



HOUSE OF LORDS

Select Committee on the Constitution

8th Report of Session 2009–10

**Pre-Legislative
Scrutiny in the
2008–09 and 2009–10
Sessions**

Report

Ordered to be printed 3 March 2010 and published 8 March 2010

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£4.50

HL Paper 78

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 2008–09 and 2009–10 Sessions

Introduction

1. In 2004 the Committee published a report on *Parliament and the Legislative Process*, which included a chapter on pre-legislative scrutiny,¹ in which the Committee welcomed the use of pre-legislative scrutiny, and expressed a desire to see it “improved and extended”.²
2. In the years following the publication of the 2004 report, the amount of pre-legislative scrutiny declined. In response to this disappointing decline, the Committee resolved to 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 third such report.

Pre-Legislative Scrutiny in 2008–09 and 2009–10

3. This report to the House is on pre-legislative scrutiny in the 2008–09 session and the 2009–10 session.

i) Draft Bills Published in the 2008–09 Session

4. As the Committee noted in the 2007–08 report, the Government announced the intention to publish seven draft bills in the 2008–09 session.³ In the event, only four of these were published during 2008–09, two of them a few days before the end of the session. Of the three outstanding, the **draft Civil Law Reform Bill** was published early in the 2009–10 session (see paragraph 5 below), the proposed **draft Communications Data Bill** was not published, and in June 2009, the Government announced that “given the stage of the parliamentary cycle”, they did not intend to proceed with the proposed **draft Community Empowerment Bill**.⁴ The four bills that were published were:
 - **Draft Antarctic Bill**: published 10 November 2009, two days before the end of the 2008–09 session. A Government consultation process was launched, which closed on 12 February 2010. No parliamentary committee scrutinised the draft bill.
 - **Draft Bribery Bill**: published 25 March 2009 and scrutinised by a Joint Committee of both Houses of Parliament. The Joint Committee published its report on 28 July.⁵ The Government’s response was published on 23 November 2009.⁶ The Queen’s Speech stated that “a Bill

¹ 14th Report (2003–04): *Parliament and the Legislative Process* (HL 173). See especially Chapter 3.

² *ibid.*, paras 25, 28.

³ 8th Report (2008–09): *Pre-Legislative Scrutiny in the 2007–08 Session* (HL 66), para 5.

⁴ HL Deb 17 Jun 2009, col WA208.

⁵ 1st Report (2008–09): *Draft Bribery Bill* (HL 115/ HC 430).

⁶ Ministry of Justice, *Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill*, November 2009 (Cm 7748).

will be introduced to strengthen the law against bribery”.⁷ The Bribery Bill was introduced to the House of Lords on 19 November 2009.

- **Draft Flood and Water Management Bill:** published 21 April 2009 and scrutinised by the House of Commons Environment, Food and Rural Affairs Select Committee. The Committee published its report on 23 September 2009.⁸ The Government’s response was published in November 2009.⁹ The Government consultation closed on 24 July 2009. The Queen’s Speech stated that “legislation will be introduced to protect communities from flooding and to improve the management of water supplies”.¹⁰ The Flood and Water Management Bill was introduced to the House of Commons on 19 November 2009.
- **Draft Immigration Bill:** published 11 November 2009, the day before prorogation. The Government consultation closed on 3 February 2010. No parliamentary committee scrutinised the draft bill.

ii) Draft Bills Published in the 2009–10 Session

5. Four draft bills have been published in the 2009–10 session:¹¹
 - **Draft Animal Health Bill:** published 25 January 2010. A Government consultation process has been launched, to close on 19 April 2010. No parliamentary committee has undertaken scrutiny of the draft bill.
 - **Draft Civil Law Reform Bill:** published 15 December 2009 and being scrutinised by the House of Commons Justice Select Committee. The Government consultation closed on 9 February 2010.
 - **Draft International Development (Official Development Assistance Target) Bill:** published 15 January 2010 and being scrutinised by the House of Commons International Development Select Committee.
 - **Draft Terrorist Asset-Freezing Bill:** published 5 February 2010, following the Supreme Court’s decision to quash the Terrorism Order 2006. No parliamentary committee has as yet undertaken scrutiny of the draft bill.
6. The Queen’s Speech includes a declaration that the Government would “publish draft legislation on proposals for a reformed second chamber of Parliament with a democratic mandate”.¹² Draft clauses on **House of Lords reform** are expected to be published shortly.

iii) Analysis of the Trends in Pre-Legislative Scrutiny

7. In previous reports, we produced a table showing the number of draft bills that had been published in each session, comparing it with the number of Government bills introduced, based on statistics provided by the

⁷ HL Deb 18 Nov 2009, col 3.

⁸ 6th Report (2008–09): *The Draft Flood and Water Management Bill* (HC 555).

⁹ Department for Environment, Food and Rural Affairs, *Taking forward the draft Flood and Water Management Bill*, November 2009 (Cm 7741).

¹⁰ HL Deb 18 Nov 2009, col 2.

¹¹ Correct as at 3 March 2010.

¹² HL Deb 18 Nov 2009, col 3.

Government in answer to a written question from the Committee Chairman.¹³ We have reproduced the table below, adding the figures for 2008–09 and those expected for 2009–10.

TABLE

Session	Government statistics		Ratio of draft bills to Government bills
	Number of Government bills introduced into at least one House ¹⁴	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 ¹⁵	1:4
2003–04	37	12	1:3
2004–05	34	5	1:7
2005–06	58	4 ¹⁶	1:15
2006–07	36	4	1:9
2007–08	31	9	1:3
2008–09	27	4	1:7
2009–10	20	5 ¹⁷	1:4

8. In our report on the 2006–07 session, we noted with concern that both the number and proportion of draft bills had fallen between the 2003–04 session and the 2006–07 session, in spite of the Government’s 2005 commitment “at least to maintain the proportion of bills published in draft”.¹⁸ We expressed our concern that “the number of draft bills has permanently plateaued at only four or five per session”.¹⁹ In last year’s report, we welcomed the fact that in 2007–08 the number of draft bills, and the ratio of draft bills to

¹³ HL Deb 29 Nov 2007, cols WA134–35.

¹⁴ 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.

¹⁵ Excludes draft clauses on the Gambling Bill published in this Session, for which the main draft Bill was published in the 2003–04 Session.

¹⁶ 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.

¹⁷ Includes the prospective draft clauses on House of Lords reform, which had not been published at the time of going to print.

¹⁸ 4th Report (2007–08), *Pre-Legislative Scrutiny in the 2006–07 Session* (HL 43), paras 13, 16; 6th Report (2004–05): *Parliament and the Legislative Process: The Government’s Response* (HL 114), Appendix 1, para 11.

¹⁹ *Pre-Legislative Scrutiny in the 2006–07 Session*, op. cit., para 15.

Government bills, were at their highest since 2003–04. We welcomed the fact that a further seven draft bills were planned for the 2008–09 session, and stated that “it is imperative that the progress made in the 2007–08 session is maintained”.²⁰

9. We were therefore disappointed that only four draft bills were published in the 2008–09 session, two of which only at the end of the session. The progress made in 2007–08 was not maintained.
10. **We reaffirm our strong support for pre-legislative scrutiny and our desire to see it used more routinely. We are disappointed that the apparent progress made in 2007–08 was not maintained in 2008–09. The Committee hope that all concerned will support pre-legislative scrutiny in the new Parliament.**

The Pre-Legislative Scrutiny Process

i) Time Provided for Pre-Legislative Scrutiny

11. In our previous reports, we expressed our concern that draft bills were not published in adequate time, and called on the Government to ensure that all draft bills were published in proper time (allowing 12 weeks for scrutiny at the minimum, and preferably considerably more). In the report on the 2007–08 session, we expressed our fear that the Government were “too often failing” to meet their stated commitment to allow at least three months for pre-legislative scrutiny. We also registered our concern about the delays in setting up joint committees on pre-legislative scrutiny. We called on the Government “to redouble their efforts to ensure that adequate time (that is to say, three months at the very minimum, and preferably more) is allowed for pre-legislative scrutiny in all but the most exceptional of circumstances, and to ensure that such needless delays do not occur again in the future”.²¹
12. The Government’s response asserted “the importance of allowing as much time as possible for pre-legislative scrutiny, with a minimum of twelve weeks as an objective ... The Government will continue to strive to allow the maximum time available for pre-legislative scrutiny. The Leader of the House of Commons routinely reminds departments of this timescale and we do all we can to prevent slippage.” Whilst the Government acknowledged that there had been delays in setting up joint committees, they told us that they do all they can “to minimise these delays”, but “this is not something which lies exclusively within the Government’s control.”²²
13. Each of the four draft bills published in 2008–09 were open for consultation for 12 weeks, although, in the case of the draft Immigration Bill, the bare minimum time was provided. Only one of the four, the draft Bribery Bill, was scrutinised by a joint committee. In its report, the Joint Committee on the draft Bribery Bill stated that the original publication date and reporting deadline set by the Government “would have allowed nearly four months for a Joint Committee to carry out its work: hardly a relaxed timetable, but one which nonetheless would have given the Committee adequate time to

²⁰ *Pre-Legislative Scrutiny in the 2007–08 Session*, op. cit., para 11.

²¹ *ibid.*, para 20. See also *Pre-Legislative Scrutiny in the 2006–07 Session*, op. cit., para 21.

²² 21st Report (2008–09), *Government Response to a report on Pre-legislative Scrutiny in the 2007–08 session* (HL 160), Appendix 1, p 4.

conduct thorough pre-legislative scrutiny of the draft bill. Unfortunately, the business managers in both Houses took some considerable time to nominate Members to a Joint Committee, with Members only being nominated in the House of Lords on 11 May 2009. This left a bare ten weeks ... Nearly seven weeks were lost to the pre-legislative scrutiny process before the Joint Committee was even appointed. This repeats a pattern established in earlier years”.²³

14. The Joint Committee’s conclusion expressed “regret that we were given a bare ten weeks to conduct pre-legislative scrutiny of this important draft Bill. We recommend that, in order to demonstrate its respect for the process, the Government ensure that future Joint Committees are established sufficiently promptly to allow for a minimum scrutiny period of twelve weeks from the first meeting of the committee appointed to undertake scrutiny.”²⁴
15. The Government’s response stated that they were “grateful to the Committee for carrying out scrutiny of the draft Bill to a challenging ten week timetable. The Government agrees that 12 weeks should be regarded as the norm for pre-legislative scrutiny and will try to provide a minimum of 12 weeks wherever possible.”²⁵
16. **We note with concern the continued frustration on the part of parliamentarians at the truncated timetable allowed for the pre-legislative scrutiny process. We note the Government’s commitment to “try to provide a minimum of 12 weeks wherever possible”, but given the repeated criticisms made in recent sessions, we believe that this commitment is inadequate. The pre-legislative scrutiny process is undermined if anything less than 12 weeks is allowed for parliamentary scrutiny. We recommend that the Government should give parliamentary committees a minimum of 12 weeks for scrutiny, and that the reporting deadline should take this into account. If there are delays in establishing a committee, the reporting deadline should be put back accordingly. The same minimum 12 week principle should continue to apply to public consultations on draft legislation.**

ii) Concentration of Publication of Draft Bills

17. In our previous reports, we have expressed concern at the tendency for the publication of draft bills to be concentrated around Easter time. This tendency has exacerbated the difficulties with time provided for scrutiny, since joint committees established in the spring have tended to run out of time when reporting deadlines have been set around the time that Parliament rises for the summer recess. In last year’s report, we called on the Government to “increase their efforts to spread the publication of draft bills throughout the parliamentary year”.²⁶
18. The Government’s response stated that “timing considerations mean that draft Bills cannot always be spaced as evenly throughout the year as either

²³ *Draft Bribery Bill*, op. cit., paras 245–6.

²⁴ *ibid.*, para 247.

²⁵ *Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill*, op. cit., p 21

²⁶ *Pre-Legislative Scrutiny in the 2007–08 Session*, op. cit., para 23. See also *Pre-Legislative Scrutiny in the 2006–07 Session*, op. cit., para 21.

the Government or Parliament would like. We will continue to work to improve processes to ensure that the spread can be as even as possible.”²⁷

19. Of the four draft bills published in the last session, two were published in the spring. The only bill that was scrutinised by a joint committee, the draft Bribery Bill, was published in the spring, and the Committee’s proceedings were constrained by the need to report before the summer recess. The other two were published in November, within days of the end of the session, leaving no time for parliamentary scrutiny until the start of the following session.
20. **The Committee welcome the Government’s efforts in the 2008–09 session to spread the publication of draft bills throughout the year. The difficulties of spring publication are most apparent in relation to draft bills that are scrutinised by a joint committee. Where such scrutiny is anticipated, we call on the Government (in addition to providing a minimum of 12 weeks for scrutiny) to seek to publish the relevant draft bill as early in the parliamentary calendar as possible.**

iii) Government Liaison with Committees

21. Last year’s report emphasised the importance of effective Government liaison with parliamentary committees of both Houses. We affirmed the important role that departmental committees in the House of Commons play in scrutinising draft bills, and recognised the value which the House of Lords contributes to pre-legislative scrutiny, not least through the forum of joint committees on draft bills, and also, where appropriate, through the work of sessional committees. We therefore called on the Government “to commit to ‘engage in genuine consultation’ with this House about the pre-legislative scrutiny programme”, and suggested that “the most appropriate means for such consultation would be for the Leader of the House of Lords to engage with the House of Lords Liaison Committee”.²⁸
22. The Government’s response stated that they recognised “the value that the House of Lords can bring to pre-legislative scrutiny. Whilst in most cases, pre-legislative scrutiny is undertaken by Commons departmental Select Committees, in several cases recently, there has been interest both from Commons departmental Select Committees and from the Lords. Where there are significant expressions of interest from the House of Lords we would not envisage meeting a request from a Commons select committee to undertake sole consideration of a bill and we will continue to seek Lords participation in pre-legislative scrutiny. The Leader of the House of Commons has written to the Commons Liaison Committee several times this Session to update them on progress with the publication of draft Bills ... I will be happy to ensure in future that they are also sent to the Lords Liaison Committee.”²⁹
23. **We welcome the Government’s recognition of the important role played by this House in undertaking pre-legislative scrutiny, and their agreement to engage with the House of Lords Liaison Committee about the progress of the pre-legislative scrutiny**

²⁷ *Government Response to a report on Pre-legislative Scrutiny in the 2007–08 session*, op. cit., Appendix 1, p 5.

²⁸ *Pre-Legislative Scrutiny in the 2007–08 Session*, op. cit., para 27.

²⁹ *Government Response to a report on Pre-legislative Scrutiny in the 2007–08 session*, op. cit., Appendix 1, p 5.

programme. We call on the Government to continue to seek to “engage in genuine consultation” with this House about the pre-legislative scrutiny programme.

iv) The Proceedings of Draft Bills after Pre-Legislative Scrutiny

24. Concerns expressed in last year’s report related to the course of draft bills after scrutiny, including the likelihood of a draft bill being introduced as a bill, and whether the response to parliamentary scrutiny of draft legislation was adequate. We reported on the experience of the Joint Committee on the draft Constitutional Renewal Bill of 2007–08, the Government’s response to whom had still not been published.³⁰ The Government’s response was published in July 2009, nearly a year after the Joint Committee had published its report—beyond the Government’s undertaking to provide a written response to reports, if possible, within two months of publication.
25. In last year’s report, we expressed concern “at the possibility of draft proposals sinking without trace. In such cases where there is a change of plan, for instance when a draft bill is not to be pursued in legislation for the time being, where the provisions of a draft bill are substantially amended or combined with other proposals, or where there is cause to delay a response to a committee report on a draft bill, we call on the Government to make a formal response to the relevant report, outlining the change of plan and the reason for such changes being made.”³¹
26. In their response, the Government stated that they had “a good record for introducing draft bills”.³² We note that, of the four draft bills published in 2008–09, two have subsequently been introduced in legislation. We note that the publication of two of the draft bills so late in the session made it virtually impossible for either measure to be introduced, let alone passed, before the end of the Parliament. We also note, with regret, that while there has been no repeat of the long delay to the Government’s response to the report of the Joint Committee on the draft Constitutional Renewal Bill, the Government took nearly four months to respond to the report of the Joint Committee on the draft Bribery Bill.
27. We recognise that there will be occasions when the Government decide not to bring forward in legislation the proposals contained in a draft bill. Such a decision may be influenced by the scrutiny undertaken by parliamentary committees. The Government should be held accountable for such decisions.
28. **We recommend that if the measures contained in a draft bill have not been pursued in legislation within one year of its publication, or where the provisions in a draft bill are substantially amended or combined with other proposals in subsequent legislation, the Government should make a written statement to the House outlining the reasons for change.**
29. **Likewise, where a Government response to a committee report on draft legislation is delayed beyond the normal two month interval, the Government should write to the Committee concerned to explain the delay, or, in the case of joint committees where the Committee no**

³⁰ *Pre-Legislative Scrutiny in the 2007–08 Session*, op. cit., paras 30–1.

³¹ *ibid.*, para 32.

³² *Government Response to a report on Pre-legislative Scrutiny in the 2007–08 session*, op. cit., Appendix 1, p 5.

longer exists, make a written statement to the House explaining the delay.

30. The same principle should apply in cases where a draft bill has been announced as part of the Government's legislative programme, but is not subsequently pursued. **If a draft Bill announced as part of the Government's legislative programme is not subsequently brought forward, the Government should, by the end of the session, make a written statement to the House to explain the decision not to proceed.**
31. **We recommend that the Government should include further details of any such changes of plan as those described in the preceding three paragraphs in its response to our annual pre-legislative scrutiny reports.**

