



# Post-Legislative Scrutiny

## Introduction

This Guide to Parliaments looks at the recent innovation of Post-Legislative Scrutiny (PLS) and describes how PLS can enhance the parliamentary and legislative process.

Post-Legislative Scrutiny involves Parliament, usually through its committees, scrutinising and evaluating the effects and consequences of a law after it has been implemented. If appropriate, the Committee may make recommendations for changes to the law or to how it operates in practice. The main subject areas covered in this Guide to Parliament are:

- What is Post-Legislative Scrutiny?
- Why PLS matters to the Legislative and Parliamentary Process
- How to Undertake PLS
- Making an Assessment: Criteria used in PLS
- Taking a Realistic Approach to PLS
- Choosing a Law for PLS
- Gathering information: Who to approach
- PLS in action: Examples from Different Countries
- Making an Impact: Recommendations, Reports and Follow-Up.

## 1. What is Post-Legislative Scrutiny?

Once a law is enacted and implemented, its provisions bind society, unless and until it is subsequently repealed or amended. Most laws are generally brought forward by Government and are used to provide the legal framework for Government powers and policies and provide the authorisation for public services. Yet it is often only after implementation that the effects and implications of a law

can be assessed to determine whether it has met its policy objectives, whether it has worked well in practice or if it has unintended consequences.

PLS therefore provides a way for Parliament to scrutinise the impact and effects of laws. It also enables Parliamentarians to listen to the views and experiences of those affected by the law and be responsive to their concerns.

## 2. Why is PLS important to the legislative and parliamentary process?

Parliaments world-wide are increasingly becoming aware of what has been described as the 'end-to-end' nature of an effective legislative process.

An end-to-end legislative process begins with parliamentary scrutiny of the principles and policy objectives behind legislation and considers early drafts of legislation. This initial stage is often described as pre-legislative scrutiny. Such pre-legislative consideration helps to ensure that proposed laws, when they are eventually introduced into Parliament, are of higher quality and better address the issues.

Once introduced into Parliament, legislation is scrutinised during the formal legislative stages, such as debates in plenary session and detailed consideration in committee. These stages remain the pivotal part of the legislative process, including: votes on the principles of the legislation and on its details, proposed amendments, and the process of turning bills into laws.

There has been traditionally a tendency that once a law has been approved

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and enacted, Parliament's attention then moves on to other matters and the effects of the law may not receive sufficient, or indeed any, further consideration.

It is, in fact, only after a law has come into force that its real effectiveness can be judged – even the best drafted laws are of no use unless they work in practice.

For this reason, Parliamentarians should follow-up afterwards to make sure that the law is fully implemented and that it is achieving the results that were originally intended. This final stage of the end-to-end legislative process can be termed 'Post-Legislative Scrutiny.'

#### The Unique Role of MPs in PLS

The media or academics or civil society organisations can undertake a useful form of post-legislative scrutiny and can launch studies and campaigns about how laws are working. But it is only elected MPs, representing the people, who have the legitimate mandate to carry out PLS. This is because post-legislative scrutiny is essentially a political process; part of the way in which elected representatives oversee public policy and its implementation.

#### Identifying Success

It is important to note that PLS should not be exclusively about identifying problems with legislation or showing that its objectives have not been met. On some occasions, the law may be working well and PLS can be useful in highlighting models of good policy and practice so that future legislation can learn the lessons of a successful approach.

### 3. How to Undertake Post-Legislative Scrutiny

There is no fixed or agreed method that should be followed to carry out PLS. However, there are some core principles and functions on which PLS should be based.

A period of time should elapse before PLS is undertaken to allow the effects of the law to become apparent. In the United Kingdom, post-legislative scrutiny usually takes place three to five years after the law has been passed, although if there are obvious and pressing issues arising from a law's implementation, PLS may be undertaken more quickly.

The methods used and outcomes of PLS are similar to those used by committees in oversight or policy inquiries. The parliamentary committee which covers the relevant policy area will most often undertake the PLS inquiry and will follow

the normal procedures for a committee inquiry e.g. the collection of information and views about the law (written and in oral evidence sessions), analysis of the information received, followed by committee deliberations, the publication of a report and, if appropriate, recommendation for amendment of the law or proposal to reform how it works in practice.

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, provides further information about oversight and policy inquiries by parliamentary committees.

### 4. Making an assessment – What criteria should be used in PLS?

A PLS inquiry should first establish some factual information about the implementation of the law to provide the framework for the analysis, for example:

- Information on when and how different provisions of the Act had been brought into operation.
- Information highlighting any provisions which had not been brought into force and the reasons why not.
- Any associated secondary legislation, rules or guidance issued in connection with the law.
- A summary of any other research or assessments of the law which have been conducted, for example, by Government or universities.

The nature of the PLS will be determined, to a certain extent, by the subject matter and provisions in the Act and there may be some different criteria for different laws. However, a number of key standards and criteria for post-legislative scrutiny can be identified:

- Has the law met its policy objectives?
- Has the law had any unintended consequences (good or bad)?
- What has been the administrative impact of legislation?
- Has the way that it has been put into practice caused any problems?
- Has the law had legal challenges or interpretations, which reveal deficiency or confusion?
- Is the law clear, unambiguous and well-drafted?
- Does the law complement or conflict with other laws and policies?
- Has the law impacted differentially, or perhaps unfairly, on different groups within society?
- Do the provisions of the law need to

be more widely explained, promoted or advertised?

- Is there sufficient knowledge and understanding of the law?
- Has the funding for implementation been sufficient? Has the law provided good value for money?
- What good practice and other lessons can be learned from the implementation of the law?
- Has the political and legal context changed so that the law is no longer needed?

### Assessing Policy Objectives

In evaluating the success of the law's policy objectives, it can be helpful to judge the impact and operation of the Act against previously published material, including:

- The stated objectives for the legislation when it was introduced.
- Whether any consultation documents, policy statements, explanatory notes or Impact Assessments had been produced when the law was first produced.
- The content of the debates in the Plenary Chamber and committee scrutiny when the law passed through Parliament.
- The findings of any pre-legislative scrutiny undertaken.
- Whether the Government made any statements, assurances or clarifications about how the law was intended to work in practice.

## 5. Taking a realistic approach to PLS – some issues to take into account

There are some issues related to PLS of which parliamentarians need to be mindful. First, the natural focus of a Parliament's work will be on current legislation and policies, rather than looking back at laws that have already passed. In fact, a great deal of a Parliament's time is already spent on the legislative process, and it is important not to expect MPs to carry out too many PLS inquiries. A system of PLS must be realistic and set within the context of the many competing demands on individual parliamentarians and committees.

Secondly, the Executive may be nervous that post-legislative scrutiny will take up time and energy of government officials and possibly expose matters that they would prefer are kept hidden.

Also, Parliamentarians should avoid re-opening the original debate that occurred when the law was passed. PLS should be an assessment of how an Act has worked and not a replay of all the same policy and political debates that went into devising the

law in the first place. That is not the role of PLS.

### Looking at the Cumulative Effects of Legislation

It is also important to recognise that many pieces of legislation amend, or build upon, existing legislation. Looking at the individual law in isolation might therefore only provide a partial insight. PLS therefore may sometimes have to consider the broader picture of how the Act operates in the context of other existing legislation and policy.

### Piloting Post-Legislative Scrutiny

It may be sensible to pilot different methods of PLS to monitor and evaluate which ones have proved most effective before deciding on the best form of PLS to be adopted as the standard model.

## 6. Choosing a Law to be subject to Post-Legislative Scrutiny

It is vital to recognise that not all laws need to be subject to PLS. First, a reasonable period needs to elapse between a law coming into force and the decision to undertake post-legislative scrutiny into that law. Three to five years after a law has been passed is usually a good time to see how it is working. Enough time has passed for initial teething troubles to subside and for those affected to make sound judgements based on the evidence of the law's impact.

Secondly, a law which is very contentious politically may not be a good candidate for post-legislative scrutiny and will most likely lead to re-running old political arguments. PLS may not be suitable for laws where there are intense disagreements between parliamentarians about the fundamentals of the policy underpinning the law.

Given that parliamentarians are always pressed for time, only a small number of laws can be selected for PLS based on factors, such as:

- Representations from individuals or organisations that a law needs review.
- Concerns raised by MPs about the operation of the law.
- A public petition to Parliament.
- Media coverage that a law is not working well.
- Legal challenges or comments from members of the judiciary.
- A requirement in the legislation itself that a review should be held such as a 'sunset clause' (which is a clause that provides that a law will cease to have effect on a particular day and stipulates that it needs to be reviewed).

## 7. Gathering information: Who to approach?

Once a law has been selected for PLS, the next stage is to gather information from stakeholders about how the law has worked in practice. This can be done in a variety of ways:

- Inviting written information, and analysing individual complaints, including those raised with MPs by the public.
- Commissioning opinion polls and questionnaires to ask questions to a cross-section of the public.
- Holding oral hearings hosted by the Committee.
- Inviting information from social media, including blogs and web-forums.
- Conducting interviews, hearings and focus groups with targeted individuals or groups.
- Commissioning in-depth case studies of different regions, social or economic groups of people, selected for a detailed perspective.
- Identifying different stakeholders such as:
  - » The Government and Executive Agencies.
  - » Local or Regional Municipalities.
  - » Professional groups and representatives of private businesses.
  - » Experts and academics who have expertise in the area.
  - » Public bodies such as Audit Institutions and Regulators.
  - » The judiciary and legal profession who may know if the law has caused any difficulties of interpretation or implementation.
  - » International Agencies e.g. United Nations Agencies, International Labour Organisation.
  - » Civil Society Organisations: One primary motivation for PLS is to allow individuals and interested parties to give their views and experiences of how they have been affected by legislation.

As part of its inquiry, the committee will be able to compare and analyse the information collected against the criteria chosen to assess the law. The information will ensure the Committee's inquiry is based on evidence, not conjecture.

## 8. PLS in Action: Examples of PLS in different countries

### The United Kingdom experience

Introduced about 10 years ago, PLS in the UK has become part of regular parliamentary activity. It is now usual practice for the UK Government to provide a Memorandum on the law to the relevant specialist parliamentary Committee, between three and five years after every law

is passed. This Memorandum sets out the Executive's view on how effective the law has been. The Committee then studies the Memorandum. It might decide to take no further action; this is what happens in the majority of cases.

But in a few selected cases, perhaps three or four laws in total across Parliament each year, the Committee will decide that the law should be subject to a full post-legislative scrutiny inquiry. Examples of PLS have ranged widely across legislative area. Laws on Freedom of Information; Extradition; Family Law; Mental Health; Adoption and Gambling have all been subject to full PLS inquiries in the United Kingdom. Parliamentarians are supported by a Scrutiny Unit which contains expert research staff including lawyers who provide specialist analysis for PLS.

### PLS in Honduras

In Honduras, Parliament has conducted post-legislative scrutiny on the law on people-trafficking. As part of the PLS inquiry the Congress of Honduras has heard testimony from victims of people-trafficking about the effectiveness of the law. After the inquiry, the government agreed to provide greater resources to anti-human trafficking organisations.

### PLS in Iraq

Some notable examples of PLS can be found in the Iraqi Parliament. The Human Rights Committee in the Iraqi Council of Representatives conducted in 2016 successful post-legislative scrutiny of the Human Trafficking Law 2012. The Committee took extensive evidence from interested parties, identified loopholes in the law and made a series of recommendations for improvement and better implementation by the Executive, the Judiciary and the Human Rights Commission. As part of the PLS inquiry the Human Rights Committee received correspondence from those affected by human trafficking and held face-to-face discussions with key individuals, such as judges, and civil society organisations.

A different PLS example from the Iraqi Parliament involved the Reporters Rights Law 2011. The PLS inquiry by the Culture and Media Committee looked at how the law protected the rights of journalists and proposed improvements and amendments to the law. The Committee consulted international and local organisations concerned with the rights of journalists and the media, as well as a hearing in person from the National Union for Journalists and the Association for the Defence of Journalists' Rights. The Committee liaised with the Regional Offices of the

Iraqi Parliament to hear the views and experiences of those affected by the law in different localities within Iraq.

## 9. Making an Impact: Recommendations, Reports and Follow-Up

The outcome of a PLS inquiry will be usually be a published report containing the committee's judgement on the key issues relating to the law and stating its conclusions and recommendations.

PLS reports should be comprehensive and based on analysis of the information received during the inquiry. Reports of this nature should, wherever possible, be agreed unanimously by the Committee, to boost their credibility. The report may often contain critical elements, and proposals for reform and improvement, although sometimes credit and praise should be given when it is merited.

A copy of the report should be sent to the Government Ministry with policy responsibility for the law and the Ministry should be requested to respond to the conclusions and recommendations contained in the report within a fixed period of time. In the United Kingdom, the Government response is expected within 60 days.

### Dissemination

The final report should be published and placed on-line. The committee should alert the media to the report's publication through issuing press releases.

Copies of the report should be sent to interested and expert organisations and individuals. A copy should always be sent to all those bodies that provided written information to the inquiry and to those who appeared before the committee.

Copies of the report, or information about the report, should be circulated within Parliament; for example, to the Speaker, political parties or blocs and other relevant committees.

### Follow-Up: What comes after the report?

Publishing the PLS report is not the end of the process. If the committee is not satisfied by the Government's response to the report, or perhaps if the Government has not responded at all, the committee should keep pressing for action, possibly by holding further sessions with the Minister or officials.

If the committee has made proposals for amendments to the law or to the way that it operates in practice, the committee

should follow-up to assess whether the Government has in fact carried out these changes, and whether these changes have actually made any difference.

## Conclusion

Post-legislative scrutiny that is planned well and executed well can ensure that laws are not just passed, but that they are implemented effectively.

Government and Parliament tend to shift their focus to other new political or legislative measures once a law has been passed. PLS can help to rectify this tendency and help the governmental system to address what it has already done and to look back reflectively. It is wasteful of parliamentary time, as well as potentially destructive of popular support, to pass laws that are not implemented well or which are seen as failing to meet their objectives. A culture that ensures that lessons are learned from post-legislative scrutiny can improve the whole legislative process.

PLS can also help to strengthen MPs' representative and oversight functions. It underpins the critical role that Parliament can play in citizens' lives by providing a mechanism for those affected – individual citizens, civil society groups and businesses – to feed their views into the parliamentary process. Effective post-legislative scrutiny will thus benefit the public that Parliament represents while also enhancing the role and the standing of the Parliament itself.

## About the author



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