

HOUSE OF LORDS

Select Committee on the Constitution

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6th Report of Session 2004-05

**Parliament and the  
Legislative Process:  
The Government's  
Response**

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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### *Contact Details*

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 5960/1228

The Committee's email address is: [constitution@parliament.uk](mailto:constitution@parliament.uk)

# Parliament and the Legislative Process: The Government's Response

In October 2004 we published a report on Parliament and the Legislative Process (HL Paper 173–I and II), identifying ways to improve the process by which legislation is scrutinised, the means to ensure that citizens have the opportunity to express their opinions on legislation being considered by Parliament, and the case for more rigorous post-legislative scrutiny. The Government responded on 7 April 2005 with a letter from the Leader of the House of Lords, enclosing a memorandum dated 6 April.

The memorandum is printed as Appendix 1.

We look forward to debating the issues in the next Parliament.

*7 April 2005*

## APPENDIX 1: THE GOVERNMENT'S RESPONSE

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1. The Government welcomes the Constitution Committee's report on Parliament and the legislative process and, in particular, the acknowledgement that there have been positive developments since the Hansard Society Commission's report *Making the Law* was published in 1992.
2. The Government is committed to strengthening Parliamentary scrutiny and believes that good scrutiny leads to better legislation. It has supported measures to make the legislative process more effective and more accessible to the public. It has significantly increased the number of bills published in draft, (49 draft bills have been published since 1997) therefore allowing for more pre-legislative scrutiny. It has also announced to Parliament in advance what its plans are for publication of draft bills. Many of these changes are very recent and their full effect is yet to be seen. However, the Government is pleased that these reforms have been generally welcomed and will continue to monitor their effectiveness.
3. Both Government and Parliament have a common interest in effective scrutiny of legislation but it is important to be clear about their different roles. Governments are elected on a legislative platform: they develop policy and, where necessary, introduce legislation. Parliament examines and refines that legislation. Strengthening Parliament's role in the legislative process must not prevent the Government from carrying out the work it was elected to do, nor from responding to new and sometimes urgent demands that arise.
4. It is also important to be realistic about the resources available within Parliament as well as within Government. The demands placed on existing select committees are already considerable. The capacity for increasing ad hoc evidence-taking committees is not unlimited. Similarly, there are significant constraints on resources within Government departments.
5. Some of the Committee's recommendations are essentially matters for one or both of the two Houses. This response comments on those recommendations when we believe the Government's views are relevant.
6. This response follows the structure of the Committee's report, addressing in turn Pre-Legislative Scrutiny, the Legislative Process, Post-Legislative Scrutiny and Connecting with the Public.

### Pre-Legislative Scrutiny

#### *Publishing draft bills*

7. The Government welcomes the Committee's acknowledgement of the increased use of pre-legislative scrutiny. The report points out that the Government has significantly increased the number of bills published in draft.
8. The Government publishes a bill in draft as one part of an effective consultation process. As the Committee recognises, the legislative process normally begins with some form of public consultation, such as a Green or White paper setting out policy proposals. Publishing a draft bill for pre-legislative scrutiny is the next step in this process. This provides parliamentarians with opportunities to comment on the draft bill as well as

providing members of the public and stakeholders with additional opportunities to express their views in evidence to the Committee.

9. The parameters of pre-legislative scrutiny have never been clearly defined. Committees are of course able to make whatever recommendations they wish, but it is generally understood that they should focus on the issues covered by the draft bill rather than seeking considerably to increase its scope. That is not to say that committees are limited to technical matters of drafting: on the contrary, a pre-legislative scrutiny committee needs to consider the policy lying behind the bill and to examine the principle of the bill, as well as its content. For the Government, it can be valuable if pre-legislative scrutiny brings to light concerns of principle or of detail about the bill, both within Parliament and among stakeholders. The experience of the Gambling and Mental Capacity Bills reinforces, rather than undermines, the argument for pre-legislative scrutiny.
10. Measuring the effectiveness of pre-legislative scrutiny is not easy. In addition to the influence of reports from the Parliamentary Committees, there are other influences on Departments as they prepare bills for introduction. But the Government believes that, overall, pre-legislative scrutiny has contributed greatly to the quality of legislation and the Government appreciates the role that Committees have played.

**Recommendation 1. We believe the Government should move from deciding which bills should be published in draft each session to deciding which bills should not be published in draft. Where the decision is taken not to publish a bill in draft, then the reasons for this should appear in the Explanatory Notes to the bill. (Para 34)**

11. The Government continues to be committed to pre-legislative scrutiny. Whilst it will not be possible nor necessarily desirable to sustain the recent year-on-year increase for an indefinite period, we will seek at least to maintain the proportion of bills published in draft.
12. The Government is not persuaded by the recommendation that the reasons for not having published a bill in draft should be outlined in the explanatory notes to a bill. In the case of emergency legislation the reasons for not publishing a bill in draft will be self-evident. In other cases, the reasons may include pressure of time, demands of Parliamentary Counsel, the priority of other bills. On that basis, any explanation in the notes would likely to be formulaic and would not add to the transparency of decision making. The Government notes that if members of Parliament wish to question why a particular bill has not been published in draft, there are already a number of available means of so doing; for example by raising issues during debates on the bill and by tabling oral and written parliamentary questions.

### **Rolling Legislative Programme**

**Recommendation 2. We endorse the view that there should be a rolling legislative programme, with Departments gaining slots in specified future sessions subject to the bills having first been published in draft. The presumption should be that no bill should be allocated a slot without being published in draft unless a compelling case has been made to the contrary. (Para 35)**

13. The sessional cut-off is currently an integral part of the legislative programme. The Government is aware, however, that other Parliaments

operate satisfactorily without a system of annual Sessions. We also recognise that there would be some benefits, both to Parliament and to Government, in having a rolling legislative programme.

14. To some extent the Government has already moved towards a rolling programme through increasing the number of bills that are published in draft and by the recent use of carry-over. (The School Transport, Mental Capacity and Gambling Bills were all subject to pre-legislative scrutiny, then introduced towards the end of the 2003-04 Session and carried over to the current Session).
15. The Government is always sympathetic to the case for pre-legislative scrutiny. But there is a need to maintain flexibility so that the Government of the day can respond to external events and manage its overall legislative programme effectively.

### **Pre-legislative scrutiny**

**Recommendation 3. The decision as to which draft bills should be subject to pre-legislative scrutiny should be the result of negotiation between the Government and the Liaison Committee of the House of Commons. We also propose the creation of a Joint Liaison Committee of the two Houses so that the opinion of the House of Lords can be taken into account. (Para 41)**

16. The Government greatly welcomes the scrutiny of draft Bills carried out by Select and Joint Committees. We recognise that it is important for Parliament to have information about draft bills in good time to allow for workload planning. The Leader of the Commons has, in the last two Sessions, provided a provisional list of draft bills to the House of Commons Liaison Committee. That information has also been made available to and discussed with the Usual Channels in both Houses.
17. The proposal for a joint Liaison Committee is a matter for the two Houses. We note that, in their present form, the Liaison Committees in the two Houses have different membership and different functions. We also note that the House of Commons Liaison Committee is doubtful that it would be beneficial (Annual Report for 2004, First Report 2004-05, HC419, para 43).
18. We believe that the current process by which the form of pre-legislative scrutiny is decided on is satisfactory. Where there have been difficulties, lessons have been learned and the process has improved. Communication within and between Usual Channels in both Houses, in consultation with the House of Commons Liaison Committee, allows an effective way of considering different methods of pre-legislative scrutiny, while respecting the autonomy of each House and of each existing Committee.

**Recommendation 4. A draft bill should normally be considered by a Departmental Select Committee. Failing that, the Liaison Committee of the Commons might consider appointing a temporary committee. For big and complex bills, and where there is particular expertise in the House of Lords, a Joint Committee should be considered. Where a bill cuts across several sectors, then a (sub)committee drawn from two or more Commons Select Committees, or a Joint Committee, may be appropriate. (Para 48)**

19. The Government notes the Committee's view that a draft bill should normally be considered by a Commons Departmental Select Committee. We also note that the recent report from the Leader's Group on the Review of Working Practices, which was endorsed by the House of Lords Procedure Committee and the House of Lords on 10th November 2004, said that:

"We support the continued consideration on a case-by-case basis of the appropriate forum for pre-legislative scrutiny, but would favour greater use of joint committees and of Lords' committees where appropriate".

20. On some occasions it becomes clear that there should be a Joint Committee, particularly when the remit of the Bill falls outside one departmental Committee or where there is significant expertise in the House of Lords. We note that there would be significant resource implications in setting up Joint Committees for all draft bills and a pattern is emerging of running no more than two at once. Where a House of Commons departmental Select Committee carries out pre-legislative scrutiny it is of course always open to that Committee to engage informally with interested members of the House of Lords; and the Government welcomes such co-operation.

**Recommendation 5. Checklists should be employed by committees engaged in pre-legislative scrutiny, as well as by committees at other stages of the legislative process. The Joint Liaison Committee that we have recommended would appear well suited to draw up the checklists. (Para 57)**

21. The issue of checklists is a matter for the two Houses. The Government welcomes the steps taken in both Houses to communicate good practice in pre-legislative scrutiny.

**Recommendation 6. We endorse the recommendation of the Joint Committee on the Draft Gambling Bill that the Government should ensure that the full text of draft Bills is available to pre-legislative scrutiny committees in good time before they are asked to report. (Para 63)**

22. The Government agrees in principle that Committees should have the full text of draft Bills on which they are reporting in good time and is committed to ensuring that this happens wherever possible (Government Response to the First Report of the Joint Committee on the Draft Gambling Bill, Cm 6253, p5). However, departments continue to work on the draft Bill whilst pre-legislative scrutiny is ongoing and provisions may be amended or added. In these circumstances it may be better to publish amended or new provisions for Committee scrutiny rather than waiting until the bill is introduced.

**Recommendation 7. We agree with the Joint Committee on the Draft Communications Bill's recommendation that Joint Committees be set up at least two sitting weeks before a draft bill is published and not be required to report until at least one month after the end of the consultation period. We add that, in the absence of a formal consultation exercise on the part of the Government, the minimum should be 4 months from publication of draft bills. (Para 69)**

23. The Government agrees that there is benefit in establishing Joint Committees two sitting weeks before a draft Bill is published. We have not been able to meet this on every occasion but we aim to achieve this wherever possible.

24. We believe it is of benefit to all parties to aim to allow four months between publication of the draft bill and the publication of the Committee report, or to allow the Committee one month after the end of the Government's own consultation period. We aim to meet this whenever possible. There are some circumstances where it may be necessary to move quicker than this and for some short bills this could be quite acceptable. Too stringent a rule could mean that the Government would not have the opportunity to publish a bill in draft even if a Committee were willing to scrutinise a draft bill in a shorter timeframe.

**Recommendation 8. A committee considering a draft bill should be supplied with the findings of a consultation exercise, and the Government's response to those findings should be made available to it. (Para 71)**

25. The Government is committed to consulting people in a clear and effective manner. Effective consultation includes providing feedback on the responses received and demonstrating the effect of the outcome of consultation on policy. The Government has recently strengthened our commitment to this as is outlined in the Cabinet's Office Guidance to Code of Practice on Consultation. If Ministers believe it is necessary to deviate from the guidance in this Code they should outline the reasons in the consultation document.
26. The Government will endeavour to provide Committees with the findings of the Government's own consultation on a draft bill, and, if time permits, the Government's response to those findings. If a Committee is not satisfied with the material provided, it can use its evidence-taking powers to ask for more.

**Recommendation 9. Each bill should at some stage be subject to detailed examination by a parliamentary committee of one or other or both Houses, empowered to take evidence. (Para 74)**

27. The Government has already significantly increased the number of bills which are subject to detailed scrutiny by an evidence-taking committee, by publishing more bills in draft. The Government is not convinced that it would be appropriate to commit all bills which have not been scrutinised in draft to an evidence-taking committee after Second Reading but we are ready to consider this option in exceptional circumstances (and have done in the past). Some bills have already been widely consulted upon; on others there is no time. On some bills the issues are essentially partisan; evidence-taking would be difficult to do objectively and would be unlikely to affect the outcome.
28. We note that there are a number of Committees in the House of Lords, the Joint Committee on Human Rights, and the departmental Committees in the House of Commons that are able to take evidence on any bill about which they have concerns. Some of these Committees already take evidence on bills before Parliament.

**Recommendation 10. Guidance given by the Cabinet Office on the preparation of Explanatory Notes should be closely adhered to, and the Cabinet Office should monitor compliance with the guidance. (Para 81)**

29. The Government agrees with the Committee that explanatory notes (ENs) should be presented in a consistent manner and that guidance should be closely adhered to. The Cabinet Committee on the Legislative Programme,

chaired by the Leader of the Commons, receives draft copies of ENs when deciding whether or not a Bill is ready to introduce to Parliament.

**Recommendation 11: The Explanatory Notes to each bill should include, in the introductory section, a clear and developed explanation of the purpose of the bill, incorporating or accompanied by the criteria by which the bill, once enacted, can be judged to have met its purpose. (Para 87)**

30. The Government is sympathetic to the principle that lies behind this recommendation, which links closely with the Committee's recommendations on post-legislative scrutiny.
31. Departments already engage in post-legislative scrutiny: policy evaluation is a constant activity, and it is frequently linked to legislation, which is just one means of implementing policy aims. Nevertheless, the Government believes that strengthening post-legislative scrutiny further could help to ensure that the Government's aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect.
32. The Government has recently been giving close consideration to how post-legislative scrutiny can best be achieved. What is meant by "post-legislative scrutiny" is often ill-defined. It could range from a wide-ranging policy review to a quite limited and technical evaluation of the effectiveness of the drafting. We have asked the Law Commission to undertake a study of the options, and to identify, in each case, who would most appropriately take on the role. We are conscious that the resources of the Law Commission are not used to best effect, and believe that they may have a role to play in post-legislative scrutiny. We are also, separately, exploring how to increase take-up of their proposals for law reform.
33. The Government agrees that it is desirable that departments are clear about the purpose of a bill. It is also desirable that departments have a clear idea of how they are going to ensure and to evaluate the effectiveness of the bill once it is enacted. The Government is currently considering taking this forward, bearing in mind the constraints on departmental resources.
34. The Government agrees that explanatory notes should clearly indicate what the purpose of a bill is. This is reflected in our current guidance on how to write Explanatory Notes, which says that the summary should:
 

"explain briefly what the legislation does and its purpose, including any relevant background and describe in broad terms how the legislation goes about achieving its aims".

The Explanatory Notes are updated as the Bill progresses through Parliament, reflecting changes that are agreed. The Government agrees with the Committee that the explanation of purpose should be adequately full but there is a balance to be struck between detail and accessibility. We would need to consider how changing the approach to declaring the purposes of legislation would impact on the interpretation of law by the courts.
35. The Government is not persuaded that it would be appropriate to include in the explanatory notes the criteria by which the bill, once enacted, can be judged to have met its purpose. A more appropriate place to outline such criteria might be preceding policy documents, or in debates during parliamentary proceedings on a bill, such as Second Reading debates. The Government will consider ways in which it might be possible to provide a

statement of success criteria as part of its wider consideration of the options for strengthening post-legislative scrutiny.

**Recommendation 12: Where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and should be included in the Explanatory Notes to the bill. (Para 98)**

36. The Government agrees that, where a bill amends an Act, it can be helpful to Parliament, and to the public, to see a copy of the Act as it would be amended. In some cases this can be essential to understanding the bill. Departments have often provided documents showing how the bill would amend previous legislation to assist Members considering the Bill. The Government's Guide to Legislative Procedure states:

"9.24 Many Bills amend existing legislation and it can be difficult for the reader to work out what the amended legislation will look like. Where it is likely to be helpful to the reader, revised passages showing important amendments to key extracts of existing legislation may be annexed to the Explanatory Notes. The Explanatory Notes should not include lengthy annexes setting out existing legislation as amended. If Departments feel that these would be helpful to Members, they should be provided separately by Departments."

37. The Government does not believe that it is necessary or realistic to require Departments to provide a print of an amended Act in every case. This would require considerable resources, and in some cases (as for example, with the annual Finance Bill) it would simply be impractical in the time available. Nevertheless, we will continue to encourage Departments to provide such documents where appropriate. If in a particular case Members believe they need such material, they should say so.
38. The Government appreciates the benefits in accessibility in attaching material to the Explanatory Notes, but there is a balance to be struck between including information and not making the documents unhelpfully bulky. While it may well be appropriate to annex key extracts of amended Acts to the ENs, we believe that enclosing whole Acts as amended would be too much. It would also add considerably to the printing costs of the two Houses.

**Recommendation 13. The Explanatory Notes to all bills introduced to give effect to EU obligations should carry a section detailing the scrutiny history of the measure. (Para 103)**

39. The Government accepts this recommendation. The new Transposition Guide issued recently by the Cabinet Office states that Explanatory Notes should include the scrutiny history of the bill if it implements an EU obligation, as Explanatory Memoranda on Statutory Instruments already do. The transposition notes will also now be annexed to, and published with, the Explanatory Notes.

**Recommendation 14: Consideration should be given to the establishment of business committees at Westminster. (Para 123)**

40. The Government notes the Committee's recommendation. The option of a business committee in the House of Commons has been considered over the years. The Government does not believe it would offer significant advantage over current arrangements.

**Recommendation 15. Every bill should at some stage be subject to detailed examination by a committee empowered to take evidence. (Para 143)**

**Recommendation 16. Bills should normally be committed after Second Reading to a committee empowered to take evidence; though that requirement may be dispensed with if the House is satisfied that the bill in that form has already been subject to detailed evidence-taking examination in the other House. (Para 144)**

41. We refer to the response given above to the Committee's recommendation 9.

**Recommendation 17. The membership of a committee examining a bill should normally include some Members who have been responsible for the pre-legislative scrutiny of the measure. (Para 145)**

42. The Government accepts that there may be merit in some overlap between Members who served on a pre-legislative scrutiny Committee and a bill Committee and will, for its part, bear this in mind when proposing members for membership of the House of Commons Standing Committees.

**Recommendation 18. We commend the value of obtaining evidence through informal meetings and seminars. (Para 150)**

43. This is a matter for the two Houses. We are aware that this is a tool used by many Committees already.

**Recommendation 19. We support the principle of the carry-over for bills that have been subject to pre-legislative scrutiny, but believe that bills carried over should be subject to a stipulated cut-off period from the time of their introduction. We suggest that 14 months would be appropriate. (Para 163)**

44. We refer to our response to the Committee's recommendation 2. We welcome the Committee's support for the principle of carry-over for bills that have been subject to pre-legislative scrutiny.

45. We note the Committee's recommendation of a stipulated cut-off period for carry-over and the suggestion that 14 months after introduction would be appropriate. The Government believes that in many cases 12 months, or fewer, may be appropriate, particularly where the bill has been subject to thorough pre-legislative scrutiny, but that this is probably best approached on a case by case basis. We note that House of Commons Standing Order No 80A on carry-over of bills provides for proceedings on a carried-over bill to lapse on the expiry of a period of 12 months after first reading in the first session, unless extended by a separate extension motion (up to the end of the second session).

46. At present the end of the second session provides an effective cut-off for carried-over bills. If there were to be any move away from the sessional approach, there would certainly be a need to establish a clear system of time limits for consideration of bills.

**Recommendation 20. Most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner. (Para 180)**

47. As is set out above in response to recommendation 11 the Government accepts that there is a case for more post-legislative scrutiny. Whether or not

this should take the form of continuous monitoring or of formal review after a fixed period will probably depend on the nature of the bill. There is a resource issue: departments may not be able to evaluate fully every provision of every bill. In general, however, the Government is minded to agree with the Committee that six years after a bill's enactment provides a reasonable time-frame for review.

**Recommendation 21. Each Government department should undertake a review of an Act, against the criteria it provided in the Explanatory Notes, within the time period that we have identified, and copies of such reviews should be deposited with the appropriate Departmental Select Committee. (Para 189)**

48. We refer to our responses to recommendations 11 and 20. The Government accepts that Parliament has a role to play in post-legislative scrutiny.

**Recommendation 22. The reviews undertaken by Departments should include consultation with interested parties, similar to consultation at the pre-legislative stage. (Para 190)**

49. The Government considers that the appropriate form of post-legislative evaluation would probably vary from case to case but it agrees with the Committee that interested parties should be consulted.

**Recommendation 23. Money should be made available from the parliamentary budget to allow Departmental Select and other Committees, if they elect to do so, to commission research on the effect of an Act. (Para 191)**

50. This is a matter for both Houses. We understand that in the House of Commons there is a budget for research available to Committees if they believe that it is necessary. In the House of Lords, the issue of resources for Committees is a matter for the Liaison Committee.

**Recommendation 24. Committees should retain the discretion to undertake an inquiry themselves should they deem it necessary, either in the light of the Departmental review or the research that they have commissioned. (Para 192)**

51. This is, of course, a matter for the Committees. The Government notes that many select committees have already conducted inquiries which involve, in whole or in part, post-legislative scrutiny.

**Recommendation 25. Evidence-taking committees, at pre-legislative and committee stage, should be empowered to take evidence outside Westminster. (Para 202)**

52. Select Committees and joint committees on draft bills are customarily empowered to "adjourn from place to place", either without restriction or within the United Kingdom. This permits evidence-taking outside of Westminster. Committees appointed to consider bills once they have been introduced (such as the recent House of Lords Select Committee on the Constitutional Reform Bill, House of Lords special public bill committees or House of Commons special standing committees) are not empowered to take evidence outside Westminster; whether to change this would be a matter for the two Houses; bearing in mind the time-constraints.

**Recommendation 26. Each House should give priority to ensuring that material about itself put in the public domain explains in clear**

**and accessible manner what they are doing and what consultation exercises are being undertaken in which comments from the public are invited. (Para 208)**

53. This is a matter for the two Houses. The Government welcomes the work that has been done in both Houses to increase the accessibility of information about Parliament, such as the pre-legislative scrutiny page on [www.parliament.uk](http://www.parliament.uk) and the development of the parliamentary consultation website by the Hansard Society ([www.tellparliament.net](http://www.tellparliament.net)).

**Recommendation 27. We recommend the greater use of e-consultation, but such consultation should be moderated and seen as but one of the tools available to consult the public and interested groups. (Para 213)**

54. This is a matter for the two Houses and for the committees concerned. The Government agrees that e-consultation can be a very useful tool and would welcome greater use of it by Parliament. We are aware of work being done in the two Houses to spread knowledge of best practice.

**Recommendation 28. We recommend that Committees are encouraged to consider commissioning public opinion polls where they believe it useful to have an awareness of public opinion on the bill in question. (Para 217)**

This is a matter for the two Houses.

*6<sup>th</sup> April 2005*