Inquiry into Government consultation practice: Government Response

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

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

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;
   (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
   (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

(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
Baroness Andrews  Lord Eames  Baroness Stern
Lord Bichard  Rt Hon. Lord Goodlad (Chairman)  Lord Plant of Highfield
Lord Borwick  Baroness Hamwee  Lord Woolmer of Leeds
Lord Bowness  Baroness Humphreys

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’s work, 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 hlseslegscrutiny@parliament.uk.

Statutory instruments
1. In January of this year, we published the report of our inquiry into Government consultation practice (22nd Report of Session 2014–15: HL Paper 98).

2. In our conclusions, we welcomed the readiness of the Minister for Government Policy in the Cabinet Office, the Rt Hon. Oliver Letwin, MP, to revise the Government’s consultation principles to make it clear that Departments should set consultation periods that were not largely vitiated by coinciding with holidays; to specify that Departments should allow a period between the end of consultation and the laying of a statutory instrument to consider responses; and to say that Departments should publish their consultation summaries no later than the time of laying the instruments concerned before Parliament. We also welcomed his undertaking to promote as good practice that Explanatory Memoranda to statutory instruments should as a matter of course set out, in concise form, the key issues covered in a consultation exercise and the responses on those issues.

3. However, we had continuing concerns. We said that, in order to ensure that consultations did not proceed on the basis of misunderstanding among respondents, Government Departments must make sustained efforts to explain their intentions more clearly. Pressure on Departments to expedite the work of Government had intensified in this final Session of Parliament, and we commented that Departments must resist that pressure to the extent of ensuring that consultations balanced the interests of all concerned. Finally we said that the evidence suggested that neither individual Departments nor the Cabinet Office were systematically monitoring consultations across the board, and hence that no-one in Government was learning lessons in an organised way which would serve to improve consultation practice generally. We said that the Cabinet Office should have a stronger role, both in issuing advice on remedying bad Departmental practice, and in publishing a yearly report which should draw on effective monitoring by each Department of its own consultations.

4. On 19 March, Mr Letwin wrote to offer a first response to the report, and we are publishing his letter, and the enclosures to it, at Appendix 1. This is an interim response: Mr Letwin says that the Government will report to the Committee further early in the next Parliament. We shall consider the further and fuller response carefully. Our scrutiny of secondary legislation since our inquiry report was published in January of this year has provided ample evidence of Departments under pressure to expedite the Government’s work, to the detriment as we see it of adequate consultation processes. We look to Government to respond positively to the conclusions of our inquiry in order to remedy shortcomings in current consultation practice.
APPENDIX 1: CORRESPONDENCE ON INQUIRY INTO GOVERNMENT CONSULTATION PRACTICE

Letter from Rt Hon Oliver Letwin MP, Cabinet Office.

I thank the Committee for its report of 23 January and for the valuable work that it undertakes.

Amendments to the Consultation Principles

I reiterate the commitment I made during my evidence to the Committee in December to seek agreement in the next parliament to amendments to the consultation principles.

In particular, I hope to include in the principles stipulations that:

- except in extraordinary circumstances, responses to consultations should be published before or at the time of laying any consequential legislative instruments; and that

- departments should ensure that appropriate time is allocated between the closing of a consultation and implementation of legislation or policy to allow the consultation responses to be considered fully.

In respect of the Committee's concerns over consultation around holiday periods I have made clear to departments that they should act in compliance with the consultation principles, drawing their attention to the following extract from the principles:

“Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating action.”

Monitoring of Government Practice

I note the proposal for the Cabinet Office to perform a stronger role both in issuing advice and monitoring consultation practice. I take the Committee's views very seriously and am discussing with the Cabinet Secretary and Minister for the Cabinet Office how such a role could be implemented and resourced. The Committee have further identified concerns that the number of consultations has risen by two thirds, potentially leading to consultation overload on potential respondents. The establishment of a central function may help to ensure that when government consults it does so in the most efficient and accessible manner and that consultations are focussed and necessary.

I have written to departments and arms length bodies that have held unusually short consultations. I attach responses from the Department of Business Innovation and Skills, Public Health England, HMRC and OFSTED to my correspondence.

The Government will report to the Committee further early in the next parliament.

19 March 2015

Letter from Lin Homer, Chief Executive, HM Revenue and Customs, HM Revenue Customs, to the Rt Hon Oliver Letwin MP, Cabinet Office.

The Chief Secretary to the Treasury announced on 25 September 2012 that he had jointly tasked Cabinet Office and HM Revenue and Customs with devising a means to use the Government procurement process to encourage tax compliance from Government suppliers and bear down on abuse.

HMRC subsequently worked with Cabinet Office to identify aspects of a potential supplier’s tax conduct which Cabinet Office procurement guidance could refer to for this purpose. Government confirmed in the Autumn Statement on 5 December 2012 that it intended to consult on these.

Consultation on the proposal ran from Thursday 14 February 2013 to Thursday 28 February 2013.

Whilst we agree that the consultation period was short, we concluded at the time that it was proportionate and justified. This was a very focused measure and Cabinet Office helped identify the relevant stakeholders, both within Government and outside, so that we were able to discuss the proposals with procurement specialists in government departments, suppliers, accountancy and legal firms and representative bodies. There were a large number (50) of cogent, well-argued responses. The same fundamental issues were raised by most respondents, and more time would have been unlikely to expand on these. HMRC remained open to further comments from stakeholders after the consultation itself closed.

The final policy design included changes made to address concerns put forward, while still promoting tax compliance by Government suppliers and we regard it as having been an effective consultation.

16 February 2015
Letter from Jo Swinson, MP, Minister for Employment Relations and Consumer Affairs, Department for Business, Innovation and Skills, to the Rt Hon Oliver Letwin MP, Cabinet Office.

Thank you for your letter of 24 January expressing concern that the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014 consultation took place over a holiday period.

While we make every effort to consult for as long as possible, in this instance it was necessary to consult for a five week period over the summer to ensure that we met the Government objective of banning overseas-only advertising by agencies by the end of 2014/early 2015. To mitigate the risk of respondents not having sufficient time to respond to the consultation, officials in my Department held meetings with key stakeholders, including recruitment sector trade bodies, the TUC and the Equality and Human Rights Commission, prior to publishing the consultation document. This gave stakeholders the opportunity to share their views and help shape the draft policy.

We will shortly be consulting on further reforms to the Conduct of Employment Agencies and Employment Businesses Regulations and intend to consult for at least eight weeks.

12 February 2015
Letter from Sir Michael Wilshaw, Her Majesty’s Chief Inspector, Ofsted, to the Rt Hon Oliver Letwin MP, Cabinet Office.

Thank you for your letter of 24 January 2015.

Your letter raises two concerns. First, that Ofsted’s consultation on the regulation of social work providers was available for just 14 days and, second, that the resultant consultation response has not been published.

I share your concern about the limited length of this consultation. Throughout the latter part of 2012 and all of 2013, we were in regular contact with officials from the Department for Education (DfE) responsible for the requirement for Ofsted to register and regulate social work providers. Throughout this period, we were very clear that we did not consider the provisions within the Children and Young Persons Act 2008 concerning Ofsted’s role to be appropriate.

Ultimately the DfE was in full agreement with this view. To this end, a Legislative Reform Order was drafted to remove Ofsted’s responsibility to register social work providers. Unfortunately, this was rejected by the Delegated Powers and Regulatory Reform committee in the House of Lords in July 2013.

Throughout August and September 2013 there was an exchange of correspondence between the Director General, Children’s Services, at the DfE and myself. Meetings between respective officials also took place on this issue. Given that the legislation was due to commence in November 2013, this gave Ofsted little time to fully prepare to meet these new statutory responsibilities. October 2013 was the only possible ‘window’ in which to establish our policies and procedures and then consult upon our proposals. Despite these constraints, the public consultation period, together with a face-to-face event involving children and young people, elicited over 50 responses. This was the best that we could have hoped to have achieved in the time constraints that prevailed.

In relation to your concern that the consultation response was not published, I can advise that the response was published on Ofsted’s website in November 2013. However, a recent move to a new gov.uk website unfortunately failed to transfer this document. This has now been rectified. For ease, please use the following link to access the formal consultation response:


I am of course very happy to discuss further any aspect of this work.

12 February 2015
Letter from Duncan Selbie, Chief Executive, Public Health England, to the Rt Hon Oliver Letwin MP, Cabinet Office.

Thank you for your letter of 24 January regarding the consultation arrangements for Public Health England's (PHE) Strategic Framework to promote the health of men who have sex with men (published 23 May 2014). This framework was part of longer-term work by PHE to support a reduction in HIV incidence. It was published as an evidence review, and did not include government policy proposals or regulatory measures.

In developing the framework we ensured full stakeholder engagement. Its publication on the .gov.uk pages was the final stage in an extensive consultation process. Prior engagement included two significant events that reached over 150 participants in total, the establishment of an Expert Advisory Group comprised of academics and community groups, and close discussion with the Government Equalities office.

We endeavoured to consult in a way that was 'accessible and useful to stakeholders' and took 'necessary actions to engage effectively with hard to reach or vulnerable groups' as outlined in the Cabinet Office Consultation Principles guidance.

In these circumstances, we felt that providing two weeks for final comments to be submitted through .gov.uk was an appropriate course of action. I would be very happy to hear back if you thought this still inappropriate and will make sure we are in full compliance going forward.

27 February 2015
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 24 March 2015 Members declared no relevant interests.

Attendance:

The meeting was attended by Lord Bichard, Lord Borwick, Lord Bowness, Lord Goodlad, Baroness Hamwee, Baroness Humphreys, Lord Plant of Highfield, Baroness Stern and Lord Woolmer of Leeds.