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Select Committee on the Constitution

4th Report of Session 2007–08

Pre-Legislative Scrutiny in the 2006–07 Session

Report

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Select Committee on the Constitution

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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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Pre-Legislative Scrutiny in the 2006–07 Session

Introduction

1. The Committee is appointed “to examine the constitutional implications of all Public Bills coming before the House; and to keep under review the operation of the constitution”. In keeping under review the operation of the constitution, the Committee scrutinises the legislative process. In 2004 we published a major report on *Parliament and the Legislative Process*,¹ which included a chapter on pre-legislative scrutiny.
2. In the 2004 report, the Committee stated that “we very much welcome the pre-legislative scrutiny that has been undertaken. We have already identified the value to Members, enhancing the capacity of Parliament to influence legislation at a formative stage. It is also of value to interested individuals and bodies, as they have an opportunity to contribute to the committees’ deliberations. It is of value to Government, since ... it should lead to better legislation and, potentially, save some time during the later legislative stages of the bills”. Indeed, we not only welcomed the use of pre-legislative scrutiny, but wished to see it “improved and extended”.² Yet in the years following the publication of the 2004 report, the amount of pre-legislative scrutiny declined markedly.
3. In response to this disappointing decline, we wrote to Baroness Amos, the then Leader of the House of Lords, in January 2007, to ask whether she would “agree to send us a letter at the end of each session setting out how many bills were published in draft (including those only partially published in draft) and giving an explanation of that figure and any trend it reveals”.³ Baroness Amos rejected our request because she was “not convinced that it would add any real benefit”.⁴ Accordingly we announced that we would produce and publish statistics on the volume of draft bills at the end of each session, “along with any comment that we feel to be necessary”. This is the first such report.
4. Our task proved considerably more difficult than expected. Whilst the available statistics were clear on the number of full draft bills that had been published, there was less clarity in regard to the number of bills published partially in draft or the number of clauses published in draft.⁵ In addition, we were dismayed at the lack of statistical clarity about the number of Government bills that had been presented in each session. In light of these

¹ 14th Report (2003–04) (HL Paper 173).

² *Ibid*, paragraphs 25 and 28.

³ See <http://www.parliament.uk/documents/upload/Letter%20from%20the%20Chairman%20to%20Baroness%20Amos%2023%2001%2007.doc>.

⁴ See <http://www.parliament.uk/documents/upload/Letter%20from%20the%20Rt%20Hon%20The%20Baroness%20Amos%20to%20the%20Chairman%2012%2002%2007.pdf>.

⁵ Sometimes the Government publishes complex or controversial clauses in draft before publishing the bill itself.

difficulties, our Chairman tabled a written question in order to obtain the Government's official figures. Table 1 below sets out the statistics that the Government provided.⁶ We have also added a column to the table which sets out the approximate ratio of draft bills to Government bills in each session.

TABLE 1

Session	Government statistics		Ratio of draft bills to Government bills
	Number of Government bills introduced into at least one House ¹	Number of draft bills published	
1997–98	53	3	1:18
1998–99	31	6	1:5
1999–2000	41	6	1:7
2000–01	28	2	1:14
2001–02	39	7	1:6
2002–03	36	9 ²	1:4
2003–04	37	12	1:3
2004–05	34	5	1:7
2005–06	58	4 ³	1:15
2006–07	36	4	1:9

¹ Figures include tax law rewrite Bills, Law Commission Bills and Consolidation Bills (all of which will have been published in various kinds of draft form or are pre-existing legislation, but are not included in the list of draft bills in column 3) and Consolidated Fund Bills. Some bills are carried over from one Session to the next and therefore appear in figures for both Sessions.

² Excludes draft clauses on the Gambling Bill published in this Session, for which the main draft Bill was published in the 2003–04 Session.

³ Excludes draft clauses on the Company Law Reform Bill published in this Session, for which the first substantial body of draft clauses was published in the 2004–05 Session.

5. Unfortunately the Government were unable to provide figures on the number of draft clauses published because “no systematic records are available”.⁷ Even the figures they did provide cannot necessarily be treated as accurate since they are at variance with several other authoritative sets of figures, such as those provided by the House of Commons Liaison Committee.⁸ The disparities between the different sets of figures may be explained by the varying methodologies employed.⁹ Therefore, the only way of achieving a universally accepted figure would be for the Government to published detailed criteria setting out exactly what should and should not be included when figures are being collated.
6. **In order to aid parliamentary scrutiny of the legislative process, and to avoid the confusion that currently prevails, we strongly urge the Government to publish criteria on how the statistics on legislation**

⁶ 29 November 2007, WA 134–5.

⁷ Ibid.

⁸ 1st Report (2006–07): *Annual Report for 2005–06* (HC 406), Appendix 4: Memorandum on the work of the Scrutiny Unit.

⁹ For example, whether bills that are carried over should be counted once or twice.

and draft legislation—including clauses published in draft—should be collated. Moreover, we urge them to draw up comprehensive figures at the end of every session on the basis of the criteria provided.

Incidence of Pre-Legislative Scrutiny

7. We now consider the incidence of pre-legislative scrutiny in the 2006–07 session and look forward to the draft bills promised for the current session. We also analyse any trends that these figures reveal.

i) Pre-Legislative Scrutiny in 2006–07

8. Four draft bills were published during the 2006–07 session:
- **Draft Climate Change Bill:** published 13 March 2007 and scrutinised by a Joint Committee of both Houses of Parliament. The Joint Committee published its report on 3 August.¹⁰ The House of Commons Environment, Food and Rural Affairs Committee also examined the draft bill, publishing a report on 4 July,¹¹ whilst the Environmental Audit Committee considered it as part of its inquiry entitled *Beyond Stern: From the Climate Change Programme Review to the Draft Climate Change Bill*.¹² In addition, the Department for Environment, Food and Rural Affairs held its own consultation process, which closed on 12 June. The Government published a joint response to all three reports (as well as the public consultation) in October.¹³ The Climate Change Bill was included in the Queen’s Speech and introduced to the House of Lords on 14 November 2007.
 - **Draft Human Tissue and Embryos Bill:** published 17 May 2007 and scrutinised by a Joint Committee of both Houses of Parliament. The Joint Committee published its report on 1 August,¹⁴ and the Government’s response was published on 8 October.¹⁵ The ensuing Human Fertilisation and Embryology Bill was included in the Queen’s Speech and introduced to the House of Lords on 8 November 2007.
 - **Draft Local Transport Bill:** published 22 May 2007 and scrutinised by the House of Commons Transport Committee. The Committee published its report on 3 August,¹⁶ and the Government’s response was published on 17 October.¹⁷ The Department for Transport also held its own consultation process, which closed on 7 September 2007. The Local Transport Bill was included in the Queen’s Speech and introduced to the House of Lords on 7 November 2007.

¹⁰ 1st Report (2006–07): *Draft Climate Change Bill* (HL 170/HC 542).

¹¹ 5th Report (2006–07): *Draft Climate Change Bill* (HC 534).

¹² 7th Report (2006–07) (HC 460).

¹³ Defra, *Taking Forward the UK Climate Change Bill: The Government Response to Pre-Legislative Scrutiny and Public Consultation* (Cm 7225).

¹⁴ 1st Report (2006–07): *Human Tissue and Embryos (Draft) Bill* (HL 169/HC 630).

¹⁵ Department of Health, *Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill* (Cm 7209).

¹⁶ 9th Report (2006–07): *The draft Local Transport Bill and the Transport Innovation Fund* (HC 692).

¹⁷ 13th Special Report (2006–07): *The draft Local Transport Bill and the Transport Innovation Fund: Government Response to the Committee’s Ninth Report of Session 2006–07* (HC 1053).

- **Draft Regulatory Enforcement and Sanctions Bill:** published 15 May 2007. The Cabinet Office¹⁸ held a consultation process, which closed on 15 August 2007. The Government’s response was published on 28 September.¹⁹ However, the draft bill was not subject to parliamentary scrutiny. The Regulatory Enforcement and Sanctions Bill was included in the Queen’s Speech and introduced to the House of Lords on 8 November 2007.

ii) Prospective Pre-Legislative Scrutiny for 2007–08

9. The Government announced that they expected to publish seven draft bills during the 2007–08 session:
- Apprenticeship Reform
 - Citizenship and Immigration
 - Constitutional Renewal
 - Cultural Property (Armed Conflict)
 - Heritage Protection
 - Marine
 - Marine Navigation and Port Safety

iii) Analysis of the Trends in Pre-Legislative Scrutiny

10. The value of pre-legislative scrutiny continues to be appreciated by Parliament. In the 2006–07 Session, the House of Commons Treasury Committee called for a draft bill on credit unions and co-operatives,²⁰ the House of Commons Communities and Local Government Committee concluded that a draft Equalities Bill “would enable wider public and greater parliamentary scrutiny”²¹ and the House of Commons Home Affairs Committee expressed “much regret that the flow of legislation in draft form from the Home Office appears to have dried up”.²² Individual members of this House also continue to emphasise the importance of pre-legislative scrutiny. For example, during Second Reading of the Human Fertilisation and Embryology Bill, Baroness Williams of Crosby noted that the bill as introduced was “a remarkable example of how the legislature should be brought in to the drafting and scrutiny of Bills to a much greater extent than is generally true”.²³ Similarly, during Second Reading of the Climate Change Bill, Lord Haskel said that the bill “demonstrates once again how right we were to introduce pre-legislative scrutiny in this House six years ago”.²⁴

¹⁸ Responsibility for the bill has since been transferred to the Department for Business, Enterprise and Regulatory Reform.

¹⁹ Department for Business, Enterprise and Regulatory Reform, *Government Response to the Consultation on the Draft Regulatory Enforcement and Sanctions Bill*.

²⁰ 13th Report (2006–07): *Financial inclusion follow-up: saving for all and shorter term saving products* (HC 504), paragraph 116.

²¹ 6th Report (2006–07): *Equality* (HC 468), paragraph 40.

²² 1st Report (2006–7): *Work of the Committee in 2005–06* (HC 296), paragraph 23.

²³ HL Deb 19 November 2007 col 685.

²⁴ HL Deb 27 November 2007 col 1157.

11. Likewise, the Government continue to affirm their enthusiasm for pre-legislative scrutiny. In his evidence to this Committee on 23 October 2007, the Lord Chancellor, Jack Straw MP, explained that “business managers are always anxious to see bills go into pre-legislative scrutiny because it makes them on the whole better bills and it improves their chances of going through”.²⁵ Indeed, Lord Rooker recently introduced the Climate Change Bill by saying, “I must take this opportunity to say how helpful the pre-legislative scrutiny has been in developing the bill. It was incredibly helpful to civil servants and parliamentary draftsmen in Whitehall” and that “the bill has benefited greatly from [the Joint Committee’s] careful examination”.²⁶
12. However, Mr Straw also accepted that this enthusiasm was not necessarily reflected in the number of draft bills introduced over the last few sessions. He told us that he was “concerned ... about the fact that the number of bills which have been subject to pre-legislative scrutiny had dropped off”. He added that “the problem is ... one of actually managing [draft bills] through” and whilst “there is no hostility to pre-legislative scrutiny whatsoever, it is just that there have been some practical problems with it”.²⁷
13. There do indeed appear to have been some practical problems: as Table 1 above shows, both the number and proportion of draft bills fell between the 2003–04 session and the 2006–07 session. The ratio of draft bills to Government bills fell from 1:3 in 2003–04 to 1:9 in 2006–07, and in the long 2005–06 session it was as low as 1:15. The number of draft bills dropped by two-thirds over that period. This was contrary to the Government’s 2005 commitment “at least to maintain the proportion of bills published in draft”.²⁸
14. The decline in the number and proportion of draft bills since 2003 has not gone unnoticed. In its Annual Report for 2005–06, the House of Commons Liaison Committee expressed disappointment that the Government had failed to live up to the expectations raised about the number of bills it would publish in draft, and recommended that the Government ensure that a more substantial number of draft bills be submitted for consideration in the future.²⁹ In their response, the Government stated that they were “aware that the number of draft bills published in recent years has not reached the same totals as those published in one or two earlier years”. The response added that the Government remained “committed to the policy of publishing as many bills in draft as possible, but it is difficult to set any precise target given the variety of circumstances—in particular deadlines for enactment of policies—which can arise ... Nevertheless, the Government would hope that the number of draft bills published each year will be above the number achieved in the 2005–06 session”.³⁰
15. In spite of this aspiration, the Government introduced just four draft bills in the 2006–07 session—the same number as in the 2005–06 session. Yet there

²⁵ See http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/999/const231007_ev1.pdf, Q 60.

²⁶ HL Deb 27 November 2007 col 1124.

²⁷ See http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/999/const231007_ev1.pdf, Q 60.

²⁸ Constitution Committee, 6th Report (2004–05), *Parliament and the Legislative Process: The Government’s Response* (HL 114), Appendix 1, paragraph 11.

²⁹ 1st Report (2006–07): *Annual Report for 2005–06* (HC 406), paragraphs 14–17.

³⁰ Liaison Committee, 1st Special Report (2006–07): *Annual Report for 2005–06: Government Response to the Committee’s First Report of Session 2006–07* (HC 920), paragraph 1.

may be grounds for optimism in light of the Government's announcement that they expect to publish seven draft bills during the 2007–08 session. If this commitment is fulfilled, it will mark the highest number of draft bills published in a session since 2003–04. This would also alleviate the Committee's concerns that the number of draft bills has permanently plateaued at only four or five per session.

16. **We reaffirm our strong support for pre-legislative scrutiny and our desire to see it used more routinely. Whilst welcoming the Government's stated support for pre-legislative scrutiny, we note with concern the decline both in the absolute number and in the proportion of bills published in draft in each session. Building on the positive signals in this year's Queen's Speech, we call on the Government to commit to increase the number of draft bills published per session to at least the 2003–04 level.**

Problems with the Pre-Legislative Scrutiny Process

17. Aside from the low rate of draft bills, it is clear from the experience of the 2006–07 session that there are other problems with the pre-legislative scrutiny process. For example, the two joint committees undertaking pre-legislative scrutiny drew attention to the excessively tight timescale. The Joint Committee on the draft Climate Change Bill stated:

The Government set a deadline for us to report by 25 July. This meant we had only three months to carry out our inquiry (the minimum 12 week period recommended by the Joint Committee on the draft Charities Bill in 2004). We are disappointed that it was not possible to establish the Committee sooner, as this meant our inquiry was more hurried than we, and those who gave evidence to us, would have liked. It is especially puzzling that there should have been such a long delay between the publication of the draft bill and our appointment.³¹

Similarly, the Joint Committee on the draft Human Tissue and Embryos Bill concluded:

We welcome the decision to present this draft Bill for pre-legislative scrutiny although we note the limited time we were given to undertake our inquiry—just under 9 sitting weeks from the publication of the draft Bill (less than the recommended 12 sitting weeks).³²

18. This is not a new problem. The House of Commons Liaison Committee, in its Annual Report for 2005–06, noted that “one of the problems connected with pre-legislative scrutiny has been the timing of publication of draft bills and the short period available for their scrutiny”, and concluded:

The Government cannot claim to be engaging in the pre-legislative scrutiny process when it has published the draft Bill so late that there is insufficient time for scrutiny to be carried out thoroughly and effectively ... The experiences of committees confirm the need for the Government to publish the draft bill in sufficient time to enable proper consideration by a committee. We recommend that the Government take account of

³¹ Joint Committee on the Draft Climate Change Bill, 1st Report (2006–07): *Draft Climate Change Bill* (HL 170/HC 542), paragraph 5.

³² Joint Committee on the Draft Human Tissue and Embryos Bill, 1st Report (2006–07): *Human Tissue and Embryos (Draft) Bill* (HL 169/HC 630), paragraph 3.

the need for adequate time for detailed scrutiny by committees when planning publication. This could be done most suitably by informal consultation between the minister or the Leader of the House and the committee chairman.³³

19. The Government's response to the Liaison Committee acknowledged "the importance of publishing draft bills in good time" and explained that "the Cabinet Office's *Guide to Legislative Procedures* indicates that generally three to four months should be allowed for committee examination, which means in practice that it will often be desirable for draft bills to be published by the Easter recess". However, whilst the Government always "aim at meeting this target [they are] aware that this is not always achieved".³⁴
20. The House of Commons Transport Committee ran up against a different kind of problem when scrutinising the draft Local Transport Bill. Having undertaken pre-legislative scrutiny at the request of the Secretary of State for Transport, the Committee then discovered that the Government had launched a further consultation on the role of the Traffic Commissioners, even though this matter was dealt with in the draft bill. The Committee said:

It is extremely bad practice for the government to announce, in the middle of its own consultation and at the end of our inquiry, another consultation on matters which are included in the draft Bill. Some of the changes the Secretary of State indicated might be in the consultation were mooted seven months ago; with a little planning and foresight they could perfectly well have been incorporated into the present consultation exercise.³⁵
21. **Whilst welcoming the Government's acknowledgement of the importance of publishing draft bills in good time, the Committee continues to be concerned that this is not happening in practice. We call on the Government to ensure that all draft bills are published in good time (allowing twelve weeks for scrutiny at the very minimum, and if possible considerably more), and wherever possible that their release is spread throughout the parliamentary year. Moreover, we urge the Government not to undermine the scrutiny process by launching additional consultations once pre-legislative scrutiny is already underway, or indeed after it has been completed.**

³³ 1st Report (2006-07): *Annual Report for 2005-06* (HC 406), paragraphs 19 and 21.

³⁴ Liaison Committee, 1st Special Report (2006-07): *Annual Report for 2005-06: Government Response to the Committee's First Report of Session 2006-07* (HC 920), paragraphs 2-3.

³⁵ 9th Report (2006-07): *The draft Local Transport Bill and the Transport Innovation Fund* (HC 692).