



Law Society
of Scotland

House of Lords Liaison Committee Review of Investigative and Scrutiny Committees

The Law Society of Scotland's Response

April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law sub-committee welcomes the opportunity to consider and respond to the House of Lords Liaison Committee Inquiry on Review of Investigative and Scrutiny Committees. The sub-committee has the following comments to put forward for consideration.

General Comments

We welcome the Liaison Committee's review of Investigative and Scrutiny Committees. It is essential to the proper working of the Committee system that there is a strategic approach to the organisation of the committees and the work they do.

We suggest that, as with every reform, change should be evidence based. Accordingly, a survey of each committee, its remit, membership and meeting pattern needs to be undertaken. This will identify potential synergies in the areas of competence of each committee and although unlikely any overlaps or duplication.

The effectiveness and efficiency of each committee should be assessed. This will identify where the committees are influential and what impact their work has. Having ascertained where the committees are it will be necessary to identify where the House wants them to be. What areas of policy will be of the greater importance in the future? What areas are not covered and what should be done to fill any gaps?

1. How can committees add most value to the scrutiny work of the House of Lords as a second chamber?

Legislation is the way in which Government policies are made into binding rules which affect us all. If legislation is to achieve this purpose, it must reflect those policies and express them clearly to those who are affected by the law. Committees can add most value to the scrutiny work of the House by examining legislation closely and commenting on its clarity, effectiveness and accessibility in order to help create good law. The office of the Parliamentary Counsel has expressed "good law" as law that is necessary, clear, coherent, effective and accessible. If committees keep these qualities in mind when scrutinising legislation the outcome should be better law and a better statute book.

Good Law covers four areas:

- a. Content, How much detail? Is this law necessary? Does it duplicate, or conflict with, another law?
- b. Language and style, Do we know what the likely readership is? Is the language easy to understand?
- c. Architecture of the statute book, what should determine the hierarchy and structure of statute law? What should go into Acts and Regulations?
- d. Publication, How will law appear to the online user? What can be done to improve navigation? Should we draft law to be machine-readable?

These would be the kind of questions which committees should have in mind when scrutinising legislation.

2. How can House of Lords committees develop a national conversation to complement their inquiry and scrutiny work?

House of Lords committees can engage more effectively with public and media by developing new methods of taking evidence (indeed even using the phrase “taking evidence” should be reconsidered as it implies a formal near-court process which could be off putting to many) using language which is more accessible and less parliamentary in style. Committees can also conduct broader outreach by holding sessions outwith the House of Lords and by choosing a more diverse range of locations in which to meet with the public. Finally, committees should be more flexible about the channels of communication which they employ and the engagement programme which they undertake. Each committee should have a communications plan and identify targets for engagement with community groups, representative bodies; individuals and those on the margins of society which should be achieved within any given parliamentary session. Adopting these methods could help to develop an authentic two-way conversation with Society broadly.

3. What are the strengths and weaknesses of the current House of Lords committee structure and what should change?

It is generally considered undesirable for House of Lords committees to overlap with committees in the House of Commons. However where committees have a joint interest in a mainstream area of law or policy such as human rights it is helpful to have a joint committee.

In other areas it is important for there to be distance between the committees of both Houses. Departmental committees in the House of Commons have a different role in as much as they are comprised of Members of Parliament who are accountable to their constituents. The committees are designed to assist in holding Government to account. On the other hand, Peers are not subject to the same political pressures as MPs and can bring their expertise and experience to each inquiry. They can also have a wider perspective on issues, examine broader themes and adopt more holistic views.

4. How can House of Lords committees maximize their impact inside and outside the House?

The House of Lords committees can maximise the impact inside and outside the House by mounting inquiries which are seen as relevant by government, policy makers, civic society, stakeholder groups and the wider public.

Relevant inquiries can be supported by deep research on the topics identified for the inquiry and by the production of robust, sustainable reports which are respected for their impartiality, application of evidence, logic and the usefulness of their recommendations. In general recommendations should fulfil the following criteria they should be SMART. specific, measurable, achievable, relevant and time bound.

To maximise the impact of the work which committees have done each committee should create a communications strategy to accompany each inquiry. The communications strategy should be informed by the objects of the inquiry, the context in which the inquiry takes place politically and socially and the communication methods available to the committee. The committee should avoid adopting a “one size fits all” communication strategy. Some communications to government the civil service or sophisticated stakeholders would not be appropriate to non-governmental bodies, more general stakeholders or the public.

5. How can House of Lords committees promote inter-parliamentary dialogue both within and outside the UK?

House of Lords committees can promote inter-parliamentary dialogue within the UK by being a forum to bring together members of the UK Parliament and legislatures in Scotland, Wales and Northern Ireland and by creating an opportunity for debate, exchange and communication between the UK Parliament and the devolved legislatures. However that opportunity does not simply relate to the devolved structures but should extend to other aspects of devolution including City Mayors, participants in regional devolution plans and Local Authorities. House of Lords committees should travel to other legislatures and to hold meetings. This will enable committees to indicate their willingness to engage and may change the perception of House of Lords committees which some participants outwith the House may hold.

Internationally there are a number of existing groups which the committees can enhance participation with including the Inter-Parliamentary Union, the Commonwealth Parliamentary Association and the Association of State Legislators. Other international bodies generally which have an interest or capacity in law making, treaty formulation and legal process would be useful to engage with. Examples of this group would include The United Nations, the EU institutions, the Council of Europe, the Hague Conference on Private International Law and the International Bar Association.

Bilateral relationships with other legislatures should also be enhanced, particularly with the Upper Houses of European national legislatures. The withdrawal of the UK from the EU will require the strengthening of such bilateral relationships to maintain a common level of understanding about the objectives, challenges and attitudes which prevail in the UK and among member states.

Subject matter and structure

An overriding question is: How should the structure and working practices of House of Lords

committees be rationalised?

The essential questions are what do we consider committees to be for? and how can they best achieve those objectives?

The Parliament website states that “Committees consider policy issues, scrutinise the work and expenditure of the government, and examine proposals for primary and secondary legislation. Select committees operate largely by an investigative process, while legislative committees operate mainly by debate”.

According to the Committee’s Consultation document there are 24 House of Lords investigative and scrutiny committees and sub committees. This is a significant number of committees and sub committees and represents a considerable investment in committee work. In order to rationalise the structure and working practices it will be necessary to undertake the evidence gathering process referred to above and then examine critically the remits of each of these committees and sub committees and ascertain whether those remits remain relevant. There are many changing circumstances and developing arrangements in the UK not only in the context of withdrawal from the European Union but also in connection with the economy, international relations devolution and other representative structures.

1. Should the current committee structure be changed?

The factors which suggest that change to the current committee structure is necessary include:-

(a) The UK’s Withdrawal from the EU

The UK’s withdrawal from the EU and replacement of policy and law originating from the EU with that originating within the UK. This will require changed roles for committees and sub committees and the opportunity should be taken to rationalise and modernise the committee structure. Government’s aspirations to create a ‘Global Britain’ and to create a network of trade agreements will necessitate additional scrutiny requirements. Accordingly this could translate into the creation of Select Committees on International Trade, Free Trade Agreements, Private International Law and Citizens’ Rights.

(b) Devolution

Since 1998 devolution has developed considerably with significant increases in powers in 2012 and 2016 for Scotland and in 2006 and 2017 Wales and more powers made available to the Northern Ireland Assembly. Devolution has also developed in England with proposals for English votes for English laws, enhanced power for City Mayors and proposals for regional devolution. Increasing powers for the devolved administrations means that the UK Parliament does not exercise those powers for the devolved areas but the continued relevance of Parliament as a legislature for reserved powers and continued ministerial decision making particularly in connection with finance and strategic matters still rests with Whitehall. House of Lords committees are well placed to consider and examine proposals by the UK Parliament and Government which will have an impact on the devolved arrangements across the UK.

(c) Technological Change

Changes to technology have in the past few years revolutionised the ways in which people communicate, form networks and learn. A use of data and the influence which that use can bring has increased and can be a force for good but can also create controversy when it is abused. Technology is developing very quickly; the use of robots, AI Solutions and over posted communications leaves policy development behind. IT and technological solutions are used by many committees and legislatures within the UK to good effect. House of Lords committees should explore how their work can be enhanced by the application of IT solutions. The renovation of Parliament presents a good opportunity to accommodate current technology in a widespread way and, as far as possible to anticipate advances in technology.

2. What changes are needed in the wake of Brexit? Are committees needed to scrutinise the UK-EU relationship in future, and if so how?

Some may believe there will be no need for an EU committee once the UK has withdrawn from the European Union however the EU will remain a significant trading partner and a significant generator of policy and law which will impact on the UK in a variety of ways. Therefore it will be important for the House of Lords to maintain a committee or committees which will maintain a monitoring and horizon scanning role. This will assist in alerting Parliament and Government to EU developments. The return of powers from the EU to UK will be considerable and the sub committees which currently scrutinise EU proposals will require to be re-orientated to scrutinise UK proposals in areas of former EU competence and where appropriate take into account views from the devolved legislatures.

3. To what extent does it remain desirable to avoid overlap with the House of Commons

Whilst it is desirable to avoid overlap the House of Commons on many things in certain instances it is essential for there to be a joint position. Proper scrutiny of legislation or policy development is not the preserve of one House of Parliament as opposed to another – both Houses have roles to play. That is why collaboration between Committees can be a good use of procedures – or even suggestions such as Committee members being seconded between Houses. The current joint committees: Joint Committee on Human Rights, Joint Committee on the National Security Strategy, Pre Legislative Draft Bill Committee and the Joint Committee on Statutory Instruments all fulfil useful work in areas where both Houses of Parliament will have a common interest.

However it remains desirable for the House of Lords to maintain separate Investigative and Select committees because of the distinct interest which the House of Lords has as a revising chamber. Furthermore committees of the House of Lords can draw on members of significant and wide experience as well as those who have held high political office but can approach matters in a way which does not mirror the highly political environment which can be found in the House of Commons.

4. What is the best balance between ad hoc committees and sessional committees?

This is a matter of context. It is correct that Sessional Committees are available to provide oversight and review. Sessional Committees such as the European Union Committees, the Economic Affairs Select

Committee, the Communications Select Committee, the Constitution Select Committee, the International Relations Select Committee, and the Science and Technology Committee undertake work which touches on matters of policy and law of a specialist nature.

On the other hand the ad hoc select committees on artificial intelligence, citizenship and civic engagement, the Natural Environment and Rural Communities Act 2006 and political polling and digital media are much more related to aspects of policy or law which emerge during the course of a session.

The Committees should be broad based with a range of expertise and skills and flexible enough to deal with long range matters and to react to developments during the course of a session on matters of public or parliamentary interest by the creation of ad hoc committees. However as the list of ad hoc committees illustrates there is no particular over-arching principle for the creation of an ad hoc committee.

Ad hoc committees are appointed to undertake a particular inquiry and are appointed only for a year. This is insufficient time to develop expertise and disband most after a year is effectively a waste of resources.

The Liaison Committee recommends up to four proposals for new ad hoc committees one of which will be a Post Legislative Scrutiny Committee set against those criteria listed on page 7.

5. What is the best balance between short and long inquiries?

This is a matter of context and will depend upon the subject of the inquiry. Select committees do not shadow the work of government departments. Their investigations look into specialist subjects, taking advantage of Lords expertise and more time (compared to the House of Commons) available to them to examine issues.

The six committees are reappointed at the beginning of a new session. Each one runs inquiries and reports on the issues within their specific areas. Ad hoc committees are established to consider issues outside these specialist subject areas.

Accordingly whether the inquiry is long or short will depend on the topics which appear on the committee agendas.

6. What should be the duration of most committees (e.g. a two or three year term)?

The Fixed-term Parliaments Act 2011 puts a five year period between general elections. We suggest that committees which are Sessional Committees should run for the whole five years this will ensure the creation of a high level of expertise amongst the members of the committee involved and allow for a consistency of approach.

Ad hoc committees

In relation to ad hoc committees, the Liaison Committee has considered proposals for new committees against these criteria:

(a) makes the best use of the knowledge and experience of members of the House,

- (b) complements the work of House of Commons departmental select committees
- (c) addresses areas of policy that cross departmental boundaries and
- (d) that the activity proposed should be capable of being confined to one year.

7. Are the present criteria for examining proposals for ad hoc committees the right ones?

The criteria for selection of ad hoc committees could be enhanced by insuring that proposals for ad hoc committees relate to matters of significant public or policy interest. The current arrangements for following up committee report especially those of ad hoc committees are not systematic. The Liaison Committee should undertake a study of ad hoc committee reports on a biennial basis and ascertain which reports are suitable for post reporting scrutiny.

8. Are the current arrangements for following-up committee reports (especially those of ad hoc committees) appropriate?

We believe that strategic, planned arrangements for follow-up of committee reports should be built into the reports from the start. Each committee should include a recommendation concerning follow-up in each report.

9. What is the correct balance between the flexibility of having new committees each year and more sessional committees?

This depends on the social and political context at the time.

10. How should the work of post-legislative scrutiny committees be developed?

Post legislative scrutiny is an essential part of learning from the making and implementation of legislation. The Commission on Parliamentary Reform (2017) considered ways to reform the Scottish Parliament and deliver a stronger, more agile, inclusive and effective Parliament. The Commission considered the issue of post legislative scrutiny, paragraphs 107 and 108 of their report are relevant to this inquiry:-

107. Our starting point for considering this issue is what is most in keeping with the Parliament's founding principles of openness, transparency and power sharing. We have 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.

108. We propose, therefore, that a statement should be provided by the Scottish Government or, in some circumstances, the relevant public body, which details the extent to which the legislation has been enacted, what outcomes have been achieved and the cost of implementation. Committees would then consider this statement as part of the legislative process.

We recommend that post legislative scrutiny is built into the remits of sessional and ad hoc committees. The remit of the Scottish Parliament's Public Auditor Committee was extended to include post legislative scrutiny during 2017.

We note that in the committee appointment round issued on 13 November 2017 the Liaison Committee expected to recommend up to four proposals for new ad hoc committees for appointment in 2018-2019 one of which will be a Post Legislative Scrutiny Committee. In session 2016-2017 33 bills received royal assent in session 2015-2016 29 bills received the royal ascent and in session 2014-2015 36 bills received the royal assent. Accordingly conduct of post legislative scrutiny on one bill per session may be considered to be inadequate if there is to be proper assessment of the effectiveness of legislation.

Engagement with the public

There has been a substantial increase in media coverage of Lords committees in recent years. Committees began using Twitter in 2014. Committees have also engaged with hard-to-reach groups by releasing easy-read versions of some reports. There have been additional efforts to engage with children and young people through a variety of methods, including online surveys.

11. How can Lords committees engage more effectively with the public and media to encourage a national conversation?

See our response to question 2.

12. What has been successful in increasing the levels of engagement on social media, and what more could be done?

The media which the House of Lords should use ought to include the following range:

- using rich media (videos and pictures)
- using plain English/language
- tagging and engaging with other relevant accounts (organisations and people)
- using a range of hashtags to link to relevant content
- following social 'influencers' in chosen topics and reaching out to them directly
- blogger outreach
- creating useful content that supports the chosen message

13. What new offline channels could be used to engage with the public?

'New' offline channels are often variations on existing themes e.g. using posters, attending/supporting relevant events, writing articles for non-traditional print media.

14. How should committees engage with stakeholders in evaluating their activity?

Committees should evaluate their activity by undertaking surveys of the community groups and individuals with which the committee has engaged in the session.

Chairmen and members

15. Are the current arrangements for the appointment of committee Chairmen and members satisfactory, including the “rotation rule”?

The Committee of Selection was appointed on 19 May 2016 to select and propose to the House members to form each select committee of the House (except the Committee of Selection itself and any committee otherwise provided for by statute or by order of the House), Chairman of each select committee, Members to form any other body not being a select committee referred to it by the Chairman of Committees, Members to fill casual vacancies occurring in the membership of select committees and Members to form the panel of Deputy Chairmen of Committees. More transparency around the appointment of Committees would help to ensure public confidence in the process.

An easy but effective way to enhance the power of committees is to moderate the influence of political parties over committee membership, especially Chairmanship. Elected chairmen are considered a success because of the experience of the House of Commons, the Dáil Éireann and National Assembly for Wales. On the other hand many other legislatures do not elect their committee chairmen.

16. What is the ideal number of members for investigative and scrutiny committees?

The ideal number of members for investigative and scrutiny committees depend on the subjects being investigated or the scrutiny being undertaken. House of Lords committees normally comprise 12 members. It is very difficult to identify the optimum number however the following principles should apply:-

- (a) there should be a balance of political representation on the committee.
- (b) there should be a balance of expertise on the committee.
- (c) consideration of gender, race and disability balance is essential.
- (d) the number of committee members should be an odd number.

The Commission on Parliamentary Reform reported that the number of MSPs on Scottish Parliament committees was highlighted as another reason why committees do not operate as effectively as they could. This aspect was considered by the Scottish Parliament’s Standards Procedure and Public Appointments Committee in 2013 when it recommended committees should normally have a maximum of seven members. The Commission noted that critics argue that party dynamics are more likely to be replicated within larger committees (roughly interpreted as being eight members or more), thus preventing its members from developing a distinct committee identity. It is also argued larger committees are too unwieldy to discuss detailed and complex policy issues effectively. Supporters of larger committees,

however, argue they enable all the parties in Parliament to have a voice and can provide additional scrutiny capacity if more diverse means of inquiry are adopted (such as sub-committees and reporters)(paragraphs 39 and 40).

17. Should there be a written role description for committee chairmen and members to clarify expectations from the outset?

We take the view that there should be a written role and description for the Committee Chairmen and members to clarify expectations for the outset and that this should be supported by a system of orientation and training, performance review and post inquiry review.

Committee effectiveness

18. Is there anything committee staff could do to support chairmen and members to be more effective in their committee work?

It is difficult to answer this question without full knowledge of the current level of support which committee staff provide to Chairmen and members although Committees should have specialist staff in areas which are particularly complex or difficult to deal with.

19. How can the timeliness and content of Government responses be improved?

The timeliness and content of Government responses could be improved by means of a statutory duty on Government to respond to the reports of House of Lords Committees. Failing compliance with the time limit to respond the Government should be under a statutory obligation to provide reasons for that failure. Each report should include an invitation for the Government Minister to appear personally before the committee to explain the Government's response.



For further information, please contact:

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131 476 8163

michaelclacy@lawscot.org.uk