



HOUSE OF LORDS

Select Committee on the Constitution

3rd Report of Session 2010–11

Sessional Report 2009–10

Report

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

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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Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Baroness Jay of Paddington (Chairman)
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Declaration of Interests

A full list of Members' interests can be found in the Register of Lords' Interests:

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Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

Publications

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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 1228/5960

The Committee's email address is: constitution@parliament.uk

Sessional Report 2009–10

Introduction

1. The House of Lords Constitution Committee is appointed by the House “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. Accordingly, we conduct bill scrutiny whilst simultaneously carrying out longer, in-depth policy inquiries.
2. Hitherto we have produced Annual Reports each of which covered a year-long session of a Parliament. The 2009–10 session was a short one because of the 2010 General Election—Parliament was dissolved on 12 April 2010, having sat for under five months. We have therefore decided that henceforth we will produce a Sessional Report covering each session of Parliament. In making such reports, we seek to:
 - summarise for the House and the public our work over the preceding session;
 - assess the impact of that work wherever possible; and
 - comment on any other general matters we consider to be important.

Bill Scrutiny

3. In this section we examine in detail the bill scrutiny conducted during the 2009–10 session. In Appendix 1 we set out the broad principles and methods which guide the Committee in carrying out our legislative scrutiny function.
4. In 2009–10 the Committee considered the constitutional implications of 17 Government bills and two Private Members’ bills. We made seven scrutiny reports to the House on six bills—the Bribery Bill, the Co-operative and Community Benefit Societies and Credit Unions Bill, the Video Recordings Bill, the Digital Economy Bill, the Constitutional Reform and Governance Bill and the Crime and Security Bill. We also corresponded with ministers on several other bills. A table summarising bills examined can be found at Appendix 2.

Bribery Bill¹

5. The chief purpose of the Bribery Bill was to reform the criminal law of bribery; this is a matter that had been examined in two reports from the Law Commission (in 1998 and 2008) and was subject to a draft Bill in 2008–09. The Committee produced two reports on clause 12 of the Bribery Bill. We drew clause 12 to the attention of the House not only because of the constitutional concerns it raised, but also because it was drafted in a way which was notably different from the corresponding clauses in the draft Bribery Bill.
6. Clause 13 of the draft Bribery Bill had allowed for the domestic intelligence agencies to be granted a ministerial authorisation to bribe. The Joint

¹ 1st Report (2009–10) (HL Paper 10) and 7th Report (2009–10) (HL Paper 49).

Committee on the draft bill had reported that it had heard no persuasive need for such an authorisation. In clause 12 of the bill as introduced the scheme for ministerial authorisation of bribery by the domestic intelligence services was abandoned in favour of a series of blanket defences extending to law enforcement agencies and the armed forces. We reported to the House, on 4 December, that the removal of the safeguard of there being a Minister responsible was a matter of constitutional concern. Furthermore our report made it clear that in our view the defences provided for in clause 12(1)(a) and (b) were drawn too widely.

7. Our report met with widespread support on Second Reading and in Grand Committee. The Government's written response explained that in the light of our report they proposed to table amendments to remove clause 12(1)(a) and limit the defence to persons pursuing the legitimate purposes of the intelligence services and armed forces. This amendment was agreed to at Report stage.
8. Our second report on the Bribery Bill was published on 2 February 2010. It welcomed the Government's decision to seek the removal of clause 12(1)(a) but reiterated our recommendation that the defences in respect of both the intelligence services and the armed forces should be accompanied by a system of prior ministerial authorisation. The Bill was amended at Third Reading in the Lords to include provision in clause 10 for a discretionary prior ministerial authorisation scheme in respect of conduct by the intelligence services and armed forces. In line with the Committee's recommendation, this scheme was designed to augment, rather than replace, the defence in what is now clause 13 of the Bill. The Government did not support this amendment but accepted that a compromise was necessary. At Commons Committee stage the Government tabled amendments to omit subsections (6) to (14) of clause 10 of the Bill, but in their place tabled amendments to further strengthen the accountability arrangements in respect of conduct by the intelligence services and armed forces that would fall within the ambit of clause 13. These amendments were agreed to.

Co-operative and Community Benefit Societies and Credit Unions Bill²

9. In the 2008–09 session a Private Members' Bill entitled the Co-operative and Community Benefit Societies and Credit Unions Bill which had all-party support was introduced. The main purposes of the Bill were to rebrand "industrial and providence societies" as "community benefit societies", to require them to register with the Financial Services Authority, and to apply certain provisions of company law to them. From a constitutional point of view, the subject-matter of the Bill was straightforward and uncontroversial and no objection to it was raised by the Committee. The Committee did however produce a report in which it raised concerns relating to drafting and, in particular, to the powers the Bill would confer on the Treasury to amend legislation by order: so-called "Henry VIII Clauses".
10. The Bill did not proceed beyond Second Reading in the 2008–09 session.
11. In 2009–10 a Co-operative and Community Benefit Societies and Credit Unions Bill was introduced which was identical to the previous Bill, save that it was re-drafted in two respects in order to take account of this Committee's

² 3rd Report (2009–10) (HL Paper 17).

concerns. We published a report which welcomed the fact that the Government had responded positively to our concerns. The Bill received Royal Assent on 18 March.

Video Recordings Bill³

12. The Video Recordings Bill repealed and immediately revived the Video Recordings Act 1984. The Bill made no substantive amendment to the provisions of the 1984 Act. It was necessary to do this in order to make the Act enforceable. Owing to an oversight the Act was not notified to the European Commission, as it should have been, under the Technical Standards Directive.
13. Our report on the Bill called on the Government to take steps to ensure that this oversight was not repeated in the future.
14. This Bill was the first piece of fast-track legislation to have been introduced into Parliament since we published our report, *Fast-track Legislation: Constitutional Implications and Safeguards*. We noted with approval that the Government acted upon the recommendations we made in that report so that the Explanatory Notes for the Video Recordings Bill addressed each of the matters included on our check-list, and give a full explanation of and justification for the need to fast-track this Bill. We were likewise pleased to note that the Government Deputy Chief Whip, when introducing the Bill in the House, gave an Oral Statement to the same effect. The Committee welcomes these practices and regards them as precedents which should apply to any future fast-tracking of legislation. (We note that these practices were also followed in respect of the other piece of fast-track legislation introduced in the 2009–10 Session: namely, the Terrorist Asset-Freezing (Temporary Provisions) Bill.)

Digital Economy Bill⁴

15. The Digital Economy Bill contained provisions concerning a wide range of issues emanating from the *Digital Britain Final Report*, concerning both the law of copyright (especially as it applies online) and various regulatory aspects of broadcasting, including the powers of OFCOM, as well as other matters. In its scrutiny of the Bill the Committee noted one important matter of constitutional concern: the extent of the powers which the Bill sought to confer on the Secretary of State.
16. We raised this matter in correspondence with the then Secretary of State (Lord Mandelson). We raised concerns, in particular, about clauses 17 and 42. While we accepted his explanation of and justification for clause 42, we were not persuaded by what the Secretary of State had to say in his letter about clause 17. We published a report on 22 January which criticised the broadly worded Henry VIII power contained in clause 17. In the event, amendments were moved to clause 17, which significantly narrowed the Secretary of State's powers to amend legislation by order. We are pleased to note that the Digital Economy Act as enacted does not contain a Henry VIII clause anything like as open-ended as that to which we had objected when the Bill was introduced.

³ 5th Report (2009–10) (HL Paper 36).

⁴ 6th Report (2009–10) (HL Paper 40).

*Constitutional Reform and Governance Bill*⁵

17. As introduced, the Constitutional Reform and Governance Bill included provisions concerning the following areas: the civil service, the ratification of treaties, membership of the House of Lords, demonstrations in the vicinity of Parliament, human rights claims against devolved administrations, courts and tribunals, national audit, and transparency of Government financial reporting to Parliament. The Bill was much augmented in the House of Commons, as a series of Government amendments were added to it during its Committee stage in that House.
18. This Bill was preceded by a Green Paper of 3 July 2007, by a White Paper of March 2008, and by a Draft Constitutional Renewal Bill of March 2008. The Draft Bill was subject to detailed pre-legislative scrutiny by a specially appointed Joint Committee on the Draft Constitutional Renewal Bill, which reported in July 2008. The Government's much delayed response to the Joint Committee's report was published on the same day as the Constitutional Reform and Governance Bill, in July 2009.
19. The Bill did not reach the House of Lords until March 2010, only five weeks before Parliament was dissolved. Our report on the Bill, published on 18 March, analysed both the subject matter of the Bill and the parliamentary processes it was subject to. We were strongly critical of the Government for introducing the Bill so late in the Parliament and thus effectively denying both Houses of Parliament—and especially this House—the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserved. We concluded that, “we consider it to be extraordinary that it could be contemplated that matters of such fundamental constitutional importance as, for example, placing the civil service on a statutory footing should be agreed in the ‘wash-up’ and be denied the full parliamentary deliberation which they deserve. This is no way to undertake the task of constitutional reform.”⁶
20. Our report was widely praised on the floor of the House and cited with approval by many Members who spoke in the Second Reading debate to criticise the manner in which the Bill was being taken through Parliament. The Government eventually conceded to most of the points that we made and tabled amendments to remove from the face of the Bill many of its provisions.
21. The Government responded in writing to our report and we published that response.⁷ In paragraph 8 of our report on the Bill we called on the Government to publish the promised and much-delayed war powers resolution. In the response the then Government undertook to publish the resolution as soon as possible. This publication has not yet taken place.

*Crime and Security Bill*⁸

22. The Crime and Security Bill contained provisions concerning a variety of aspects of criminal justice, including powers of stop and search, powers with regard to domestic violence, and powers concerning gang-related violence.

⁵ 11th Report (2009–10) (HL Paper 98).

⁶ 11th Report (2009–10) (HL Paper 98).

⁷ 14th Report (2009–10) (HL Paper 108).

⁸ 13th Report (2009–10) (HL Paper 107).

Our report on the Bill drew to the attention of the House the provisions governing the retention and destruction of biometric material (especially as regards DNA profiles). In large part these provisions had been brought forward in response to the judgment of the European Court of Human Rights in *S and Marper v. United Kingdom*, in which the system governing this area in England and Wales had been condemned (Scotland has its own system, which was regarded by the European Court as complying with Convention rights).

23. We welcomed the fact that the Government was seeking to reform the system that was found by the European Court to be in breach of Convention rights and, in particular, the fact that the Government was seeking to achieve this through primary legislation. But we had concerns about the six-year period during which a DNA profile may be retained in respect of an individual who is arrested for (but not convicted of) a criminal offence. We criticised this as excessive and warned that it was liable to be ruled disproportionate.

Scrutiny of Welsh Legislative Competence Orders

24. During the 2006–07 session the Committee agreed to conduct pre-legislative scrutiny of proposed Legislative Competence Orders (LCOs) under section 95 of the Government of Wales Act 2006 for an initial 12-month trial period. This scrutiny was to complement the similar scrutiny roles of the House of Commons Welsh Affairs Committee and the National Assembly for Wales. This was in line with the recommendations of our scrutiny report on the Government of Wales Bill published during the Bill’s passage through Parliament, in which we suggested that pre-legislative scrutiny in this House should be carried out by either the Delegated Powers and Regulatory Reform Committee or by the Constitution Committee.⁹
25. The purpose of LCOs is to enlarge the National Assembly for Wales’ powers to make Measures and the powers of Welsh Ministers to make subordinate legislation. Proposed LCOs are subjected to pre-legislative scrutiny before being formally laid before Parliament for approval. The full LCO process is set out in detail in our second report published in the 2007–08 session.¹⁰
26. On 27 November 2007 we published a report, *Scrutiny of Welsh Legislative Competence Orders*. The purpose of this report was to remind members of the House (and other interested parties) what Legislative Competence Orders (LCOs) are and to explain how they would be scrutinised at the pre-legislative stage and subsequently in both Parliament and the National Assembly for Wales.
27. During the 2009–10 session we examined three proposed LCOs¹¹ and cleared them without report.

Policy Inquiries and Reports

28. Pursuant to the second part of our terms of appointment, “to keep under review the operation of the constitution”, the Committee conducts in-depth policy inquiries into major constitutional issues. We published two major reports in the 2009–10 session.

⁹ 8th Report (2005–06) *Government of Wales Bill* (HL Paper 142), paragraphs 23–24.

¹⁰ 2nd Report (2007–08) *Scrutiny of Welsh Legislative Competence Orders* (HL Paper 17).

¹¹ Those relating to Education, Transport and Housing and Local Government.

*The Cabinet Office and the Centre of Government*¹²

29. In March 2009, the Committee began an inquiry into “the contemporary workings of the Cabinet Office and the centre of government.” The inquiry aimed to shine light on the role that the Cabinet Office seeks to fulfil as part of the wider “centre of government”. In the context of the Cabinet Office’s three core functions, supporting the Prime Minister, Supporting the Cabinet, and Strengthening the Civil Service, the Committee examined:
- Whether the function of the Cabinet Office, in supporting the Cabinet, had changed, and if so, how;
 - The roles of the Prime Minister, the Cabinet Secretary and the Minister for the Cabinet Office;
 - The nature of the Cabinet Office’s relationships with the Cabinet, the Prime Minister’s Office, HM Treasury, and other government departments;
 - The extent to which the Cabinet Office and the centre are subject to effective parliamentary accountability; and
 - Whether the centre provides for effective co-ordination of the Executive’s accountabilities.
30. The Committee heard evidence from 28 oral witnesses and received 15 written submissions. Witnesses included the then Cabinet Office Minister and other prominent politicians, the Cabinet Secretary and several former senior civil servants, academics, former special advisers and media experts.
31. The Committee’s report was published on 29 January 2010. The Committee’s central recommendation was that structures of accountability should mirror structures of power, and, bearing in mind the degree to which the role and status of the Cabinet Office has evolved over the years, that where structures of power have changed the structures of accountability should be adjusted accordingly. The Committee particularly emphasised the importance of upholding and improving the Cabinet Office’s accountability to Parliament, and ensuring that all elements of the centre, and all aspects of the centre’s work are transparent.
32. The Committee also recommended:
- Clarification in the nature of the relationship between the Cabinet Office and the Prime Minister’s Office, and appropriate parliamentary accountability for the Prime Minister’s Office;
 - That the Prime Minister’s role and the centre’s role in policy delivery are transparent and accountable to Parliament;
 - In light of concerns that the Cabinet Office had tended to function as a “dustbin” of miscellaneous units, a review of the units that have accrued to the centre;
 - Ensuring that special advisers fulfil an appropriate function that complements, rather than diminishes, the role and responsibilities of ministers and civil servants;

¹² 4th Report (2009–10) (HL Paper 30).

- The continued affirmation of cabinet government and the principle of collective ministerial responsibility;
 - A reassessment of the function of the Minister for the Cabinet Office to ensure that the postholder's responsibilities accurately reflect and account for the strategic role that the Cabinet Office plays;
 - That the Cabinet Office should play a formal role in investigating the likely consequences of any machinery of government changes, particularly those with constitutional implications;
 - A requirement for the government to set before Parliament a written analysis of the relevant issues and consequences relating to a proposed machinery of government change with constitutional implications, and that an oral ministerial statement be made in Parliament; and
 - That the Cabinet Secretary should continue to fulfil the function of Head of the Civil Service.
33. The then Government's response was received on 6 April and published on 1 July.

*Referendums in the United Kingdom*¹³

34. In November 2009, the Committee began an inquiry into "the role of referendums in the UK's constitutional experience". The inquiry was undertaken in the context of various commitments by political parties to the future use of referendums, and sought to address the following questions:
- What are the advantages and disadvantages of referendums?
 - How do referendums accord with the UK's system of representative democracy?
 - When is it appropriate for referendums to be used?
 - Is it appropriate for constitutional issues to be subject to a referendum?
 - If referendums are used, what rules should govern their use?
 - Is the regulatory framework, as set out in the Political Parties, Elections and Referendums Act 2000, effective and appropriate?
 - Does the Electoral Commission play an appropriate role as part of this regulatory system?
35. The Committee received oral evidence from 19 witnesses, and received 24 written submissions. Witnesses included the then Minister, Michael Wills MP, academics and other constitutional experts, former referendum campaigners, international experts and representatives of the Electoral Commission.
36. The Committee's report was published on 7 April 2010. The Committee concluded that referendums are not a panacea, and that while noting the arguments for their use as a way of strengthening the democratic process, that the drawbacks and difficulties of their use are serious. The Committee acknowledged that referendums may become a part of the UK's democratic and constitutional framework, but that there has, as yet, been little

¹³ 12th Report (2009–10) (HL Paper 99).

consistency in their use. Referendums have instead taken place on an *ad hoc* basis, frequently as a tactical device rather than on the basis of constitutional principle.

37. Notwithstanding this, the Committee acknowledged arguments that, if referendums are to be used, they are most appropriately used in relation to fundamental constitutional issues. The Committee concluded that there are difficulties in defining what constitutes a “fundamental constitutional issue”. Although some constitutional issues clearly are of fundamental importance, and others not, there is a grey area where the importance of issues is a matter of political judgment. The Committee judged that it is inappropriate to leave such decisions entirely in the hands of the government of the day. Parliament should decide whether or not a referendum is appropriate in a given circumstance.
38. The Committee concluded that while it is impossible to provide a precise definition of what constitutes a “fundamental constitutional issue”, the following potential proposals fall within such criteria:
 - To abolish the monarchy;
 - To leave the European Union;
 - For any nations of the UK to secede from the Union;
 - To abolish either House of Parliament;
 - To change the electoral system for the House of Commons;
 - To adopt a written constitution;
 - To change the UK’s currency.
39. The Committee recommended that referendums should not be held on the same day as General Elections and that there should be a presumption against holding referendums on the same day as other elections but that this should be judged on a case-by-case basis by the Electoral Commission. The Committee judged that the Electoral Commission should also have a statutory role in devising the wording of the referendum question, which should then be presented to Parliament for approval. The Committee also expressed concern about the use of voter turnout thresholds and supermajorities, the regulation of information provision, funding and campaigning, and the role of government and political parties in referendum campaigns.
40. The Government’s response has yet to be received.

APPENDIX 1: LEGISLATIVE SCRUTINY FUNCTION

In carrying out our legislative scrutiny function, we seek to identify any issues of principle affecting a principal part of the constitution (the “two p’s” test).¹⁴ Such issues may arise in bills which at first glance do not deal with matters of high constitutional importance, as well as bills where the subject matter obviously engages with basic elements of the constitution. As the Committee explained in its first Annual Report, a wide variety of matters fall within the rubric of “the constitution”.¹⁵

Without seeking to narrow the broad remit entrusted to it by the House, the Committee believes that its attention is most likely to be engaged by significant legislative proposals that affect the relationship between the executive and the judicial system; the system of civil and criminal justice; the integrity of the legislative process; the democratic process (with specific regard to the electoral system and the use of referendums); the distribution of powers between the central executive, the devolved institutions and local government; public accountability; and fundamental principles relating to good government, liberty and the rule of law. Many legislative proposals arise from the United Kingdom’s obligations at the international level; where this is the case, the Committee seeks to understand the nature of those obligations when it examines the manner in which Parliament is asked to implement them.¹⁶

All Government bills introduced to the House of Lords, and those Private Members’ bills that have “a reasonable prospect of being enacted”,¹⁷ are subjected to scrutiny. If it is felt that a particular bill raises an issue of principle affecting a principal part of the constitution, a number of options are available to the Committee. These options are set out in the flowchart in Figure 1 below, which also incorporates the sift system that we have adopted to streamline the scrutiny process.

¹⁴ Constitution Committee, 1st Report (2001–02) *Reviewing the Constitution: Terms of Reference and Method of Working* (HL Paper 11), paragraph 22.

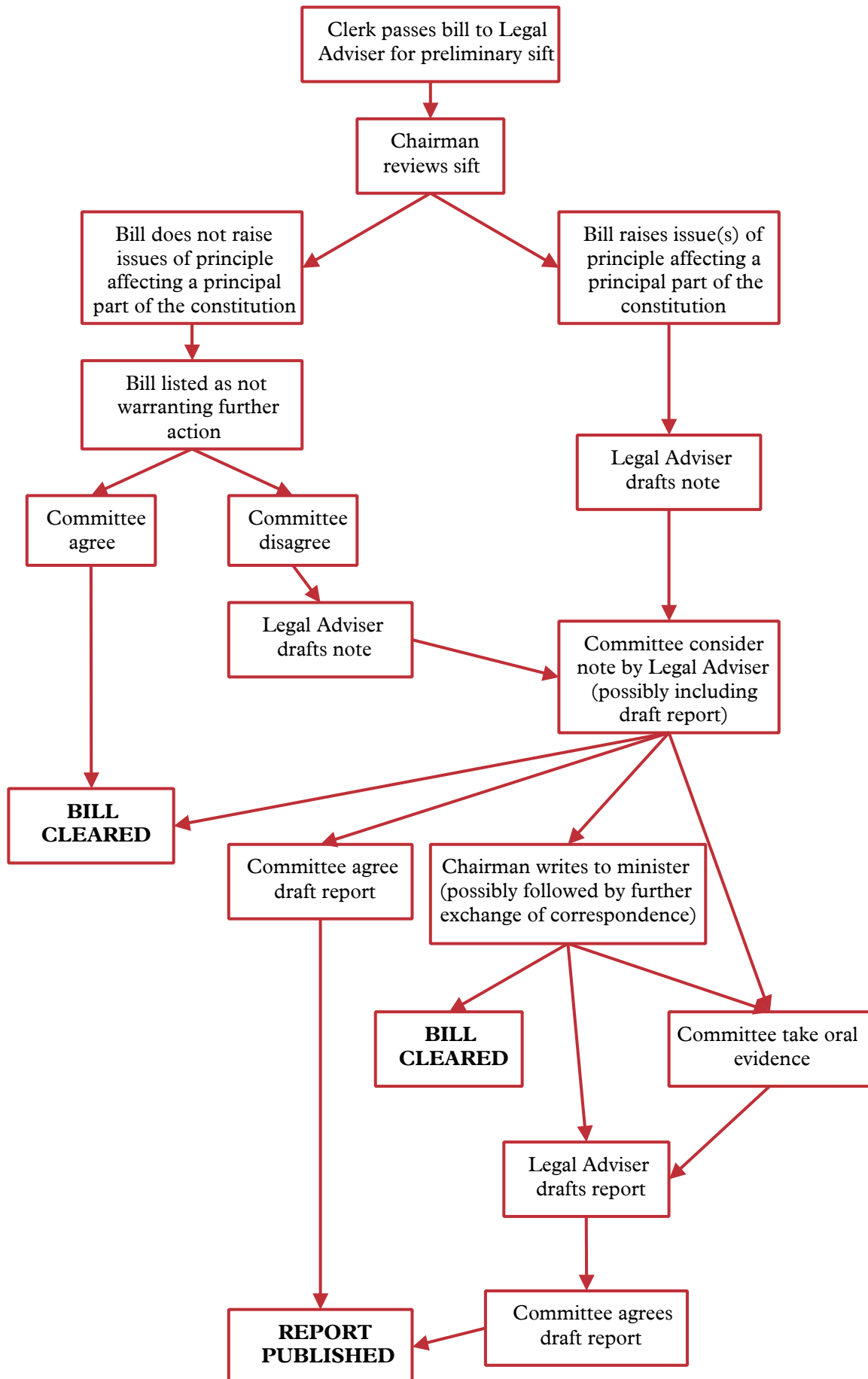
¹⁵ 2nd Report (2003–04) (HL Paper 19).

¹⁶ 2nd Report (2003–04) (HL Paper 19), paragraph 6.

¹⁷ 17th Report (2003–04): *Annual Report 2003–04* (HL Paper 194), paragraph 2.

FIGURE 1

Flowchart: Bill Scrutiny



In some cases, as the flowchart indicates, the Committee considers that the constitutional principles engaged are of sufficient import to warrant a report to the House. The purpose of scrutiny reports is to ensure that informed debate on a bill's constitutional implications takes place during its legislative stages. We endeavour to publish any such reports before the bill in question receives its Second Reading in this House, although this is not always possible. Scrutiny reports published in advance of the bill's Second Reading are often cited alongside the Second Reading entry in *House of Lords Business*, thus increasing members' awareness of the report. Where publication of a scrutiny report before a bill's Second Reading is not possible, the report is cited alongside the bill's Committee stage entry in *House of Lords Business*.

In some cases, the Committee's scrutiny reports simply highlight the constitutional implications of the bill in question without expressing a view on the merits of the provisions, but in other cases we feel it necessary to conclude that particular provisions, if enacted, would breach one or more key constitutional principles.

The Committee's bill scrutiny reports over the years have had a significant impact on the House's deliberations. However, it is equally clear that our concerns about a bill can on occasion disappear from view before detailed consideration of that bill takes place during Committee and Report Stages. Often this is because our concerns cannot be addressed without fundamentally altering the policy thrust of the bill or as a result of fast-tracking. On other occasions some or all of our concerns can be resolved through amendments to the bill. Accordingly, we have adopted the occasional practice of tabling amendments in the Chairman's name (and sometimes in the name of other Committee members) on behalf of the Committee, which seek to improve clauses that threaten to breach one or more key constitutional principles. This not only ensures that the Committee's concerns are fully debated in the House, with the participation of our Chairman and other Committee members, but can also result in the bill being improved from a constitutional perspective.

Title	HL Bill Number	First discussed ¹⁹	Comments	Action	Cleared
Northern Ireland Assembly Members Bill [HL]	4, 29	2 December		NFA	X
Contaminated Blood (Support for Infected and Bereaved Persons) Bill [HL]	5, 54		Lord Morris of Manchester PMB	NFA	
Marriage (Wales) Bill [HL]	6		Lord Morris of Aberavon PMB	NFA	
Live Music Bill [HL]	7		Lord Clement-Jones PMB	NFA	
Children's Rights Bill [HL]	8		Baroness Walmsley PMB	NFA	
Rehabilitation of Offenders (Amendment) Bill [HL]	9, 25		Lord Dholakia PMB	NFA	
Building Regulations (Amendment) Bill [HL]	10		Lord Harrison PMB	NFA	
Co-operative and Community Benefit Societies and Credit Unions Bill [HL]	11	9 December	Lord Tomlinson PMB Committee had reported on bill by same name in previous session; concerns responded to positively by Government in this bill.	Agreed to publish report welcoming bill and Government's actions to meet concerns of Committee; report published 10 December	X

Title	HL Bill Number	First discussed ¹⁹	Comments	Action	Cleared
Child Poverty Bill	21, 34, 46	13 January		NFA	X
Video Recordings Bill	22	13 January	Bill repealed and immediately revived the Video Recordings Act 1984; Committee urged Government to take steps to avoid future such oversights.	Report published 15 January.	X
Personal Care at Home Bill	23, 48, 49	20 January		NFA	X
Fiscal Responsibility Bill	24	10 February		NFA	X
Financial Services Bill	26, 51	24 February		C response received 16 March; response discussed on 24 March; further letter praising helpfulness of response sent on 25 March.	X
Flood and Water Management Bill	28, 50	24 February		Agreed to write to Minister; letter sent 25 February;	
Anti-Slavery Day Bill	30		Baroness Butler-Sloss PMB	NFA	
Terrorist Asset-Freezing (Temporary Provisions) Bill	33	10 February		Bill passed before the Committee had an opportunity to scrutinise it; Agreed that the Chairman should write to the Minister raising questions relating to the fast-tracking of the Bill and asking the Government to set out their intentions in relation to the draft bill; letter sent 11 February; reply received 8 March and noted on 10 March.	

