS, against Bills not subject to PLS, the argument that PLS pre-empts a Committee's later role can be discounted. Both PLS and non-PLS Bills were amended at the formal committee stage, therefore, it is not the case that PLS merely replaces a Committee's role in the formal legislative process.

- issues raised in submissions and hearings for PLS and/or the recommendations of the Committee can frame subsequent legislative debate on the issue
- PLS does not always lead to significant changes in legislation. While this may be related to the piece of legislation in question, other factors may be at play. The research found some correlations between the time available to a committee to undertake PLS and its capacity to influence the outcome, which may indicate that PLS may be more effective when built-into the legislative drafting process i.e. government waits for committee report before formally drafting the bill.

5 Scottish Parliament and Welsh Parliament

To date, pre-legislative scrutiny has not been a consistent feature of the work of committees in either the Scottish Parliament or the Welsh Parliament. The Commission on Parliamentary Reform in Scotland highlighted that:

...there is considerable scope for Parliament to engage with the policy making process before a bill is introduced without compromising its scrutiny role in the legislative process. We consider Parliament should take a more proactive role. Pre-legislative scrutiny allows a committee (and wider society) to prepare ahead of a bill's introduction, especially in terms of keeping a 'watching brief' on the issue and enabling proactive planning of background briefings or engagement activities which may be useful in informing members of the key issues. It also provides the opportunity to clarify the outcomes the bill is expected to achieve.¹²³

It also emphasised concerns around committees being involved at both the policy development and scrutiny stages of bills and noted that the Convenors' Group (equivalent to the CLG) had previously rejected pre-legislative scrutiny on that basis.

Although the Commission recommended the inclusion of two additional stages in the committee scrutiny process to facilitate formal pre and post-legislative scrutiny, this was not accepted by the Presiding Officer's Advisory Group in its response. Instead, it noted that the Programme for Government provides an opportunity for committees to identify potential areas for pre-legislative work.

The report of the Expert Panel on Assembly Electoral Reform, *A Parliament that Works for Wales*, also highlighted the benefits of pre-legislative scrutiny but did not make any formal recommendations.

¹²³ Report of the Commission on Parliamentary Reform (Scotland), June 2017: <https://parliamentaryreform.scot/>

Figure 2 is an overview of some pre-legislative scrutiny carried out by the Children, Young People and Education Committee on the Draft Additional Learning Needs and Education Tribunal (Wales) Bill.

Figure 2: Pre-legislative scrutiny by the Children, Young People and Education Committee on the Draft Additional Learning Needs and Education Tribunal (Wales) Bill

| |
|--|
| July 2015: Government publishes draft Additional Learning Needs and Education Tribunal (Wales) Bill |
| 14 th October to 11 th November 2015: Committee issues call for evidence – 23 responses received |
| Informal roundtable discussions held with stakeholders |
| Formal oral evidence taken from other stakeholders |
| December 2015: Committee publishes response to draft Bill (letter to relevant Minister) |

6 Issues for consideration

There is no definitive answer as to whether pre-legislative scrutiny leads to better quality legislation, although on balance the potential benefits do appear to make it a worthwhile exercise. The House of Lords’ Constitutional Committee commented that:

At present, pre-legislative scrutiny is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation to the other stages of scrutiny which legislation undergoes. Pre-legislative scrutiny should be considered an integral part of the wider legislative process. This may mean adapting other parts of the process to take account of pre-legislative scrutiny when it occurs.¹²⁴

Increased pre-legislative scrutiny will have an impact on the resources of legislatures as more time would need to be allocated to it, which means less time for other issues. Staff resources would need to be diverted or increased and it would further stretch members’ time.

¹²⁴ House of Lords Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament*, October 2017

The detailed research that looked at the process of pre-legislative scrutiny in the Dáil found that it can have a positive impact, but that factors such as the time available to committees can limit this influence.

The ability of a committee to undertake this work is of course reliant on the government publishing a draft bill. This then raises the appropriateness of a scrutiny committee becoming involved in the policy development of legislation, something that the Commission on Parliamentary Reform highlighted and on which basis pre-legislative scrutiny had previously been rejected by the Scottish Parliament.

Part 2: Post-legislative scrutiny

1 Introduction

The issue of post-legislative scrutiny (PLS) has gained traction in recent years across European parliaments and is more widely developed than pre-legislative scrutiny. Recent research has noted that:

*This phenomenon comprises a vast range of activities, supports rather differentiated approaches and unfolds through a large variety of organisational and procedural solutions.*¹²⁵

In 2004, the House of Lords Constitution Committee published a report on the legislative process¹²⁶. In a submission to the Committee, the then Chair of the Joint Committee on Human Rights said:

*As legislators, we need to pay as much attention to what happens after we have finished our specialised task of making the law as we do to the processes by which we achieve the law. The professional deformation against which we perhaps have to be most wary is supposing that legislating is the most effective way to achieve our ambitions, and that lawmaking is a precise science which can result in a perfect product. Our responsibility does not begin with a Bill's introduction to Parliament or end with the royal assent. Improving the efficiency with which we process legislation is only a small part of improving our effectiveness*¹²⁷.

¹²⁵ Journal of Southeast Asia Human Rights, Parliaments in Europe engaging in post-legislative scrutiny, June 2020

¹²⁶ House of Lords Constitution Committee, *Parliament and the Legislative Process*, 2004: <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/17302.htm>

¹²⁷ As above

The Committee concluded that Parliament frequently ended its legislative scrutiny at the point of Royal Assent with little or no evaluation of whether the legislation had achieved its aims.¹²⁸

In response, the Government agreed that there should be more post-legislative scrutiny and asked the Law Commission to examine the issue. The Law Commission undertook an inquiry and reported in October 2006. It identified a number of reasons why this type of scrutiny was desirable:

- to examine whether the legislation was working in practice;
- to contribute to better regulation;
- concentrating minds and sharpening the focus on implementation and its likely effects, including whether original policy aims have been met;
- identifying and disseminating good practice; and
- improving the quality of legislation.¹²⁹

Research from 2019 identified four separate categories of parliamentary approaches to post-legislative scrutiny as follows:

Figure 1: Categories of parliamentary approaches to post-legislative scrutiny

| | |
|-----------------------|---|
| Passive scrutinisers | <ul style="list-style-type: none"> • Lack of parliamentary administrative capacity and procedures to conduct own PLS analysis. • Reliance on PLS information or reports from government or independent agencies, no own monitoring or impact assessment by parliament. • Parliament considers legal assessment only (no impact assessment). • Information on the PLS work is not easily accessible to the public. |
| Informal scrutinisers | <ul style="list-style-type: none"> • Ad-hoc administrative parliamentary capacity for PLS activity, possibly through research units assigned with the additional task to conduct PLS. • Non-systematic connection with formal parliamentary procedures. • No identified or established criteria or triggers to select legislation for PLS review, but it is decided on an as-needed basis. • Parliament Committees may adopt conclusions or recommendations related to PLS. |

¹²⁸ As above

¹²⁹ The Law Commission, *Post-legislative scrutiny*, 2006: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc302_Post-legislative_Scrutiny.pdf

| | |
|---------------------------------|--|
| <p>Formal scrutinisers</p> | <ul style="list-style-type: none"> • Vested in specific parliamentary administrative departments or units assigned to conduct PLS. • There are specific procedures for identifying laws for PLS. • Often there is an explicit legal basis to conduct PLS. • Formal PLS on the legal aspects of legislative enactment prevails over impact assessment. • Limited follow-up to the PLS findings and few procedures providing for a debate or voting on the report in committee or plenary. • There is no explicit requirement for the government to respond in writing to the PLS conclusions of parliament. • PLS reports are accessible to the public. |
| <p>Independent scrutinisers</p> | <ul style="list-style-type: none"> • There are specific administrative structures and committees assigned to conduct PLS. • Based on their own criteria, triggers and priorities, parliament and its committees decide independently which laws to select for PLS. • Parliament has a more proactive approach in identifying sources of analysis • The PLS work is legally grounded, covering both legal and impact assessment • The institutionalised PLS work results in specific PLS reports. • There is ‘procedimentalisation’ of reports, which means that parliament has put in place procedures for debating or adopting the PLS report and conclusions. • There is an established follow-up to the PLS reports, including by requesting a government response in writing. • PLS work is transparent, PLS reports are published online and thus accessible to the public. |

The research placed the UK Parliament in the ‘Independent scrutinisers’ category, meaning that it is deemed to have robust procedures in place to undertake this work.

2 UK Parliament

Post-legislative scrutiny is included within one of the core tasks of select committees:

Policy: To examine the policy of the department, including areas of emerging policy or where existing policy is deficient, and make recommendations. This may include legislative scrutiny, post-legislative scrutiny, and scrutiny of delegated legislation where relevant.¹³⁰

Since 2008, successive governments have published memorandums assessing the impact of legislation three to five years after its implementation. These memorandums should include a preliminary assessment of how the Act has worked in practice, relative to objectives and benchmarks identified during the passage of the bill and in the supporting documentation.

Departmental select committees can use these memorandums as the basis for post-legislative scrutiny, although committees are free to pursue this work in other ways.

A recent study of post-legislative scrutiny in the UK Parliament¹³¹ looked at two case studies in the House of Commons and two in the House of Lords. The research benefitted from interviews with staff and members and the key points from the House of Commons case studies are discussed below.

Culture Media and Sport Committee – Gambling Act 2005

- the Act was selected because the committee received a large number of representations from the gambling industry;
- a member of the committee noted that it is common for organisations to approach committees with their concerns and problems; and
- the Department was not one that generally sponsored a lot of legislation

Justice Committee – Freedom of Information Act 2000

- the Act was selected because the Committee had received the memorandum from the Ministry of Justice and these memoranda often act as a trigger for post-legislative scrutiny;
- the issue was also salient at that time as “the government was proposing to make changes to the Act in terms of narrowing the scope of and restricting the use of it”;

¹³⁰ House of Commons Library, *Select Committees - core tasks*, April 2020:
<https://researchbriefings.files.parliament.uk/documents/SN03161/SN03161.pdf>

¹³¹ Tom Caygill, *A Tale of Two Houses? Post-legislative scrutiny in the UK Parliament*, Paper prepared for the Academic Seminar on Post-Legislative Scrutiny: <https://core.ac.uk/download/pdf/327367617.pdf>

- it was urgent to get the report out as quickly as possible, on the basis that the committee wanted to share its assessment of the challenges before the government made a decision; and
- there was also a reasonably high level of interest among the Members.

Despite the Cabinet Office guidance and the introduction of this systematic approach, "...it is yet to become a regular part of committee work, at least from the perspective of published reports".¹³² Between 2008 and 2017, post-legislative scrutiny formed a small percentage part of those Commons' committees that engaged in this work. Not all Commons committees engaged in post-legislative scrutiny.

In the slightly expanded timeframe of 2008 to 2019, 91 Departmental memorandums were produced.¹³³

3 Scottish Parliament

In October 2013 the Standards, Procedures and Public Appointments Committee (SPPAC) of the Scottish Parliament published a report on post-legislative scrutiny. The following are some of the key points from the Committee's report:

- post-legislative scrutiny is a fairly wide-ranging concept that can mean different things to different people and could range from a technical analysis of legal drafting to a wider policy review;
- the committee believed that the picture was not as bleak as had been suggested and pointed to a number of good pieces of work emanating from Scottish Parliamentary committees;
- MSPs regularly had the opportunity to embed mechanisms for post-legislative scrutiny into legislation during the passage of bills (High Hedges Act 2013 provided for a review of the operation of the Act to take place within a specific timeframe);
- it was ultimately a matter for individual committees to decide whether or not to carry out post-legislative scrutiny and that the merits of conducting post-legislative scrutiny need to be balanced against the other demands on the Committee's time;
- there are a number of possible trigger points which could prompt a committee to undertake post-legislative scrutiny, including:
 - representations from individuals or organisations that a piece of legislation needed reviewed due to a particular policy impact. As part of

¹³² Journal of Legislative Studies, Tom Caygill, *The UK post-legislative scrutiny gap*, volume 26, 2020

¹³³ Journal of Legislative Studies, Tom Caygill, *The UK post-legislative scrutiny gap*, volume 26, 2020

this review, committees could scrutinise how the Scottish Government had responded to any concerns;

- publicity in the media indicating that post-legislative scrutiny is required;
- members of the judiciary commenting that a piece of legislation should be revisited;
- a petition being brought forward calling for a review of current legislation in a particular subject area;
- a committee inquiry being undertaken into an issue which includes an examination of current legislation;
- a sunset clause or a statutory review period being included in legislation requiring it to be revisited by the Parliament;
- a bill being passed containing a requirement that the Scottish Government must report to the Parliament on a particular provision; and
- committees deciding that they will undertake scrutiny of the implementation of a piece of legislation.

Public Audit and Post-legislative Scrutiny Committee

In September 2016 the Parliament agreed that the Public Audit Committee should include post-legislative scrutiny (PLS) within its remit, meaning that:

...the Committee can consider previous Acts of the Scottish Parliament to determine whether they have achieved their intended purpose. This could involve examining a specific part of an Act rather than examining the legislation as a whole. Other committees of the Parliament have always been able to undertake PLS and will continue to do so.¹³⁴

The Committee consulted with stakeholders and members of the public on how it might undertake this new area of work and provided a checklist to assist respondents:

Figure 2: Checklist used to inform Public Audit and Post-legislative Scrutiny Committee's post-legislative scrutiny

Do you consider that the Act has had sufficient time to have made a difference? The Committee is unlikely to consider Acts that have only recently come into force.

¹³⁴ The Scottish Parliament, Post-legislative scrutiny: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105094.aspx>

Does the Act have a measurable outcome or policy objective, and has it fulfilled its intended purpose? When a Bill is introduced, a separate document called the Policy Memorandum explains why the Bill has been proposed and describes the objectives and outcomes it is designed to achieve. Has the Act been effective in delivering these objectives and outcomes?

Has another committee of the Parliament already carried out post-legislative scrutiny of the Act? Other committees of the Parliament have always been able to undertake post-legislative scrutiny and will continue to do so. It is therefore important to avoid possible duplication; having said that, if the scrutiny was undertaken more than five years ago, we may wish to revisit the legislation.

Does the Act contain an in-built mechanism for post-legislative scrutiny? The High Hedges (Scotland) Act 2013, for example, was amended to allow for a review of the operation of the Act to take place within a specific timeframe. It is anticipated that the relevant subject committee would therefore undertake post-legislative scrutiny at the appropriate time.

Has the Act been subject to, or could it be subject to, significant revision? The Scottish Government outlines its legislative programme on an annual basis, which may contain proposals for Bills that would alter existing Acts or perhaps even repeal an Act. MSPs and Committees can also seek to introduce bills. If the Government has said it will be reviewing or is planning to amend the legislation, we would not want to duplicate that work.

Would there really be merit in undertaking post-legislative scrutiny of the Act? For example, does the Act deal with a very technical or minor issue?

Is the Act subject to legal challenge? The Committee is not allowed to consider any matter that is sub judice; in other words, the Committee would not consider an Act that is being reviewed in the courts

The Committee shortlisted five Acts which met the criteria and these formed the basis of its post-legislative scrutiny work programme. This was in addition to two Acts that the Committee decided to address on the basis of public interest.

In total, the Committee was able to undertake six pieces of post-legislative scrutiny. Reviews of two pieces of legislation that had originally been shortlisted were not taken forward due to the Committee's workload.¹³⁵

Figure 3 sets out the process followed by the Committee in assessing the Control of Dogs (Scotland) Act 2010. The Committee carried out this work across 2018 and 2019.

¹³⁵ Public Audit and Post-legislative Scrutiny Committee, *Session 5 Legacy Paper*. <https://sp-bpr-en-prod-cdnep.azureedge.net/published/PAPLS/2021/3/15/4f0f838b-3e50-479a-8721-621037bca0a0/PAPLS052021R2.pdf>

Figure 3: Post-legislative scrutiny of the Control of Dogs (Scotland) Act 2010

PROCESS

Legislation originally introduced as PMB – passed in April 2010 and came into force in February 2011.

Debate in Chamber in May 2018. It raised concerns that recent figures suggested that the number of dog attacks was rising and questioning the effectiveness of the 2010 Act.

June 2018 – Committee agreed to undertake post-legislative scrutiny of the 2010 Act. The Committee subsequently launched its call for evidence which ran from 3 July to 5 October 2018.

49 consultation responses received, three evidence sessions (hearing from six panels) and three public engagement meetings held.

REPORT

Lack of available and consistent data, which has been exacerbated by the failure to establish a Scottish Dog Control Database, prevented the Committee from accurately determining the effectiveness of the Control of Dogs (Scotland) Act 2010.

The Committee believes that current dog control law is not fit for its purpose and calls on the Scottish Government to undertake a comprehensive review of all dog control legislation as a matter of urgency. The report identifies a range of issues that should be

The Committee considers that, from the evidence it has received and the data available, the Control of Dogs (Scotland) Act 2010 has had limited effect in preventing or reducing the number of dog attacks in Scotland.

OUTCOMES

March 2021 – Public Safety Minister gives evidence to Committee. Working Group set up to consider and progress the report's recommendations. Out of the 21 recommendations, five have now been delivered, one partially delivered, 14 are in progress and one not started. National dog control notice database should be in place by end of the year.

Committee not happy with what it saw as lack of progress. concerns in particular about the continuing lack of accurate data on dog attacks on humans and other dogs, the poor engagement from councils and the absence of a notable increase in dog wardens. Committee convenor urged Government to get on with it, rather than having working groups.

In its Session 5 Legacy Report, published in March 2021, the Committee recommended that the post-legislative function be removed from its remit. Its comments bear repeating:

Figure 4: Extract from Legacy Report of the Public Audit and Post-legislative Scrutiny Committee

The Consultative Steering Group recommended that the Scottish Parliament should have all-purpose Committees, combining the Westminster Select and Standing Committee role on the basis it would enable Members to develop an expertise in particular areas and to bring an informed view to the consideration of legislation and scrutiny of the Executive.

The same approach does not appear to have informed the decision to add post-legislative scrutiny as a discrete area to the remit of one committee. The Committee's audit scrutiny focuses on those areas where it can best add value to the work of the subject committees, such as financial management and governance and other cross-cutting issues. It was difficult for the Committee to select items for post-legislative scrutiny where it was better placed to undertake such scrutiny than the relevant subject committee, given the latter's subject knowledge and expertise. There was also a lack of clarity as to whether the Committee could introduce legislation to give effect to its recommendations (in the way that a subject committee could) in the event that the Scottish Government chose not to legislate.

While the Committee considered more audit reports than its predecessor committee this session its post-legislative scrutiny inquiries inevitably impacted on the Committee's ability to carry out more detailed scrutiny of individual audit reports and its broader key audit themes work and improvement agenda. This was an unfortunate consequence of the remit change, particularly given continued pressures on public services and public funding.

Recommendations

The Committee recommends that post-legislative scrutiny is removed from the remit of the Public Audit Committee in session 6.

The Committee recognises that post-legislative scrutiny is an important element of parliamentary scrutiny. However, before adding this aspect to another committee's remit, the Committee strongly recommends that the Standards, Procedures and Public Appointments Committee be invited to undertake a thorough examination of post-legislative scrutiny, including considering what it means; expected outcomes and how it is best and most effectively undertaken in the parliamentary setting.

4 Welsh Parliament

In its October 2015 report, *Making Laws in Wales*, the Constitutional and Legislative Affairs Committee addressed post-legislative scrutiny in the National Assembly for Wales (as it was then known). It recognised the benefits of this scrutiny but noted that it was not something that had routinely been carried out by committees, perhaps because of issues of capacity.

The Committee's report pointed to the work carried out by the Health and Social Care Committee in its evaluation of the Mental Health (Wales) Measure 2010, which could act as a best practice model of how to carry out post-legislative scrutiny. The approach taken by the Health and Social Care Committee in relation to the 2010 Measure is set out below.

However, it was "acutely aware of the work pressures that committees are under, trying to juggle legislative and general policy scrutiny."¹³⁶ Nevertheless, it recommended that committees incorporate consideration of post-legislative scrutiny into their scrutiny work.

There is no formal requirement on committees to undertake post-legislative scrutiny.

Figure 5: Health and Social Care Committee's evaluation of the Mental Health (Wales) Measure 2010¹³⁷

May 2014: Committee agrees to undertake post-legislative scrutiny on the Mental Health (Wales) Measure 2010

Committee used the Law Commission's four key objectives of PLS as the basis of its review:

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

Committee added its own, fifth principle:

¹³⁶ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales*, October 2015: <https://senedd.wales/laid%20documents/cr-ld10379/cr-ld10379-e.pdf>

¹³⁷ National Assembly for Wales, Health and Social Care Committee, *Post-legislative scrutiny of the Mental Health (Wales) Measure 2010*, January 2015: [https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20\(wales\)%20m/cr-ld10069-e.pdf](https://senedd.wales/laid%20documents/cr-ld10069%20-%20report%20by%20the%20health%20and%20social%20care%20committee%20on%20the%20post-legislative%20scrutiny%20of%20the%20mental%20health%20(wales)%20m/cr-ld10069-e.pdf)

- to assess whether the legislation has represented, and will continue to represent, value for money.

On the basis of these principles, the Committee decided to assess the implementation and operation of the Measure by:

- assessing the extent to which the stated objectives of the Measure are being achieved;
- identifying whether there are any lessons which can be learned or good practice shared from the making and implementation of the Measure and the associated subordinate legislation and guidance; and
- assessing whether the Measure has represented, and will continue to represent, value for money.

The Committee issued a structured call for written evidence, aimed at: statutory mental health providers (local authorities, local health boards); relevant professional bodies; relevant third sector organisations; regulatory/inspection bodies; and those who responded to the consultation issued by the Third Assembly's Legislation Committee No.3 when it scrutinised the proposed Measure in 2010.

Consultation ran from 26 June to 12 September 2014, and 22 written responses were received. The Committee also held a scrutiny session with the Minister for Health and Social Services.

January 2015: Report published which included 10 recommendations.

5 Dáil Eireann

As with pre-legislative scrutiny, the Standing Orders of Dáil Eireann provide for post-legislative, or post-enactment scrutiny. This followed a commitment in the 2016 Programme for Government for "mandatory...post-enactment review of legislation by Oireachtas Committees".¹³⁸ Standing Order 164A states:

Twelve months following the enactment of a Bill, save in the case of the Finance Bill and the Appropriation Bill, the member of the Government or Minister of State who is officially responsible for implementation of the Act

¹³⁸ A Partnership Programme for Government, May 2016:

https://merriestreet.ie/merriestreet/en/imagelibrary/programme_for_partnership_government.pdf

*shall provide a report which shall review the functioning of the Act and which shall be laid in the Parliamentary Library.*¹³⁹

This places the onus on the government to report on them, but Oireachtas committees have the power to consider them and “to require a Minister or Minister of State to appear before them to discuss post-enactment reviews.”¹⁴⁰

Research produced by the Oireachtas sets out the information required to carry out a piece of in-depth post-legislative scrutiny. It is based on analysis of post-legislative reviews carried out in other legislatures. This is reproduced at Appendix 1.

6 Issues for consideration

The House of Lords Constitution Committee justified post-legislative scrutiny on the basis that it improved the quality of law and government:

*Regular scrutiny will determine if Acts have done what they were intended to achieve; if not, it may then be possible to identify alternative means of achieving those goals. Scrutiny may also have the effect of ensuring that those who are meant to be implementing the measures are, in fact, implementing them in the way intended.*¹⁴¹

Previous research has suggested that:

*The growing impetus for PLS coincides with the rationalisation of the law-making process, and a growing demand for the quality of legislation to be reviewed as well as procedures that can support parliaments to manage contemporary ‘legislative complexity.’*¹⁴²

Post-legislative scrutiny can support this by:

*...institutionalising and systematising a moment of analysis and assessment focusing specifically on improving the quality of legislation passed. As such it should improve a parliament’s understanding of the causal relations between a law and its effects as the accuracy of assumptions underlying legislation are tested after its enactment.*¹⁴³

However, in its 2006 report the Law Commission of England and Wales cautioned that there were limitations associated with post-legislative scrutiny:

¹³⁹ Oireachtas Library and Research Service, Post-enactment scrutiny by Parliament, December 2017:

https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-01-08_spotlight-post-enactment-scrutiny-in-parliament_en.pdf

¹⁴⁰ Oireachtas Library and Research Service, Post-enactment scrutiny by Parliament, December 2017

¹⁴¹ House of Lords Constitution Committee, *Parliament and the Legislative Process*, 2004

¹⁴² De Vrieze ad Norton, *The significance of post-legislative scrutiny*, *Journal of Legislative Studies*, Volume 26, 2020

¹⁴³ As above

- **risk of replay of arguments:** post-legislative scrutiny should concentrate on the outcomes of legislation. Unless self-discipline is exercised by the reviewing body, and those giving evidence to it, there is a clear danger of it degenerating into a mere replay of arguments advanced during the passage of the Bill;
- **dependence on political will:** the evolution of a more systematic approach to post-legislative scrutiny will depend on a combination of political will and political judgement; and
- **resource constraints:** post-legislative scrutiny will place demands on resources that could be used elsewhere.

Expanding on this final point, recent research commented that post-legislative scrutiny:

...carries a cost not only in time and expenditure on the part of the legislature, but also on the part of those called on to provide evidence. Consultation with key stakeholders is generally necessary if relevant data are to be obtained and an accurate evaluation of effectiveness is to be made. In these circumstances, it is usually beyond the capacity of parliaments to conduct a systematic evaluation of entire legislative schemes.¹⁴⁴

Ultimately, the experience of both pre and post-legislative scrutiny in the UK shows that it is largely up to committees to decide if they wish to undertake additional scrutiny beyond the usual stages of a bill. Successive reports have encouraged the practice in the UK Parliament, Scottish Parliament and Welsh Parliament but it has not yet become embedded within the work of committees.

A number of factors can come into play that will impact the ability or willingness of committees to take on additional scrutiny functions. These might include the interest of members in pre and post-legislative scrutiny compared to plenary and constituency matters, the time available to engage in this work and the committee's work programme. There is also the question of which legislation is selected for review. It is probably more desirable to divert limited resources to detailed review of a few Acts each year, rather than attempting to cover too many pieces of legislation in a less thorough manner.¹⁴⁵

The decision of the Scottish Parliament's Public Audit and Post-legislative Scrutiny Committee to recommend that it be relieved of its post-legislative scrutiny remit reflects the potential strain such work can place on members with already busy workloads.

The consensus view that such scrutiny is valuable and contributes to better law has yet to be reflected in the attention given to it by the UK legislatures.

¹⁴⁴ De Vrieze ad Norton, The significance of post-legislative scrutiny, *Journal of Legislative Studies*, Volume 26, 2020

¹⁴⁵ Westminster Foundation for Democracy, *Principles of Post-Legislative Scrutiny by Parliaments*, January 2018: <https://www.wfd.org/wp-content/uploads/2018/07/Principles-of-Post-Legislative-Scrutiny-by-Parliaments.pdf>

Appendix 1 – proposed information required for post-legislative review

| Information needed | Possible Sources of data/information |
|---|---|
| Purpose: To allow the reviewer to assess how the policy objectives of the Act have been/are being achieved | |
| Set out the key policy objectives of the legislation, including the policy problem/issue it is designed to address (ideally with evidence which demonstrates the extent of the problem/issue) and how the legislation was expected to address it (i.e. through what specific actions). This is tied to the evaluative framework (see below) which is ideally developed <i>prior to</i> enactment. | Government consultation; Green Paper, White Paper; Regulatory Impact Assessment; Pre-legislative scrutiny process and report; Dáil debates on the Bill (especially Minister's explanation); Independent, impartial analysis usually supplied parliamentary research offices |
| Purpose: update of the legislative context – to set the scene | |
| Sets out factual information about progress in implementation of the Act such as: <ul style="list-style-type: none"> - When and how different provisions of the Act were brought into operation; - Any provisions not yet in force; - Any SIs and guidelines issued; - A list of (and access to) any reviews of Act undertaken. | Minister's Department Reviews by other bodies (see Box 4, p. 16)) |
| Purpose: focus on implementation, identify any possible improvements in delivery of policy aims, any un-intended policy or legal consequences of the Act | |
| Further information on how provisions have been brought into operation and, if provisions have not been, why not? Are there un-intended policy consequences as a result of the Act's implementation? Are there un-intended legal consequences and, for example, are there issues arising from the interpretation of the Act or provisions which have been the subject of litigation (past and pending?) In both cases, are possible solutions available to minimise their effect? The consequences of the Act's implementation for different groups of stakeholders (e.g. those who were/were not the original focus of the Act). | Minister Stakeholders and experts in the policy area (via consultation and/or Questions and Issues paper) Legal experts such as Law Reform Commission Legal cases Other departments/committees Data gathered for the evaluative framework. |
| Purpose: to create an evaluation framework and gather information and data to enable a reviewer to make a value judgement on the Act | |
| One, a framework for evaluating whether outputs (actions) are being implemented in a way which leads to the outcomes envisaged in the legislation and accompanying regulations. The framework should ideally identify indicators of the achievement of outputs and outcomes and data and/or information which can be used to measure/monitor these indicators. Two, a framework with which to evaluate the extent to which the policy objectives behind the Act are being achieved. This framework, which is required for an Impact-Assessment, should identify indicators with which to assess whether the Act is achieving its policy objective , i.e. the overall impact of the Act. | An evaluative frameworks, including indicators and the type of information needed to monitor them, should be agreed before implementation; Information may come from all the documents mentioned above, including any external reports and/or consultations. The Library and Research Service's Bills Digest may include suggested performance indicators. The Reviewer may develop <i>Questions and Issues Papers</i> to gather data where necessary (via call for public submissions, targeted or open). |
| Purpose: Cost of implementing the Act (Financial implications) | |
| Data on the cost of implementing the legislation Are they in line with projected costs? Are there enforcement and compliance costs (anticipated/not anticipated)? Who is bearing the cost? | Minister and Department; Public bodies involved in implementing the legislation; Public Accounts Committee and C&AG reports. |

Appendix F – Extract from Standing Orders of the Scottish Parliament

Rule 10.3 Subordinate Legislation Scrutiny

1. In considering the instrument or draft instrument, the committee mentioned in Rule 6.11 shall determine whether the attention of the Parliament should be drawn to the instrument on the grounds—

- (a) that it imposes a charge on the Scottish Consolidated Fund or contains provisions requiring payments to be made to that Fund or any part of the Scottish Administration or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment;
- (b) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, on all or certain grounds, either at all times or after the expiration of a specific period or that it contains such provisions;
- (c) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
- (d) that there appears to have been unjustifiable delay in the publication or in the laying of it before the Parliament;
- (e) that there appears to be a doubt whether it is *intra vires*;
- (f) that it raises a devolution issue;
- (g) that it has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute;
- (h) that for any special reason its form or meaning could be clearer;
- (i) that its drafting appears to be defective;
- (j) that there appears to have been a failure to lay the instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act.

or on any other ground which does not impinge on its substance or on the policy behind it.

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