



Hansard Society evidence to the House of Lords Liaison Committee: Review of investigative and scrutiny committees

Submitted: May 2018

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Summary

This submission covers:

- Strengths and weaknesses of the current House of Lords committee structure
- Possible changes to the current structure, focusing on: the quality of the legislative process; devolution; and policy foresight/horizon-scanning
- Brexit-related considerations
- Trade policy
- Public engagement

We recommend:

- On the quality of the legislative process: the creation of a Legislative Standards Committee and a Post-Legislative Scrutiny Committee, and that the remit of the Delegated Powers and Regulatory Reform Committee be amended
- On devolution, the creation of a new permanent committee
- On policy foresight/horizon-scanning, the creation of a new 'Future Forum' or Committee
- On Brexit-related matters, that the European Union Committee will need to continue to operate during any post-Brexit transition period as provided for in the draft UK-EU Withdrawal Agreement
- On trade policy, that the Lords committee structure will need to change to accommodate scrutiny of this new policy area, and that the House will need to develop a view, ideally sooner rather than later, on how this might best be effected, in cooperation with the Commons.

Submission

Strengths and weaknesses of the current House of Lords committee structure

1. The House of Lords committee structure has a number of important strengths that should be retained in any reformed system:

- It is more flexible than the Commons' system: the fact that the committee structure is not tied to the shadowing of government departments allows the Upper House more discretion. And the mix of *ad hoc* and sessional committees allows the House to combine timely one-off investigation of

particular issues - particularly ones that might otherwise be overlooked - with ongoing scrutiny of policy areas.

- The current committee structure also more easily accommodates and encourages scrutiny of cross-departmental topics than its counterpart in the Commons, where 'siloed' scrutiny has been a perennial weakness (although one which Commons select committees appear increasingly inclined to address).

2. These strengths of the current structure are augmented by other features of the Lords committee system, and of the Upper House more generally:

- House of Lords committees are reliably up and running after general elections more quickly than their Commons counterparts. This reduces the risk of scrutiny gaps.¹ (For example, the Commons European Scrutiny Committee met for the first time after the general election on 8 June 2017 on 1 November 2017; the Lords European Union Committee was nominated on 27 June and was already working in early July.) The Lords' speedier process reflects the facts that committees are not nominated exclusively on a party basis, chairs are not elected and Peers control the timetable for business on the floor of the House.
- Many members of the House of Lords bring specialist expertise and experience to select committee work and, in the absence of constituency commitments, are able to devote time to the detailed reading and scrutiny involved in its effective discharge. It is a strength that the less partisan nature of the House, and the absence of any need to appeal to particular constituencies and audiences, means that committees are less likely to focus on short-term headline-grabbing inquiries (although this of course makes them less attractive for media coverage and public engagement).
- The quality and rigour of their inquiries means that House of Lords committees are respected and listened to by government and other stakeholders. Several permanent committees – particularly the Constitution and Delegated Powers committees – are important sources of persuasion and pressure. Their reputation is such that government is mindful of them as policy is formulated, and their advice, expectations and requirements are set out in Whitehall guidance documents. They have what Professor Meg Russell

¹ "A summer without select committees - and why it must never happen again", Hansard Society blog, 3 September 2017, <https://www.hansardsociety.org.uk/blog/a-summer-without-select-committees-and-why-it-must-never-happen-again>

describes in her research on committee scrutiny as the ‘power of anticipated reaction’, and are often cited as examples of best practice in committee scrutiny in other jurisdictions.

- Compared to their Commons counterparts, House of Lords committees have easier access to time on the floor of the House for their reports to be debated. This gives committee reports greater visibility and impact, at least within the House.

3. The current House of Lords committee system also has some weaknesses:

- The current system of rotation for committee membership risks losing expertise in select committee work, and wastes experience (although there are also arguments in favour of rotation, such as the risk of ‘groupthink’ or unchallenged ‘ways of doing things’ arising on committees with unchanging membership; or of members - however unwittingly - potentially being ‘captured’ by relevant government department(s) or other stakeholders). Rules governing the membership of committees have been influenced over time by the increasing size of the House and the desire to ensure that, of Members who wish to participate in committee scrutiny, as many as possible have an opportunity to do so. However, the current review is an opportunity to examine whether retirements from committees could be staggered more effectively.
- There are three shortcomings in the current operation of *ad hoc* committees which could usefully be addressed:
 - It is unclear how the selection list of subjects for possible *ad hoc* inquiries is developed. Greater transparency would be advisable.
 - Because *ad hoc* committees are disbanded on publication of the inquiry report, it is more difficult to follow up their recommendations (although we are aware that this is an issue on which the Liaison Committee has previously been engaged).
 - The welcome flexibility to pursue one-off investigations which is offered by *ad hoc* committees arises only once a year. The system might benefit from even greater flexibility, to enable the House to respond quickly to unforeseen developments of public importance that are not picked up by House of Commons select committee scrutiny but where an inquiry is warranted. This would enable the

House to contribute to the national conversation in a timely way at a time of maximum attention and engagement.

Subject matter and structure: possible changes to the architecture of the current system

4. To build on the strengths of the current committee system, we suggest that attention could usefully focus on three areas: quality of the legislative process; devolution; and policy foresight/horizon-scanning. The extent to which any changes can be resource-neutral, *i.e.* achieved through the redeployment of resources, will depend heavily on decisions about the future scrutiny of Brexit and post-Brexit EU-related matters.

Quality of the legislative process

Legislative Standards Committee

5. The Hansard Society has long been an advocate of a Legislative Standards Committee. The proposal has, in recent years, been endorsed by the House of Commons Political and Constitutional Reform Committee (PCRC), the House of Lords Leader's Group on Working Practices and the Constitution Committee.

6. As we stated in our evidence to the PCRC in 2013, 'Parliament should at least be a partner in the process of setting the standards of what constitutes a well-prepared piece of legislation'. A committee charged with permanent oversight of legislative standards would provide a forum for ongoing debate about the issues and engage a range of stakeholders from the academic, legal, and civil society sectors. It would incentivise ministers to pay more attention to the standards agenda and hold them to account for it. In addition to calling a minister to answer questions about the preparation of a bill for which s/he is responsible, a Legislative Standards Committee could question the Leaders of both Houses about standards, the legislative programme and linked issues such as the use of parliamentary time. By shining a light on both good and bad practice and holding ministers to account for both, a committee would provide a focal point to encourage more of the former and less of the latter. It would also enable thinking *about* what constitutes legislative standards to be refined over time, in response to the changing legal, political, regulatory and technological landscape.

7. Ideally, a Legislative Standards Committee would be set up on a joint basis with the House of Commons. However, MPs have shown little or no interest in having

such a Committee, and did not act on the PCRC's recommendation in favour of one in 2013. The House of Lords should therefore fill this important gap in the legislative scrutiny landscape.

Post-Legislative Scrutiny Committee

8. The potential value of post-legislative scrutiny is widely accepted but the practice has not been widely adopted. It is a core task of House of Commons departmental select committees but is rarely undertaken. Most of the post-legislative review that has taken place has been undertaken by Lords *ad hoc* committees. However, the process for choosing the pieces of legislation that should be subject to review by such committees does not appear to be systematic. In addition, the number of Acts looked at, via one committee each session, is necessarily limited.

9. A permanent committee tasked with scrutiny of the departmental reviews of Acts (published three to five years after Royal Assent) would contribute to the 'circle of learning' about policy development and the legislative process. A new Post-Legislative Scrutiny Committee could have sub-committees to enable it to consider more than one Act at a time.

10. Any new Legislative Standards Committee and Post-Legislative Scrutiny Committee would have to liaise closely with the Constitution Committee (which has hitherto taken a lead on legislative standards) and the Delegated Powers and Secondary Legislation Scrutiny committees. Indeed, there might be occasions when a joint inquiry might helpfully explore and pursue issues of common concern.

Delegated Powers and Regulatory Reform Committee (DPRRC): expanded remit

11. We have previously recommended that the DPRRC's remit should be changed so that the Committee could report on bills when they begin their parliamentary passage, whether that be in the Commons or the Lords, rather than wait until Commons-first bills reach the Upper House.²

12. This reform would push at the commonly-understood boundaries of bi-cameral scrutiny. It would also require an increase in DPRRC resources. However, it would ensure that the House of Commons is better advised on the nature of delegated powers in bills than is generally the case at present. The DPRRC's decision to report on the EU (Withdrawal) Bill and Taxation (Cross-border Trade) Bill when they were

² R. Fox and J. Blackwell (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, London)

introduced into the Commons has been extremely helpful to MPs in their deliberations on the powers contained in this legislation. The precedent has been set and should be built upon.

Devolution/Inter-parliamentary relations

13. Devolution-related matters are currently dealt with largely by the Constitution Committee. However, with issues relating to devolution and relations between the nations of the Union taking on ever-increasing importance, there is a case for a new permanent committee on devolution. Any such committee should have a sub-committee structure modelled on that of the EU Committee but with one sub-committee for each of the nations.

14. As well as improving awareness and scrutiny of devolution-related issues at Westminster, such a committee could help strengthen relations among the UK's legislatures by acting as a focal point and perhaps exercising convening power. The Inter-parliamentary Forum on Brexit could act as a precedent in this regard.

Future Forum: Policy foresight/horizon-scanning

15. Various House of Lords *ad hoc* committees have addressed long-term, cross-cutting policy issues such as social mobility, long-term sustainability of the NHS, and citizenship and civic engagement. We see value in the creation of a permanent committee where such issues could be discussed, not only by politicians, officials and civil society representatives but also by citizens. Such an initiative would be innovative in the Westminster context.

16. A permanent committee which could undertake a wide range of future-focused scrutiny on an ongoing basis might obviate the need for more *ad hoc* committees. It might also ensure that important recommendations are followed up more effectively than at present.

17. Subject to the breadth of the remit of any such new committee, the existing Communications and Science and Technology Committees could potentially be subsumed into this new body, addressing the ongoing concern that the latter is duplicative of work already undertaken in the House of Commons.

18. This new Committee could also be a laboratory for innovation in public engagement and consultation. A number of Lords committees – Constitution, Delegated Powers, Economic Affairs, and potentially Legislative Standards, if such a Committee were established – have subject matter which does not readily lend itself

to broad audiences and media interest; generally speaking, outside Westminster, the work of such committees is of interest largely to expert stakeholders. By contrast, the issues that a new 'Future Forum' or Committee might investigate would lend themselves to potentially much broader public interest. In terms of public engagement and consultation, a number of other parliaments around the world have models that would be worth looking at. Historically, the leader in this field was the Committee for the Future (*Tulevaisuusvaliokunta*) (TVK) in the Eduskunta in Finland.

Brexit-related considerations

19. Brexit will almost certainly require that the current House of Lords committee structure be changed. For the long term, the scrutiny committee systems in both Houses will need to accommodate:

- i) scrutiny of policy areas in which the UK gains substantially expanded (e.g. agriculture) or new (e.g. trade) exclusive policy competences as a result of leaving the EU; and
- ii) scrutiny of future UK-EU relations, whether this is via some special body/bodies/procedure(s) or absorbed into broader processes for scrutinising the UK's international political and economic relations.

20. The two Houses' current European scrutiny systems are likely to become redundant, or at least substantially reduced in scope. This will have implications for their associated committees and the resources – at Westminster and in Brussels, in the shape of the National Parliament Office – that support them.

21. The Lords committee system is more directly implicated in these changes than its Commons counterpart, because of the greater extent to which the Lords EU Committee conducts policy inquiries as well as document-based European scrutiny, compared to the House of Commons European Scrutiny Committee; and because of the more central position that the EU Committee and its sub-committees hold in the overall system of Lords scrutiny committees.

22. As of early May 2018, almost all relevant aspects of Brexit remain uncertain, constraining the extent to which decisions about Brexit-related scrutiny changes could be taken or implemented now. It is to be hoped that much of this uncertainty will have been eliminated by the time that the Liaison Committee reports on its current review before the end of 2018.

Post-Brexit transition period

23. If there is a UK-EU Withdrawal Agreement as per the draft published on 19 March 2018, we have identified three specific scrutiny tasks for Parliament that would arise:³

'Standstill' transition period

i) Parliament would continue to need to *monitor new EU law and policy*, inasmuch as the UK would be obliged under the Withdrawal Agreement to take on new EU law coming into force during the transition. The considerations about when such scrutiny could 'safely' lapse (because all further new EU law would come into force only after the UK was no longer obliged to apply it) would replicate those that applied with respect to 'Brexit day' in the early part of the post-EU referendum period, before a 'standstill' post-Brexit transition became the most likely scenario. However, depending on the nature of the post-transition UK-EU relationship, new EU law coming into force after the end of the transition might continue to have relevance for the UK.

ii) Parliament would continue to need to *scrutinise the actions of the UK government at EU level*, even though these would be radically more limited than they are with the UK as a Member State. The draft Withdrawal Agreement provides for the UK to have some limited consultation rights (Articles 123(5) and (7), 124(2) and (5)); to decline to be bound by some EU CFSP decisions where it would have had a veto as a Member State (Article 124(6)); and to continue to be able to opt in to new justice and home affairs law where that amends law to which the UK has already opted-in (Article 122(5)).

These - i) and ii) - are tasks which are already carried out through the European scrutiny system, as operated in the Lords by the EU Committee. This would suggest that during any transition the EU Committee should continue with this aspect of its work essentially as now. (With the UK outside the EU, there would be less need for the Committee's traditional inquiry work into EU policy areas.)

However, the informational and institutional underpinnings of the European scrutiny system rest on the UK's position as a Member State: the system is triggered when the UK government deposits in Parliament documents which it receives from the EU institutions as a Member State government – but it appears that it will not receive such documents during transition; and scrutiny is tied to UK ministers' actions in the EU Council, but ministers will not be members of the Council after the UK leaves the

³ "Brexit: Parliament's Five Transition Tasks", Hansard Society, April 2018, <https://www.hansardsociety.org.uk/publications/briefings/brexit-parliament's-five-transition-tasks>

EU. Our reading of the draft Withdrawal Agreement (Article 123(2)) is that the UK Parliament *will* continue to be sent some EU documents by the EU institutions. This could provide the basis for some monitoring work. Nevertheless, as soon as any ‘standstill’ transition became certain, the government and the European scrutiny committees in the two Houses would need to agree new arrangements for transition-period government accountability in the absence of UK membership of the EU Council.

Withdrawal Agreement Joint Committee

iii) Parliament would need to exercise *oversight of the UK-EU Joint Committee* provided for in the draft Withdrawal Agreement. We commend the EU Committee for already starting to press the government on its plans in this respect,⁴ and the EU Committee would again seem to be the appropriate body to take this forward for the Lords. When considering appropriate parliamentary oversight, it should be borne in mind that the Withdrawal Agreement Joint Committee is intended to outlast the transition period; and that, post-Brexit, such bilateral Joint Committees could become a more frequent feature of the UK’s international relations.

UK-EU negotiations

24. Negotiations between the UK and the EU on an agreement or agreements to govern their post-transition relationship are likely to continue during the transition period. These negotiations will continue to require scrutiny. Given that the EU Committee and its sub-committees are already devoting their inquiry work almost entirely to Brexit negotiation issues, the need for ongoing Brexit-related negotiation scrutiny could constrain the extent to which exit from the EU in March 2019 in itself reduces the demands on the EU Committee system.

Post-transition: the long-term UK-EU relationship

25. The appropriate form of parliamentary scrutiny for the post-transition UK-EU relationship will be determined by the nature of that relationship. The options lie on a spectrum from, on one extreme, the EU relationship being ‘just another’ UK international relationship that may be scrutinised as part of broader international affairs arrangements; to, on the other, a uniquely close relationship that potentially requires a dedicated scrutiny body and/or process. One key issue will be the UK’s

⁴ EU Committee, Letter to Rt Hon David Davis MP on Draft Withdrawal Agreement, 21 March 2018, <https://www.parliament.uk/documents/lords-committees/eu-select/Correspondence-2017-19/20-03-18-draft-withdrawal-agreement-letter-to-Rt-Hon-David-Davis.pdf>

relationship with new EU law - whether there is any UK commitment, or option, to take on new EU law as it comes into force. If so, dedicated scrutiny arrangements are more likely to be appropriate. Current scrutiny arrangements for the UK's JHA opt-in decisions could be relevant, for example. Another issue will be whether UK ministers or officials will participate in any kind of joint governance structures with EU counterparts, in which case, again, the activities of the executive in such structures will require parliamentary scrutiny. Pending greater clarity about the post-transition UK-EU relationship, the Liaison Committee - perhaps in concert with the Commons, via the Brexit Liaison Group - could usefully gather information on scrutiny arrangements employed by countries with parliamentary systems but differing relationships with the EU.

Inter-parliamentary relations in the EU

26. Both during any standstill transition period and - depending on the nature of the UK-EU relationship - potentially afterwards, inter-parliamentary contacts within the EU could play a useful role as a source of information on EU developments and a contribution to a positive relationship. Lords committees and their members have often been active on this front. Our understanding is that the UK Parliament's post-Brexit status has not figured largely in the formal proceedings of EU inter-parliamentary bodies since the UK referendum. Given the uncertainty over, but intended shortness of, the transition period, there may be a reluctance to expend significant energy creating formal rules for a 'departing state' status in such bodies akin to candidate state status.⁵ The Lords EU Committee could usefully explore with relevant Commons counterparts whether the UK Parliament would wish to be an invitee to EU inter-parliamentary meetings during any transition. In the longer term, it should be noted that EU relationships with many third countries involve an inter-parliamentary body constituted by the European Parliament and the relevant national parliament.

Trade policy

27. Among policy areas which are being repatriated to the UK, the Hansard Society is focusing in particular on trade policy, especially trade agreements, because of the importance of the political, policy and constitutional issues involved. The Lords committee structure will need to accommodate scrutiny of this new policy area. The Lords committee system is potentially in a strong position to make a valuable contribution, given the knowledge built up through the various EU Committee sub-

⁵ We have outlined current provisions on non-Member State parliaments in the rules of EU inter-parliamentary bodies in "Brexit: Parliament's Five Transition Tasks", Hansard Society, April 2018, <https://www.hansardsociety.org.uk/publications/briefings/brexit-parliament's-five-transition-tasks>

committees that have worked on EU external trade over the years, the relevant knowledge and experience available among Members of the Upper House, and the relative ease with which Lords committees can scrutinise issues which cross departmental boundaries, of which trade policy will be one. However, the role of Lords committees would, as ever, have to be balanced against the political position of the elected House.

28. As is the case for other international agreements, Parliament's role in trade agreements is constitutionally challenging because it engages the Royal Prerogative. Given the impending new salience of trade agreements, one of the questions that Parliament may wish to consider is whether to return to the issue of its role in UK treaty-making in general, or whether instead to focus exclusively on developing arrangements to scrutinise the making of trade agreements.

29. There are strong grounds for the view that the UK's default arrangements for Parliament's role in treaty-making will be inadequate for post-Brexit trade agreements. In particular, current arrangements weight Parliament's role towards the end of the treaty process, after international agreements have been signed and when they may need implementing legislation to be passed and/or consent granted for ratification. An effective process for making international trade agreements is likely to need parliamentary engagement at earlier stages of the process, before and during negotiations and before signature of any agreement.

30. The government has indicated that it proposes to implement trade agreements which are covered by the Trade Bill by using negative delegated powers, subject to little parliamentary scrutiny, partly because these agreements have already been subject to UK parliamentary scrutiny through the European scrutiny system.⁶ This potentially opens the way politically to a scrutiny system for other UK trade agreements which parallels the relatively early engagement and scrutiny reserve involved in the European scrutiny system. In any such system, a select committee scrutiny and reporting process would seem to be an appropriate and necessary part of the process. For effective select committee scrutiny of trade negotiations and trade agreements, there would be a premium on the accumulation of experience and the availability of legal and technical advice.

31. Whatever parliamentary scrutiny arrangements are developed for post-Brexit trade agreements, their effective operation will depend on the government and Parliament having a common understanding of the documentation and information

⁶ Trade Bill, Delegated Powers Memorandum, <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0122/Trade-Bill-Delegated-Powers-Memorandum.pdf>, and Impact Assessment, <https://www.parliament.uk/documents/impact-assessments/IA17-010.pdf>

the government will automatically provide to Parliament, when it will do so, and how the material may be used; on this understanding encompassing all appropriate material; and on both sides sticking to the understanding reached. Document deposit via the European scrutiny system is an obvious precedent. So far, the record of the Brexit process on these matters is not encouraging.

32. The government's plans for Parliament's formal involvement in trade agreements not covered by the Trade Bill are unclear. Parliament could usefully take the initiative now in developing its own proposals. In this context, we welcome the inquiry into 'UK Trade Policy Transparency and Scrutiny' announced by the Commons International Trade Committee on 11 May. Give that this is the first select committee inquiry into this issue, the matter is increasingly urgent and cross-House cooperation on the issue is unavoidable, we urge Lords select committees - perhaps through the Liaison Committee - to engage with this Commons inquiry.

Public engagement

33. Any public engagement strategy has to define clear objectives. What do committees want to achieve? For example: widen the range of evidence submissions beyond the 'usual suspects'? Raise the profile of the committee and its inquiries? Garner more media coverage? Raise public awareness of Peers' work? Tackle negative public perceptions of an unelected House? The desired objective(s) would shape the public engagement strategy.

34. Based on our recent research into public attitudes to Parliament, current barriers to public engagement include:

- *Language*: the public struggle with what they see as the use of 'jargon' by politicians, rather than 'plain language'. Basic terminology confuses and frustrates those outside. For example, for those facing cost-of-living pressures, a 'bill' is something they struggle to pay each month. They do not understand the word in relation to legislation.
- *'Broadcasting' rather than feedback*: In addition to using plain language, the public want communications to convey milestones. Strongly conditioned by the idea that 'nothing ever changes', the public want to see clear demonstrations of progress. Much engagement by parliamentary committees is entirely in 'broadcast' mode, when what the public generally say they want is a 'feedback' loop.
- *Mis-prioritisation of communication channels*: Twitter is often used by committees and is a good way of reaching the Westminster political bubble and expert and stakeholder groups beyond. But for the general public,

Facebook is a far more popular social media channel; our research suggests that Twitter barely figures. And, in any case, as our latest Audit of Political Engagement illustrates, traditional print media and broadcasting channels remain by some distance the most popular way in which people access news and information about politics.