

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

29th Report of Session 2012-13

**The Government's new
approach to consultation:
Government Response**

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,
 with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (3) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord Bichard	Lord Methuen
Baroness Eaton	Rt Hon. Baroness Morris of Yardley
Lord Eames	Lord Norton of Louth
Rt Hon. Lord Goodlad (<i>Chairman</i>)	Lord Plant of Highfield
Baroness Hamwee	Rt Hon. Lord Scott of Foscote
Lord Hart of Chilton	

Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

Twenty-Ninth Report

THE GOVERNMENT'S NEW APPROACH TO CONSULTATION: GOVERNMENT RESPONSE

1. The Government announced a new approach to consultations¹ on 17 July 2012 proposing, amongst other changes, that they be shorter and “digital by default”. Following a call for evidence and an oral evidence session on 11 December with Mr Oliver Letwin, MP, Minister for Government Policy, the Committee published a report on 10 January 2013.² The Government response to it, in the form of a letter from Mr Letwin, is published at Appendix 1.
2. The Committee was disappointed with the Minister’s response and felt that he had not taken seriously the concerns the Report expressed. Proposals on which he seemed quite positive when he gave oral evidence to us in December 2012 are now swept into the review for consideration on whether they should happen. Proposals that are entirely within his control and capable of rapid resolution – like a single website for publicising government consultations – are similarly deferred to the end of the year by inclusion in the review. If, as he suggests in his response, the Minister does not propose to consult further but only to use the written evidence the Committee has already obtained, then there is no apparent reason why the review could not commence more quickly.
3. The Committee welcomes the proposed external advisory panel, which appears necessary to help officials to understand the practical operation of the Consultation Principles for respondents and to represent perspectives other than the Government’s own. However a panel of three members plus the National Audit Office member seems rather too small to achieve this. The Minister’s proposal that the Committee should nominate a member is appreciated. However, we believe that such an appointment would be contrary to the normal constitutional separation between Parliament and the Executive: the advisory panel should be truly independent. We would simply suggest that, as a minimum, there should be members drawn from each of the charity sector, industry and academia to represent the wide range of interests.
4. We recommended an early review because of the strong evidence we had received that a very wide range of interested parties saw the new Consultation Principles as having a detrimental effect on the development of good legislation. Although they have the superficial attraction of speeding up consultations (as shown in the Minister’s own figures) there was a clear message from respondents that quality would suffer if they were not allowed sufficient time to gather appropriate evidence.

¹ The Consultation Principles See: <http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

² 22nd Report - The Government’s new approach to consultation - “Work in Progress” (HL Paper 100)

5. The Minister's response missed the point of our recommendation: his initiative was not starting the process from scratch as the 2008 Code of Practice on Consultation was regarded with reasonable confidence by interested parties and seen as being fair and effective. The Consultation Principles moved suddenly from a system that appeared to be functioning reasonably on all sides to a situation in which there are significant objections. The written evidence we received clearly showed that the fact that the Government had launched the new Consultation Principles without any prior consultation was regarded with suspicion and further delay in responding to their reasonable concerns can only underline our witnesses' doubts that consultation will become a mere public relations exercise rather than a genuine means of influencing policy. We recommended an early review as a way of limiting the damage being done.
6. The evidence also impressed the Committee because it included a number of constructive suggestions on how the consultation system could be improved, particularly by the better targeted use of electronic communication. Those potential benefits are similarly being delayed.
7. In his evidence Mr Letwin justified the change to the Consultation Principles by saying: "We are trying to achieve a shift to a sense of urgently getting on with that which can be got on with urgently, taking into account what we need to take into account, focusing on being intelligent on how we find things out, so that we do not just treat time as if it were the only way in which to do things". The Committee believes that the Government should apply this sentiment to the review of the Principles.

APPENDIX 1: GOVERNMENT CONSULTATIONS: GOVERNMENT RESPONSE

Thank you for your letter of 10 January informing me of the publication of the Lords Secondary Legislation Scrutiny Committee's report: *The Government's new approach to consultation: 'Work in Progress'*.

The report makes thoughtful and valuable recommendations which we will consider in detail as part of our planned review of the operation of the consultation principles.

Format of the review

The Committee suggested that the review should be carried out by a unit independent of government, with a Stakeholder Reference Group advising it. We recognise the value in having external scrutiny of the impact of the consultation principles. For that reason, we will set up an external advisory panel to inform the review, although the review itself will be conducted by the Cabinet Office. This will enable us to produce a quick, targeted analysis of the operation of the principles. We will be able to work collaboratively with departments to gain evidence of how the principles have been used in practice and seek their views of how they could be improved. We will invite a representative from the National Audit Office to sit on the panel, alongside two other apolitical appointees. I would also like to invite the Committee to nominate a further member of the panel.

Our natural inclination is to provide an opportunity for other interested parties to comment on the review by holding a short call for evidence. However, we are wary of 'consulting on consultations' and so will seek additional views only if the Committee feels there is merit in this approach. In any case, we will fully take into account the submissions you received as part of the preparations for your report.

Timing

I understand the Committee's desire to begin this review expeditiously. However, for the review to be effective, I believe we should allow long enough to exclude the possibility of seasonal quirks, or variance as departments become familiar with the new regime. Therefore, I propose to begin the review on 5 April. This will enable us to resource the review properly, and will allow us to take into account the Committee's views on the call for evidence as well as on membership of the independent advisory panel before we recruit the panel and start work.

My intention is to ask officials and the independent panel to provide both Ministers and the Committee with the conclusions of the review on the anniversary of the launch of the principles (17 July).

I would welcome any feedback from the Committee on those findings, before Ministers respond to the conclusions and introduce any consequent changes to the principles. I hope that any changes could be in operation from the time when Parliament is back in full swing after the Party Conference season.

Content

I propose that the review should address the following issues that the Committee raised in its report:

- what range of timescales is appropriate for consultations;

- how the new principles have affected the length of consultations;
- whether the principles should include specific rules dealing with holiday periods;
- how Government can most effectively engage with key groups before a consultation is launched;
- how hard to reach groups can best be engaged in consultations, especially in the light of the Government's 'digital by default' approach to communication;
- how consultations are listed online, and the feasibility of a single webpage for all consultations, listed in the order they close;
- whether responses to consultations should be published as a matter of routine;
- how departments analyse responses and respond to consultations;
- how consistently the principles are being applied by departments; and
- whether Cabinet Office should take on a greater oversight role.

I would be grateful if the Committee could let me know whether it feels that there are additional issues that the review should address.

With regard to the possibility of a third session de-regulation Bill, this could cover a wide range of measures including the repeal of obsolete or unused legislation. It could include a wide range of topics, so a single consultation on all of the Bill's proposals would be both unnecessary and impractical. However, the measures most significantly affecting businesses and individuals will rightly have been subject to public consultation before the Bill receives Parliamentary scrutiny.

I should end by repeating my offer to appear again before the Committee to discuss the conclusions of the review.

OLIVER LETWIN

7 February 2013

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 26 February 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Eames, Baroness Eaton, Lord Goodlad, Baroness Hamwee, Lord Methuen, Baroness Morris of Yardley, Lord Norton of Louth, Lord Plant of Highfield, and Lord Scott of Foscote.