The role of pre-legislative scrutiny in complex law reform - the case of LASPO and its consequences for family justice

by J. Angelo Berbotto

Introduction

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) is an Act of Parliament which made broad changes within various areas of the administration of justice in England and Wales. In particular, it affected access to legal aid in family law cases. Until 31 March 2013, means-tested legal aid was available for Private Family Law matters.[1] Since 1 April 2013, when LASPO came into force, parents were no longer entitled to legal aid except for those who could produce 'trigger evidence'[2] proving that they had been a victim of abuse. As a consequence of not qualifying for legal aid anymore, many parents who, post-separation, were not able to agree on the arrangements in relation to their children, started filing their contact and residence applications and representing themselves in the English family courts. They are known as litigants in person (LiPs) and their numbers have increased. Between April and June 2017 in 36% of disposals where neither the applicant nor respondent were represented, compared with 34% in the previous quarter. The situation was described by Lord Thomas of Cwmgiedd as 'deeply worrying'.[3] This begs the question whether the change in the law was efficient, that is, whether it produced the desired purpose with minimum wasted effort or expense.[4]

LASPO was not subject to pre-legislative scrutiny. It was introduced in the House of Commons on 21.06.2011 with a second reading a week later. It underwent several changes before receiving Royal Assent almost a year later, on 1 May 2012.

At the end of 2017, the Government submitted a post-legislative scrutiny Memorandum of LASPO to Parliament.[5] It is expected that Parliament will carry out post-legislative scrutiny of the Act at some point in 2019. LASPO has received widespread criticism.

Hypothesis

My hypothesis is that pre-legislative scrutiny of the Bill could have avoided negative outcomes for LiPs, the courts and ultimately for children in family law matters as a result of the reforms to legal

[1] On 1 April 2013 the *Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act* 2012 http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted came into force, restricting the provision of legal aid in Private Family Law cases. As a result, since then, legal aid for divorce, contact and residence proceedings has been restricted. Legal aid remained automatically available only for Public Law matters, that is where the state (usually represented by a Local Authority's social services) starts care proceedings because they believe that the child is at risk of significant harm. In these type of cases, the child and the parents automatically receive legal aid for their representation in court, the applicant local authority is represented by an in-house lawyer or by counsel but it is not covered by legal aid.

[2] Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 contains a list of what constitutes trigger evidence.

[3] M Fouzdep 'Litigant-in-person figures expose family courts crisis' in *The Law Society Gazette* 29 Sep 2017 online edition https://www.lawgazette.co.uk/law/litigant-in-person-figures-expose-family-courts-crisis/5062993.article

[4] H Xanthaki, *On the transferability of legislative solutions: The functionality test*, in Constantin Stefanou and Helen Xanthaki, *Drafting legislation: A modern approach* (Ashgate 2008) 5

[5] Ministry of Justice *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum* Submitted to the Justice Select Committee on 30.10.2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf

aid brought about by LASPO. Pre-legislative scrutiny would have been a better forum to consider the policies in the reform of legal aid than the parliamentary procedure stages as the former could have dealt in depth with the proposed changes and the select committee would have been a more appropriate forum to scrutinise the draft Bill than the House.

The methodology I will use to prove the hypothesis is to examine the submissions received by Parliament, throughout the parliamentary procedure, from civil society and professionals working in the area of family justice and the subsequent reviews of LASPO by the Justice Committee and evaluations by third parties.

Why pre-legislative scrutiny was not used in respect of LASPO?

Pre-legislative scrutiny has been in operation in Westminster since the 1990s. The Hansard Society's report in 1993[6] led the House of Commons to appoint a Select Committee with the aim of improving law-making. The select committee's report recommended using pre-legislative scrutiny in order for the entire House, the backbenchers and the opposition to make substantial contributions to draft Bills, because it noted that Ministers would be more receptive to suggestions on changes to the draft before it is published, as a way to signal Parliament's opening towards those most affected by legislation, and because it would, most likely, mean less time spent in the final stages of the law-making process, fewer debates and better legislation without the need to amend it in the short term.[7] Pre-legislative scrutiny is a valuable tool in ensuring that the Bill encapsulates sound policy, as it requires to confront the policy to available evidence about what the policy is likely to achieve. It can be effective because usually at the pre-legislative stage, the Government's policy has not been finalised, hence it is easier to influence it.[8] Furthermore, in the case of LASPO, detailed scrutiny would have been beneficial due to the sweeping reforms it attempted.

LASPO was passed in 2012, during the Conservative-Liberal Democrat coalition. Although under the Coalition Government (2010-2015) 35 Bills were subjected to pre-legislative scrutiny, LASPO was not amongst them.[9] At the time, the Government had given notice that it would undertake a review of Legal Aid.[10] However, the 2010 Queen's Speech contained no references to a Bill reforming Legal Aid.[11] There was no Queen's Speech in 2011[12] so no formal announcement was made about reforming Legal Aid. In the end, no draft Bill was provided for pre-legislative scrutiny. However, the Government did conduct consultation for three months from November 2010 to February 2011.[13] In the consultation document the Government made it clear that the goal was to reduce the Ministry of Justice's budget by 23% and, in order to do so, it proposed to reform Legal Aid to save GBP 350 million in 2014-15.[14] In

[6] Hansard Society *Making the Law* Report on the Legislative Process chaired by Lord Rippon of Hexham, (1993) ISBN 090043224
[7] Select Committee on the Modernisation of the House of Commons *First Report* 23 July 1997 https://publications.parliament.uk/pa/cm199798/cmselect/cmmodern/190i/md0102.htm
[8] Bingham Centre for the Rule of Law *Written evidence to the House of Lords Constitution Committee´s large-scale inquiry into the legislative process* 16 October 2016 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/legislative-process/written/41147.html
[9] R Kelly *Pre-legislative scrutiny under the Coalition Government: 2010-2015* House of Commons Library 13.08.2015 p.6 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05859
[10] Cabinet Office *The Coalition: our programme for government* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf May 2010 at p 23
[11] Her Majesty's Most Gracious Speech to Both Houses of Parliament delivered on Tuesday, 25th May 2010 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238331/9780101696524.pdf.pdf
[12] The Telegraph 'Labour fury over delaying of Queen's Speech' 13.09.2010 https://www.telegraph.co.uk/news/politics/7999958/Labour-fury-over-delaying-of-Queens-Speech.html
[13] Ministry of Justice Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP12/10 November 2010 ISBN: 9780101796729 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf
[14] ibid p 5

relation to family justice, the Consultation Paper explained that it proposed to remove the following categories from legal aid funding[15]:

(a) ancillary relief (property disputes upon divorce);[16]
(b) orders for child contact and/or residence;
(c) parental responsibility order;
(d) prohibited steps orders or specific issue orders;
(e) parenting orders;
(f) adoption;
(g) family maintenance;
(h) divorce, judicial separation, nullity and dissolution of civil partnership and international child abduction.[17]

The Government's assumptions in curtailing legal aid in family justice

The Consultation Paper contained the Government's proposals to reform family justice's access to legal aid as well as its assumptions. The proposed changes to legal aid access were based on the Government's consideration of:

(a) whether litigants were likely to be able to present their own case,[18]
(b) whether there were alternative sources of funding available or other routes to resolution (eg mediation),[19] and
(c) because "while we understand that those going through relationship breakdown may be dealing with a difficult situation, both emotionally and often practically too, we do not consider that this means that the parents bringing these cases are always likely to be particularly vulnerable (compared with detained mental health patients, or elderly care home residents, for example), or that their emotional involvement in the case will necessarily mean that they are unable to present it themselves.[20]

The Government was aware, at the stage of consultation, that the reforms to legal aid access would increase the number of litigants in person and acknowledged that such an increase "may potentially lead to delays in proceedings, poorer outcomes for litigants (particularly when the opponent has legal representation), implications for the judiciary and costs for Her Majesty's Courts Service." [21] Crucially, the Government acknowledged that there was little substantive evidence of the impact of litigants in person on the outcome of proceedings and that it was very difficult to assess whether "a case involving a litigant costs more than a case where there are two represented parties." [22]

Criticism throughout the stages of the parliamentary procedure

In March 2011, the House of Commons' Justice Committee printed its first report. By this time, the Government's Consultation Paper had received 5,000 submissions but the Government had not compiled the responses. The Justice Committee was clear that it had not had the opportunity to consider in detail many aspects of the Government's proposals.[23]

[15] Except in cases where there were allegations of abuse (domestic violence or sexual assault), where Legal Aid would still be available: Ministry of Justice Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP12/10 November 2010 ISBN: 9780101796729 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf p 40
[16] note 13 at p 59
[17] ibid p 69
[18] ibid p34
[19] ibid p 35
[20] ibid p 70
[21] ibid p 81
[22] ibid p 81
[23] House of Commons' Justice Committee *Government's proposed reform of legal aid* published on 30.03.2011 https://publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/681i.pdf p 5

This is understandable as this was no pre-legislative scrutiny, but something lesser than that for want of the draft Bill. Notwithstanding this, the Justice Committee went on to record its concern, on the evidence heard, that:

(a) parents in difficult cases involving children would face problems in accessing a court and representing themselves and that this could impact adversely on the wellbeing of the children concerned,
(b) that, while the consultation paper appeared geared towards meeting the interests of the party seeking legal aid, it did not meet the interests of children involved in proceedings,[24]
(c) that the use of mediation to divert as many cases as possible from the courts was prudent and generally in the best interest of both parties and any children involved, but it could not be a panacea and that it would not work in all cases.

Hence it asked further work on how difficult and unresolved cases can be dealt with if legal aid is not available. [25]

Early on in the parliamentary debates MPs asked relevant questions for instance, on whether the Bill could be amended to ensure that LiPs in private family law cases would not be able to cross-examine either children or other adults whom they are alleged to have abused,[26] or about the impact on the courts from the number of LiPs. [27] Evidence was heard from the Convenor of the Family Mediation Council about the very real danger that those cases which cannot be resolved in family mediation and have nowhere else to go, "will end up in court and you will have some very, very stressed-out litigants in person." [28]

When the Bill reached the House of Lords, similar concerns were ventilated. Lord Bach pointed out that there was no reliable research on the implications for LiPs and the courts if the reform went ahead.[29]

By 27 March 2012, the policy in the LASPO Bill on family justice legal aid had not been substantially altered. In the Lords, Baroness Butler-Sloss, who had served as President of the Family Division of the High Court from 1999 to 2005, had this to say:

"I strongly urge the Government to review the impact of the legal aid changes no later than a year from now, to see what happens to the family courts in the light of the removal of nearly all private law cases from legal aid. I am not sure the Government really quite accept what a number of us have been saying, to the Ministers in this House and the other place, about the impact on the courts. There

[24] ibid p 36
[25] ibid p 42
[26] Transcript of the Public Committee, afternoon session on 12.07.2011 Q122 by Helen Goodman, to which the response was by the Chairman of the Bar Counsel, Peter Lodder QC "I do not see how you can do that because who is going to ask the questions? In every case, there are questions to be asked, so that evidence can be contradicted and evidence that suggests that an allegation being made is false can be considered. But if you cannot ask questions of a witness because the only person available is the person who is accused[…]" https://publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110712/pm/110712s01.htm
[27] Transcript of the Public Committee, afternoon session on 12.07.2011 Q7878 by Yvonne Fovargue, to which the response was by the Chairman of the Bar Counsel, Peter Lodder QC "[…] what I hear from young family barristers is the danger of serious damage to the safety net for children, vulnerable people and hard-working families. What I hear from judges in already busy court centres is the significant risk that those people, who will now be forced to conduct their own cases—in other words litigants in person—will clog up the courts and dramatically increase the cost of the system. In our view, this is a serious and worrying prospect, particularly because among the wide group I speak to—not just other members of the Bar but judges, interest groups and members of the public who write because they share our concern for the interest of justice—there is huge scepticism that any savings will result from these cuts. Vulnerable people's positions are going to be compromised. People are going to be forced into a position where they have to act on their own behalf in alien surroundings under conditions of great stress and we think it will cost more."
https://publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110712/pm/110712s01.htm
[28] Transcript of the Public Committee, afternoon session on 12.07.2011 by Deborah Turner just before Q95 of Elizabeth Truss.
https://publications.parliament.uk/pa/cm201011/cmpublic/legalaid/110712/pm/110712s01.htm
[29] Lord Bach, Daily Hansard, House of Lords, 10.01.2012 at 4pm
https://publications.parliament.uk/pa/ld201011/ldhansrd/text/120110-0001.htm#12011050000484

will be longer lists. I know the Ministry of Justice is already aware that the lists in the courts are too long, and they will be increased substantially."[30]

LASPO in force – reactions from practitioners, civil society and Parliament

Monitoring of LASPO started early on. This was to be expected by the number of practitioners concerned and also affected by the LASPO reforms; for instance, in April 2013, the Law Society launched monitoring of LASPO in relation to family justice.[31] By October 2013, research confirmed that half of all actual domestic violence victims were not being provided with Legal Aid due to the new evidence criteria introduced by LASPO and accompanying regulations.[32] This had detrimental effects on those victims, who in the event that they wanted to take their case to court, either had to hire a lawyer or do it themselves as LiPs.

In September 2014, the Ministry of Justice released statistical information that confirmed that family cases had reduced (by 40%) in comparison to the previous year. Not because of the absence of family issues, but because of lack of access to Legal Aid.[33] In November 2014, the National Audit Office confirmed that there had been a 22% increase in cases involving contact with children (Children's Act private law matters) in which neither party was legally represented, an increase of 30% across all family court cases (including those that remain eligible for civil legal aid) in which neither party had legal representation and that 80% of all family court cases starting in the January–March quarter of 2013-14 had at least one party who did not have legal representation.[34]

In March 2015, the Justice Committee of the House of Commons presented its report on the impact on LASPO. It found that children were inevitably at a disadvantage in asserting their legal rights, even in matters with serious long-term consequences for them.[35] Acknowledging that victims of domestic violence had difficulties obtaining documentary evidence of such, it recommended amending the law to allow evidence of domestic violence from more than 24 months prior to the date of the application in cases where the person who has suffered the violence would be materially disadvantaged by having to face the perpetrator of the violence in court.[36] The Committee heard evidence about the rise in the number of LiPs following the removal of means-tested legal aid from family law, and considered that increasing numbers of LiPs struggled to effectively present their cases, whether due to inarticulacy, poor education, lack of confidence, learning difficulties or other barriers to successful engagement with the court process.[37] The Committee was concerned that the judiciary were not necessarily able to ensure the cross-examination of victims by or on behalf of alleged abusers was appropriate and sensitive; and it recommended the Ministry of Justice bring forward legislation to prevent cross-examination of complainants by alleged abusers in the family. [38] The Committee was critical of the Government, it said that the Government had hoped and assumed that without legal aid more people would resolve their difficulties outside court, as a large majority of couples already do. However, the fall in the number of mediations as well as the rise in the number of litigants in person

[30] Baroness Butler-Sloss, Daily Hansard, House of Lords, 27.03.2012 at 3.15pm https://publications.parliament.uk/pa/ld201212/ldhansrd/text/120327-0001.htm#12032757001721

[31] Family Law Weekly *Law Society launches surveys on the impact of LASPO* https://www.familylawweek.co.uk/site.aspx?i=ed113415

[32] Family Law 31.10.2013 *New evidence requirements prevent half of domestic violence victims from accessing legal aid entitlement* https://www.familylaw.co.uk/news_and_comment/New-evidence-requirements-prevent-access-legal-aid-311013-587

[33] Family Law 24.09.2014 *New MoJ/LAA data: low-income families turn backs on court, mediation falls 50% compared to pre-LASPO times* https://www.familylaw.co.uk/news_and_comment/new-moj-laa-data-low-income-families-turn-backs-on-court-mediation-falls-50-compared-to-pre-laspo-times#.VCQiZBZ0Zn4

[34] National Audit Office *Implementing Reforms to Civil Legal Aid*, 20.11.2014, HC 784 2014-15 p 15 https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf

[35] House of Commons' Justice Committee *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* Eighth Report of Session 2014–15 Report, 4 March 2015 https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf p 25

[36] ibid p 30

[37] ibid p 38

[38] ibid p 42

showed that the Ministry of Justice was wrong.[39] The Committee concluded that the faulty implementation of the legal aid changes in Part 1 of LASPO had harmed access to justice for some litigants and that the Ministry of Justice had failed in three of its four objectives:

1) it had not discouraged unnecessary and adversarial litigation at public expense because the courts and tribunals were having to meet the costs of a significant rise in litigants in person and a corresponding fall in mediation;
2) it had failed to target legal aid at those who needed it most because it had failed to properly implement the exceptional cases funding scheme; and
3) it had failed to prove that it had delivered better overall value for money for the taxpayer because it had no idea at all of the knock-on costs of the legal aid changes to the public purse.[40]

The Government responded stating that there had been challenges in implementing such a significant reform programme, but rejected the Committee's assessment that the Government had largely failed to achieve its wider objectives for reform beyond achieving savings.[41] A briefing paper published in early 2016 contained results of research into 158 LiPs in private family law cases. This painted a picture of LiPs as:

1) individuals who could not afford a lawyer (only one in four LiPs decided to represent themselves as a matter of choice),
2) half of the LIPs had had legal representation at some stage during the current proceedings and/or in previous family law proceedings (LASPO changed that),
3) only a small minority of LIPs were able to represent themselves competently (including those with high levels of education or professional experience),
4) most LiPs were procedurally (and, where relevant, legally) challenged in some way and some had no real capacity to advocate for their or their children's interests,
5) half of the LiPs had one or more vulnerabilities (so it was more difficult for them to represent themselves),
6) LIPs were likely to create problems for the courts by not appearing, by refusing to engage with proceedings, or (less frequently) by behaving violently or aggressively (in these cases there was a link to the litigants' vulnerabilities) and
7) LIPs were no more likely to bring unmeritorious and serial applications than represented parties, although having to respond to these applications was another vulnerability faced by some women LIPs.[42]

In October 2017, the Minister of Justice submitted to the Justice Committee a Post-Legislative Memorandum on LASPO. In the Memorandum, the Government referred to the challenges in court to the policy of reducing the scope of legal aid.[43] However, the Memorandum did not amount to a thorough *ex post* evaluation. In March 2018, the Lord Chancellor, indicated (in evidence to the Justice Committee) that there would be a thorough review.

[39] ibid p 42
[40] ibid p 67
[41] Lord Chancellor and Secretary of State for Justice, *Government's Response to Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* July 2015 https://www.familylaw.co.uk/docs/pdf-files/response-to-justice-committee-LASPO.pdf p 3
[42] House of Commons research briefing *Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales* 14.01.2016 p 6 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07113#fullreport
[43] Note 5 at p21

A missed opportunity

From the material presented so far, it can be appreciated that LASPO amounted to a wide-ranging reform of a system of legal aid that had implications across the board. Although we are dealing here only with family justice in private law proceedings, the reforms affected individuals who otherwise would have had legal aid in asylum, mental health and civil cases.

This paper has shown instances where, at different stages in the parliamentary procedure, evidence was received and considered by the select committee, the Commons and the Lords in relation to concerns about the reform. In spite of this, we advance the argument that a Bill of the complexity of LASPO required proper *ex ante* evaluation as this would have involved the use of empirical data to test the policies, as a purely legal approach to evaluation is not a full evaluation.[44] In addition, it would have been appropriate to carry out pre-legislative scrutiny because at that stage, there would have been an opportunity for negotiating policies. The constraints are bigger when a bill is already in Parliament, as mentioned above.

Sir Geoffrey Bowman KCB in speaking of pre-legislative scrutiny stated that: "Bills that have gone through pre-legislative scrutiny as well as the normal parliamentary processes end up as better Bills and better Acts. That is a good thing. ... I think it does lead to fewer amendments in the House. I can almost certainly say that."[45] We have seen that LASPO took about a year from introduction to assent, as can be seen in its lengthy chronology of interventions throughout the parliamentary stages.[46] Kennon observes that the origins of pre-legislative scrutiny lie partly with dissatisfaction with the quality of scrutiny of bills through the existing parliamentary procedures.[47] And in this case, it is intriguing why the Government did not submit the draft Bill to pre-legislative scrutiny. This gives rise to speculation, since the Coalition Government at the time stated that it was committed to publishing draft Bills where it was appropriate but certainly not all Bills.[48] Whatever the reason, the result seems to have been not an efficient piece of legislation.

It is also surprising that no mechanism such as a sunset clause was included in LASPO, considering the fact that there had been no pre-legislative scrutiny and that there were gaps in the evidence (for instance as to the actual impact of LiPs on the courts). Sunsetting has been tried and tested in other jurisdictions as a process that forces the bureaucracy to consider, on a regular basis, whether or not legislation is necessary.[49]

Conclusion

In this paper, I have tried to highlight deficiencies in LASPO in relation to the detrimental effects of the legal aid reforms to a vulnerable sector of the community that sought access to family courts. The post-legislative scrutiny of LASPO has not started at the time of writing this article, and hopefully it will be carried out within a reasonable timeframe.

I have drawn attention to the concerns flagged by MPs during the stages of the Bill and the information that was provided by practitioners, the courts and other third parties flagging concerns about the Act almost from the time that LASPO came into force. In my opinion, pre-legislative scrutiny would have provided the forum for those concerns to be ventilated, for the information to be considered in detail and for the policies being modified before they became law. I have provided information in this paper about the assumptions that the Government had made which were proved wrong some time down the track. However, in the meantime, families and children were affected. Court proceedings

[44] K van Aekan "From vision to reality: ex post evaluation of legislation" 5 *Legisprudence* 41 (2011) p 55
[45] Constitution Committee, Parliament and the Legislative Process, 29 October 2004, HL 173 2003- 2004, Q354, p 106
[46] Bill stages — Legal Aid, Sentencing and Punishment of Offenders Act 2012 https://services.parliament.uk/Bills/2010-12/legalaidsentencingandpunishmentofoffenders/stages.html
[47] A Kennon 'Pre-Legislative Scrutiny of Draft Bills' [2004] Public Law 447, 491.
[48] R Kelly *Pre-legislative scrutiny under the Coalition Government: 2010-2015* House of Commons Library 13.08.2015 p.4 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05859
[49] S Argument "Legislative Scrutiny in Australia: Wisdom to Export?" *Statute Law Review* 32(2), 116–148 p 122

went ahead either at a slower pace, risking an abuser cross-examining a victim or simply in sub-standard conditions.

Pre-legislative scrutiny could have been useful to avert policies that were built on weak or misconceived assumptions and also to serve as a blueprint for an eventual post-legislative scrutiny.

It seems that the attitude of the current government to pre-legislative scrutiny is more positive as the Cabinet Office's guidelines in force on law-making state that the default position is that draft Bills must be published before the Bill is introduced to Parliament, unless there are good reasons not to do so.[50]

My argument is that there should be better safeguards to ensure the use of a key tool such as pre-legislative scrutiny in legislation with wide implications for individuals. Cabinet Office's guidelines can, and in fact, are changed with a new Government. For this reason, and having considered the fate of LASPO, I am of the opinion that there should be a mechanism to ensure that Bills with far-reaching implications should be submitted in draft for proper pre-legislative scrutiny as a matter of fact. This could be done by way of an instrument such as a Memorandum of Understanding between Parliament and the Government. It should be embedded in practice so that with a change of Government, there is a firmly established expectation that the new Government should submit draft Bills. Surely, it is appropriate for the Government to commit to pre-legislative scrutiny for draft Bills that can affect fundamental rights of individuals such as access to justice. An agreement of this sort would be a step in the direction of guaranteeing that policies are sound and that the risk of passing ineffective legislation is minimised.

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[50] Cabinet Office *Guide to Making Legislation* – July 2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf