

HOUSE OF LORDS

Select Committee on the Constitution

4th Report of Session 2017–19

The Legislative Process: Preparing Legislation for Parliament

Ordered to be printed 18 October 2017 and published 25 October 2017

Published by the Authority of the House of Lords



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Q in footnotes refers to a question in oral evidence

SUMMARY

In 2004 this Committee published a report on *Parliament and the Legislative Process* which made a series of wide-ranging recommendations covering the passage of legislation through Parliament. In 2016 we decided to follow up that report with a more wide-ranging inquiry into the legislative process, covering the entirety of the processes by which laws are developed, drafted, scrutinised and disseminated.

This report, the first arising from that inquiry, focuses on the preparation of legislation before it enters Parliament, as better policy preparation should result in better legislation. It is also important to recognise that Parliament's capacity to scrutinise legislation is limited, and therefore the process by which legislation is developed before it enters Parliament is key to ensuring the quality of the laws on the statute book.

Policy development within Government

The policy development process has been the subject of scrutiny by many parliamentary committees and other organisations over the years. The importance of ensuring that government policies are based on high-quality evidence is now better understood, although it still faces significant challenges. We welcome the fact that the process of policy development within Government now includes embedded mechanisms that place an emphasis on gathering and evaluating evidence. We also welcome the Prime Minister's commitment to a greater use of Green and White Papers—a more structured approach to policy development and consultation can only improve the quality and consistency of legislation.

The development of policy within Government has to be recognised as taking place within the context of a political environment. Ministers are responsible for the policies they oversee and they are rightly subject to political pressures from fellow politicians, the media and the public. They are accountable to Parliament and the electorate for the policy decisions they make. Empirical evidence is a valuable input to the policy development process but it cannot be the only factor on which politicians will make their decisions—that is an inevitable result of our democratic system of government. Ultimately, the Parliamentary Business and Legislation Cabinet Committee, and the Leader of the House of Commons, have a particular responsibility to ensure that the legislation presented to Parliament is necessary.

The evidence underlying government policies should normally be accessible for scrutiny by outside organisations—this is clearly not always the case at present. We also recognise, however, that there are situations in which evidence will not be available on which to base necessary policy choices: in such situations, the Government should make clear how it intends to develop an appropriate evidence base and when it intends to review the policy in light of that evidence. We recommend that the Government should routinely publish the evidence base for legislative or policy proposals. If a robust evidence base is not available, the Government should explain why it is nevertheless appropriate to proceed.

Piloting the application of policy is an important way of developing effective policies over time. Piloting is valuable both as a means to experiment with different policy variations to develop an evidence base for future policy-making and as a way of trialling the impact of new policies. There does not appear,

however, to be a consistent approach to piloting, and we recommend that the Government develop guidance for departments setting out when piloting is appropriate or desirable.

Consultation and pre-legislative scrutiny

We identify a number of points in the policy development process at which the Government should actively seek to engage stakeholders in the policy development process. These include informal discussions with stakeholders during the process of formulating policy proposals; formal consultation by means of Green and White Papers; and additional consultation during the legislative drafting process. We also draw attention to the conclusions of the House of Lords Secondary Legislation Scrutiny Committee on consultation mechanisms, including in particular its recommendation that six weeks should be considered a minimum feasible consultation period, save in circumstances which would generally be regarded as exceptional.

Once a draft legislative text is prepared, pre-legislative scrutiny by a parliamentary committee offers further opportunity for scrutiny and revision before it is introduced. In our 2004 report, *Parliament and the Legislative Process*, we recommended that it should be the norm for bills to be published in draft to afford more opportunities for formal pre-legislative scrutiny.

At present, pre-legislative scrutiny of draft bills is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation from the other stages of scrutiny which legislation undergoes. We conclude that pre-legislative scrutiny should be considered an integral part of the wider legislative process. This may mean adapting other parts of the process to take account of pre-legislative scrutiny. We do not prescribe how this might occur, but as one example we recommend that the business managers of both Houses take into account whether a bill has undergone pre-legislative scrutiny when considering how much parliamentary time to allocate to the bill when it is formally introduced.

The quality of legislation

There are areas of the law where significant strides have been made in drafting clear, accessible legislation. It is evident, however, that there remain large bodies of law which are remarkably inaccessible and difficult for practitioners to comprehend, let alone the average citizen. Quite aside from the obvious rule of law concerns that arise such law leads to costly and unnecessary strains on the resources of the justice system.

Consolidation offers at least a partial solution to this complexity, offering a route by which complex areas of the law can be gathered together in one place and made more accessible. It is also likely to have a more lasting effect now than ever before. The legislation.gov.uk website will, in effect, allow the law to be consolidated on a rolling basis in the future. This is a positive development. It will, in the longer term, make the law more accessible to both practitioners and the wider public. However, this will only be effective once an area of law is consolidated—it will not help resolve a situation where the relevant legislation is spread across the statutory landscape. In addition, it is clear that at a time when the resources of the court system are under pressure, both in terms of finance and in terms of staffing, consolidation offers the possibility of cost savings and increased efficiency. Whilst we recognise that consolidation is not a politically

attractive use of scarce parliamentary time, special parliamentary procedures exist to enable the smooth and swift passage of consolidation legislation that does not make substantive changes to law. These are currently, sadly, underused.

It is clear that consolidation is urgently needed in several areas of the law. We recommend that the Government should, as a priority, provide the Law Commission with the necessary resources to start consolidating those areas of the law where the consistent application of the law is under threat from the sheer complexity of the statute book. The evidence we received indicates that consolidating immigration law and sentencing law in particular would offer real benefits not only in relation to the clarity and ease of application of the law, but in terms of cost and efficiency savings within the justice system. We note that there are also opportunities for the creative use of technology to present complex areas of the law more clearly, where the time and resources for consolidation are not yet available.

Parliamentary counsel have a duty to ensure that legislation introduced into Parliament meets their own criteria for 'good law'. The established mechanism by which they are able to call upon the support of the Leader of the House of Commons and the Attorney General where they have concerns about either the content or drafting of legislation underlines the obligations on those two ministers in upholding the quality and integrity of the legislative process.

Both ministers are also members of the Parliamentary Business and Legislation (PBL) Cabinet Committee, which scrutinises legislation before its introduction to Parliament. Its members, and its Chair in particular (the Leader of the House of Commons), have a responsibility to ensure that they not only consider the interests of the Government in seeing its legislation pass through Parliament, but that they apply standards that promote the development of 'good law' and uphold the interests of Parliament and its ability to scrutinise properly the legislation laid before it.

Whilst the PBL Committee, and the Leader of the House of Commons especially, will continue to play an important role in upholding the standard of legislation, we believe it is in the interests of all parties to ensure that standards of legislation do not depend so heavily on the changing holders of the office of the Leader of the House of Commons. The concept of applying a set of legislative standards to government bills, perhaps through a new legislative standards select or joint committee, is not new. The principle has been endorsed by a series of select committees and other institutions over more than a decade. We continue to believe that there would be merit in producing a set of standards that legislation must meet before it can be introduced. We endorse the recommendations of the House of Lords Leader's Group on Working Practices and of the House of Commons Political and Constitutional Reform Committee and support the creation of a legislative standards committee.

The Legislative Process: Preparing Legislation for Parliament

CHAPTER 1: INTRODUCTION

1. The Office of Parliamentary Counsel describe ‘good law’ as law that is “necessary, effective, clear, coherent and accessible.”¹ The processes by which legislation is created and prepared by Government and subsequently scrutinised and enacted by Parliament are key to ensuring that new law meets these criteria.
2. In 2004, this Committee published a report on *Parliament and the Legislative Process*.² In that report, we made a number of significant recommendations about the way Parliament and the Government handled legislation. Some of those recommendations were followed by now well-embedded changes to the legislative process, such as the public evidence stage of Public Bill Committees in the Commons, and an expectation that every Act will have a post-legislative review memorandum produced by its relevant Government department within 3–6 years of its commencement. Others, such as a presumption that all bills should be published in draft ahead of their introduction to Parliament (along with consequential changes to how the legislative programme is timetabled), have not been adopted.
3. In 2016, we decided to launch a further inquiry into the legislative process in which we have taken a broader view of the law-making process. Whilst the term ‘legislative process’ is most commonly used to refer to the sequence of steps by which laws are formally adopted by Parliament, we have considered as a whole the different stages and procedures by which laws are developed, drafted, scrutinised, agreed to and disseminated. Our inquiry is broken down into four distinct parts which each address a stage or significant factor in the legislative process. These are:
 - Preparing legislation for Parliament;
 - The passage of legislation through Parliament;
 - The delegation of powers; and,
 - After Royal Assent.
4. In this report, we consider stage 1: preparing legislation for Parliament. This includes matters relating to policy development and consultation, legislative drafting and pre-legislative scrutiny. Whilst our inquiry focuses on the legislative process, we have included in this report a range of conclusions and recommendations relating to the policy development process because we consider that the quality of the process by which is policy is conceived and developed is inextricably linked with the quality of the ensuing legislation.

1 Office of Parliamentary Counsel, *When Laws Become Too Complex*, March 2013: <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex> [accessed 19 October 2017]

2 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173)

5. During our inquiry we encountered a number of issues that cut across the whole legislative process or across two or more of these different stages—these include, for example, matters relating to the drafting of legislation, bill documentation, the use of technology and public consultation. When considering these matters we have attempted, so far as possible, to separate out issues that relate specifically to the preparation of legislation before it is introduced in Parliament, leaving issues that might more appropriately be considered in the context of other stages of the legislative process to be addressed in the subsequent stages of our inquiry.
6. We heard from 26 witnesses during our inquiry, and received 28 pieces of written evidence. We are grateful to everyone who submitted written material or gave evidence to us in person.

CHAPTER 2: THE POLICY DEVELOPMENT PROCESS

Why legislation?

7. Legislation is an essential tool for Government to achieve its policy aims, but it is not the only route by which policies can be pursued and the Government's ends achieved. David Halpern, Chief Executive of the Behavioural Insights Team, told us that "You do not need to go to legislation. [As] head of the Behavioural Insights Team ... [we] spend a lot of time avoiding legislation. The point is that there are so many other things that you can do."³
8. The Government recognises that legislation should not necessarily be the first port of call for departments seeking to advance a policy objective. The Cabinet Office *Guide to Making Legislation* states that "before seeking a slot in the Government's legislative programme, departments should consider whether primary legislation is necessary ... [D]epartments should consider whether the ends they wish to achieve could be reached by purely administrative means."⁴ David Lidington MP, the then Leader of the House of Commons, told us that "probably any Government of any political stripe would argue that all their legislation is necessary", but added:

"One of the points that I and other business managers make to any Secretary of State who is pressing for a Bill is the question: is this absolutely necessary, or can you deliver your policy objectives through non-legislative means or through existing secondary legislative powers rather than resorting to a new statute? That is one of the elements of the internal government process of scrutiny, preparation and testing that goes on in the preparation of legislation before it is brought forward."⁵
9. There are, therefore, formal hurdles that need to be cleared before a department can bring forward a legislative proposal. In addition, there are clearly other reasons why departments might try to avoid legislation unless absolutely necessary: taking a bill through Parliament is resource-intensive, slow, and policies can become politicised during the process.
10. Despite these procedural hurdles, and the relative attractiveness of pursuing non-legislative change where possible, Dr Ruth Fox, Director and Head of Research at the Hansard Society, told us that "the reality is that there is no standard test of why legislation is required that is applied upstream in Whitehall." She elaborated:

"Sometimes there will be a process in place for consideration of the mischief that they want to remedy and, therefore, why legislation is required; sometimes it will emerge from a rather ad hoc political process in which it is more about Ministers being seen to act, show initiative, respond to media issues and so on. In those circumstances, what emerges is legislation as a means of demonstrating that something is happening and communicating a message, rather than a legal or legislative test about whether the policy you want to achieve is required in legislative terms."⁶

3 [Q 16](#)

4 Cabinet Office, *Guide to Making Legislation*, April 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/616341/Guide_to_Making_Legislation_Apr_2017_v2.0_final_May_update.pdf [accessed 19 October 2017]

5 [Q 89](#)

6 [Q 1](#)

11. Other witnesses agreed that factors other than legislative necessity could play a role in the introduction of legislation. Sir Richard Mottram, Chair of the Better Government Initiative, noted that one way for a minister to “shine” is by taking a bill through Parliament.⁷ Meanwhile, the Institute of Chartered Accountants in England and Wales (ICAEW) told us that “in some recent examples we have observed ‘tough new legislation’ being announced to fix a problem for which there is already legislation in place (just not being used effectively, or not brought into force). The motives for this approach are unclear.”⁸ Daniel Greenberg, a former parliamentary counsel, gave us a recent example of legislation that might, it could be argued, fail a necessity test:

“the National Citizen Service Bill ... What does it do? It sets up a body corporate with the following primary functions ‘to provide or arrange for the provision of programmes for young people ... for the purpose of ... enabling participants of different [backgrounds]’ ... If you want to do it, just do it. You do not need a Bill. I cannot find a legislative proposition in that Bill. I cannot see anything that needs to be done by legislation that cannot be done in other ways.”⁹

12. Lord Lisvane, giving the Statute Law Society’s Annual Lecture in February 2017, also suggested that the purpose of the National Citizen Service Bill could be achieved without legislation: it was “practically unnecessary but politically desirable.” Arguing against the idea of legislation being used to “send a message”, he stated that “the sole purpose of primary legislation” should be “to change the law only to the extent required to achieve the precise changes” sought.¹⁰
13. Mark Ryan, Senior Lecturer in Constitutional and Administrative Law at Coventry University, was among those¹¹ who suggested that the Government should have “to formally justify the need for its proposed legislation and also how it would sit in relation to other existing legislation (including any law which it would displace).” He suggested that “such a requirement would focus the mind of Government policy-makers on the necessity of the law proposed as it is well documented that one of the major problems with modern legislation is that of its volume and detail.”¹² We consider issues related to formal legislative standards later in this report (see paragraphs 172–183).
14. **We recognise that the initiative for new policy may come from empirical evidence, political pressure or principles; and often a mixture of all three. This is an inevitable result of our democratic system. While we recognise that there are occasions on which it will be necessary for ministers to initiate legislation in the absence of a detailed evidence base (see paragraphs 31–37 later in this chapter), we do not believe that such decisions should be taken lightly, or be viewed as an easy option when the Government feels it must be seen to do something. We welcome the then Leader of the House of**

7 See, for example, [Q 1](#) (Sir Richard Mottram)

8 Written evidence from the Institute of Chartered Accountants in England and Wales ([LEG0024](#))

9 [Q 49](#)

10 Lord Lisvane, ‘Why is there so much bad legislation?’, *Statute Law Society Annual Lecture*, 28 February 2017

11 See, for example, written evidence from the Better Government Initiative ([LEG0001](#))

12 Written evidence from Mark Ryan, Coventry University ([LEG0005](#))

Commons’ assurance that he “tests” the necessity of legislation when considering the Government’s forward legislative programme. We consider later in this report whether there is a need for a legislative standards committee which would, among other things, require civil servants and ministers to justify, and be shown to justify, whether legislation is necessary to achieve a particular policy goal (see paragraphs 172–183).

The use of evidence

Policy development

15. The introduction of legislation to Parliament is one of the final steps of a long process of policy development. While this report is focused on the process by which laws are made, the quality of legislation depends heavily on the appropriateness of the process by which the underlying policy was developed. As Sir Richard Mottram noted: “You can have what is apparently a well-drafted piece of legislation, in that it is comprehensible, coherent and so forth, but it has no possibility of achieving the objective ... [I]f it is to be a good piece of law it has to be founded on a good piece of policy-making, and that involves a prior set of questions.”¹³
16. The Committee heard evidence that, overall, evidence has become a more important and integral part of the Government’s policy-making process. Sir Richard Mottram felt that, in general, there was a “strong drive towards more evidence-based policies.”¹⁴ Jill Rutter, Programme Director at the Institute for Government, agreed. She told us that “since 2010, with the coalition, there has been a concerted attempt to produce more evidence.”¹⁵
17. Others felt there was still significant room for improvement. Jonathan Breckon, Director of the Alliance for Useful Information, told us bluntly that “The use of evidence by government in policy and legislation is not good enough.”¹⁶ His organisation’s written evidence argued in particular that tools such as systematic reviews and Rapid Evidence Assessments should be used more frequently, to ensure that the evidence on which policy decisions are taken is trustworthy.¹⁷
18. Government departments can face challenges in trying to ensure policies are evidence-based. One difficulty can be the timeframes involved. Emran Mian, Director of the Social Market Foundation, told us that there is “a mismatch between the timeframes needed to do rigorous, robust research and the timeframes that we usually allow for policy-making. On the occasions when those timetables can be aligned, we make effective use of policy-making in government ... That is often not the case because policy-making is often done in a much more abbreviated timescale.”¹⁸ Jill Rutter agreed:

“At one of our [Institute for Government] seminars, a Minister said, “The problem is, if there is no evidence that is immediately out there and I want to make a decision, I am up against the political cycle. A reasonable forecast is that I am probably in this job for 18 months or two

13 [Q 2](#)

14 [Q 5](#)

15 [Q 16](#)

16 [Q 49](#)

17 Written evidence from the Alliance for Useful Evidence ([LEG0026](#))

18 [Q 29](#) (Emran Mian)

years. I want to get things done. I need the evidence now. If I ask you to get the evidence for me, it will take you six months to develop a proposal and a bit longer to get it funded, and you will come back with the results in a couple of years' time. By that time, I will be Fisheries Minister' ... [T]here is a real conflict between what is there now and what Ministers need now. Ministers are always going to have to make decisions with only partial information."¹⁹

19. **We welcome the fact that the process of policy development within Government now includes embedded mechanisms that place an emphasis on gathering and evaluating evidence.**

Scrutinising the evidence base for Government policies

20. While the Government's use of evidence was generally perceived to have improved, a number of witnesses expressed concern that it was often hard for organisations outside Government to scrutinise the evidence base for policies; they were not always published or made available in a form that permitted proper external scrutiny.²⁰ Witnesses generally felt that, absent certain special factors such as national security or foreign policy concerns, the evidence base for government policies ought to be published.²¹ Jill Rutter told us that "you are committing public resources, so you ought to tell people the basis on which you have decided to commit those public or private resources. There are relatively few exceptions."²² David Halpern agreed, telling us that he would "struggle to find many examples of why you would not publish" the evidence base for legislative proposals.²³ Jonathan Breckon suggested learning from the experience of other nations:

"In South Africa, they now have White Papers that have a section that shows the evidence ... It can be empty, which is fine; you are being transparent about the fact that there is no evidence or it is of very dubious quality—it is a think tank with some wishy-washy survey—but at least you have something to get your teeth into."²⁴

21. In addition to publishing the evidence for policies in a more methodical manner, it was suggested that it needed to be made more accessible. A joint submission from the Institute for Government, the Alliance for Useful Evidence and Sense about Science stated that "We do not expect the public or parliament to have to 'dig' for evidence—it is the responsibility of government to make it readily accessible through inclusion, discussion and clear links and references."²⁵ Jonathan Breckon also suggested that, at present, evidence could be hidden away from public view:

"it is so hard to find evidence behind particular policies and legislation when you are on the outside ... If we take something like the Department for Education's Educational Excellence Everywhere White Paper and look at even really simple things such as the referencing, we find that it

19 [Q 51](#)

20 See, for example, [Q 5](#) (Dr Ruth Fox)

21 See, for example, written evidence from the Chartered Institute of Taxation ([LEG0018](#))

22 [Q 25](#)

23 [Q 25](#)

24 [Q 16](#)

25 Written evidence from the Institute for Government, the Alliance for Useful Evidence and Sense about Science ([LEG0008](#))

goes nowhere. It goes to a splurge of different, random bits of evidence—so we cannot find the evidence behind the particular policy.”²⁶

22. **We recommend that the Government should routinely publish the evidence base for legislative proposals. If a robust evidence base is not available, the Government should explain why it is nevertheless appropriate to proceed.**

Piloting policy

23. The evidence we heard drew a distinction between piloting new policies before they are introduced more widely, and piloting different policy variations to build an evidence base for subsequent policy-making. Dr Halpern promoted the value of the latter. He suggested that it was helpful to “put into legislation the capacity to carry on experimenting”, including testing variations in legislation. He explained:

“I will give you a concrete example ... It concerns licensing arrangements for small outlets; the example often given is a community centre or a church hall. Do they need to get a big licence to serve a couple of bottles of wine? The question arose, why could we not test it? Why could we not test variations in the legislation?

We rapidly get pushback, especially from the legal establishment, which finds it slightly abhorrent that we would deliberately vary practice, of law in this case. In principle, it applies to law or, indeed, any other practice. We might want to do that in order to establish efficacy. My own view is that we should absolutely do that. When people have objections, we should remember that that is how we made progress in medicine. When it is literally life or death, we have been prepared to vary practice to find out whether something is marginally less or more effective.”²⁷

24. Dr Halpern’s written evidence specifically drew attention to the opportunities afforded by Brexit for trialling new approaches in areas such as agriculture. He argued that when legislating for Brexit, “the more that we can include the power to trial new approaches the better.”²⁸ Dr Halpern’s call for more ‘experimentation’ echoes the views of organisations such as the Institute for Government, which in its 2011 report *Making Policy Better* argued that “In a complex and decentralised environment, the perception of policy success needs to change. A more trial and error approach to policy is likely to yield better results than policies which require wholesale system change.” The report concluded, however, that “one of the big barriers to experimentation is the perception that a failed experiment is a political failure, and a waste of public funds (rather than saving larger sums by preventing full-scale implementation of a flawed concept). Politicians and civil servants need to be more confident in defending such approaches.”²⁹
25. Emran Mian commented on the more traditional form of piloting—trialling policies in preparation for their introduction more widely—and suggested to us that while pilots had their place, they were not appropriate in every case. This might be for practical reasons, or where piloting is “inappropriate to

26 Q 16

27 Q 26

28 Written evidence from Dr David Halpern (LEG0028)

29 Institute for Government, *Making Policy Better*, April 2011: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Making%20Policy%20Better.pdf> [accessed 19 October 2017]

the structure of the policy problem.” He added, however, that in some cases piloting was not used simply because there was “a desire to just get on with it and enact the political decision ... [I]t is often read either by the political decision-maker—the Minister—or by the Opposition as foot-dragging. That is the reason why a pilot is not pursued, and that feels to me like a much less sound reason for failing to use piloting.”³⁰ To complicate matters further, he noted that there were no criteria used within Government to determine whether or not a pilot was appropriate for a particular policy: “[i]t is much more an impressionistic judgment.”³¹

26. Chris Walker, former Head of Housing, Planning and Urban Policy at Policy Exchange, agreed that piloting policies could be helpful in gathering an evidence base, but noted “There is always the time tension. Even if you can do a pilot, and all the right conditions are met to do a pilot, it will not always be the case that it necessarily adds to the evidence base ... There are ways of getting at things other than pilots.”³²
27. **We recognise the value of piloting, both as a means of experimenting with different policy variations in order to create an evidence base for policy-making and as a way to trial the impact of new policies before they are rolled out nationwide.**
28. **In some cases, piloting new policies will require the law to be applied differently in different areas—to take a high-profile example, the piloting of universal credit means that individuals will have different entitlements to benefits depending on whether they live in an area piloting universal credit. There are also, of course, variations in the law in different parts of the country as a result of devolution from which lessons could be learned.**
29. **There are, however, areas of the law where such experimentation should only be undertaken after thorough consideration of the constitutional implications of introducing variation. For example, the equal and consistent application of the criminal law is a fundamental tenet of the constitution and an important principle of the rule of law. We would not wish to see that principle diminished.**
30. **We recognise that Parliament may authorise the Government to pilot any policy it chooses, but it may help ensure a more consistent approach if the Government were to set out guidance as to when piloting is appropriate or desirable.**

The political dimension

31. One of the key issues which repeatedly arose in our evidence was, if not the tension, then the balance that must sometimes be struck between political imperatives and the requirements of evidence-based policy-making. Several witnesses noted that, while a research base for policies was important, it was only one element upon which policy-making was based. Jonathon Breckon said that “There is often a misunderstanding that evidence will trump everything else. That was never the model ... [It is a] triangulation between research, professional judgment and the stakeholders.”³³ Jill Rutter agreed,

30 [Q 32](#)

31 [Q 32](#) (Emran Mian)

32 [Q 32](#)

33 [Q 23](#)

stating that while an evidence base was important, the political judgments of ministers were also a valuable source of information: “we should not be too narrow about the sorts of evidence. Ministers, as constituency MPs, are a vital source of a different sort of evidence.”³⁴ **We recognise that MPs and ministers receive valuable information and insight on policy issues through communications with constituents, businesses, interest groups and others. The political judgement they bring to bear on policy on the basis of that knowledge is beneficial to the legislative process.**

32. Chris Walker told us that:

“At the end of the day, it is that tension between having an elected Government and a technocratic arrangement. At the end of the day, you cannot just have adherence to an economic model that says yes or no; you have to take the other considerations into account. One of the key roles of evidence in policy-making is to get the best possible outcome for Ministers and the Government, subject to the political constraints and the realpolitik.”³⁵

33. We heard that, in situations where politics and empirical research were pulling policy development in different directions, transparency was key to ensuring that the outcome could be appropriately scrutinised. In that context, several witnesses noted that ministerial directions might be a useful tool for promoting transparency. It was argued that civil servants should be able to request ministerial directions when decisions were taken that were contrary to the balance of evidence (at present they can only be requested if a permanent secretary, as accounting officer for a department, feels that a ministerial decision to spend money does not meet one of the Treasury criteria of regularity, propriety, value for money, and feasibility). Jill Rutter, for example, suggested that:

“You do not want unelected civil servants saying to Ministers, ‘You cannot do that’. Ministers will always want to do innovative things. We do not want to constrain policies only to things that have been done somewhere else before. We want policy innovation, but when people think that there is not a good enough basis for proceeding, they should be able to seek a policy direction and put on the record that they did not think there was an adequate evidence base.”³⁶

34. Emran Mian agreed, and suggested a rather different concern:

“I completely understand that there will be cases when Ministers choose not to follow where the balance of evidence might be. What is inexcusable is when the Civil Service fails to inform Ministers about where the balance of evidence is, and that happens all too often. All too often, a political decision is allowed to take place without Ministers even knowing what the evidence base is, and that does not feel right to me. It is the Civil Service’s obligation to ensure that, when Ministers are making that decision, they are doing it at least with sight of all available

34 [Q 21](#)

35 [Q 30](#)

36 [Q 56](#)

evidence. I am not sure that we always have the mechanisms in place to make sure that that is happening.”³⁷

35. These concerns echo a National Audit Office report, published in 2016, which found that departmental accounting officers “appear to lack confidence to challenge ministers where they have concerns about the feasibility or value for money of new policies or decisions, not least because standing up to ministers is seen as damaging to a civil servant’s career prospects.”³⁸
36. Francis Maude MP, then Minister for the Cabinet Office, suggested in a 2013 speech that ministers should be less wary of taking decisions that required a direction, noting that “any minister should be confident enough in the judgment he or she has made to be willing to justify it in public.”³⁹ Notwithstanding this statement, it seems to remain the case that ministerial directions are seen as a ‘nuclear’ option.
37. **Ministers are responsible for the policies they oversee, and they are accountable to Parliament and to the electorate for their decisions. Empirical evidence, where available, is a valuable input in the policy-making process, but it is not the only factor that politicians may take into account. Civil servants have a duty to ensure that ministers are aware of any relevant evidence—even when that might be politically inconvenient. We recommend that the Government should routinely publish the evidence base for legislative or policy proposals, as recommended in paragraph 22, as this should help ensure that ministers have an accurate picture of relevant evidence before decisions are taken.**

Green Papers and White Papers

38. The Prime Minister has recently indicated that “she would normally expect a Minister, before having legislation, to have gone through a Green Paper stage for discussion and then a White Paper stage to set out policy.”⁴⁰ Our witnesses were universally in favour of this stance.⁴¹
39. The Bingham Centre for the Rule of Law stated that “There is a strong case for the use of standardised or default positions in a number of areas, so that there is predictability about what process will be used (eg, timing, green paper, white paper) and then any proposed departure from the default should be published and explained.”⁴² The Liberal Democrat Constitutional Affairs Team agreed that Green Papers and White Papers ought to be “a routine pre-requisite for bills coming before Parliament.”⁴³ That view was echoed by Valerie Vaz MP, Shadow Leader of the House of Commons, who noted that “I consider publishing a green paper and white paper together

37 [Q 30](#)

38 National Audit Office, *Accountability to Parliament for taxpayers’ money*, 23 February 2016: <https://www.nao.org.uk/wp-content/uploads/2016/02/Accountability-for-Taxpayers-money.pdf> [accessed 19 October 2017]

39 Francis Maude MP, *Ministers and Mandarins: speaking truth unto power*, 5 June 2013: <https://www.gov.uk/government/speeches/ministers-and-mandarins-speaking-truth-onto-power> [accessed 19 October 2017]

40 [Q 90](#) (David Lidington MP)

41 See, for example, [Q 8](#) (Sir Richard Mottram), written evidence from the Liberal Democrat Constitutional Affairs Team ([LEG0021](#))

42 Written evidence from the Bingham Centre for the Rule of Law ([LEG0016](#))

43 Written evidence from the Liberal Democrat Constitutional Affairs Team ([LEG0021](#))

with impact assessments built on evidence based policy would be a route to good legislation.”⁴⁴

40. The then Leader of the House of Commons confirmed that the “rather old-fashioned idea of Green Papers and White Papers” was “welcome and right in principle for making for good policy”; indeed, he added that “it is actually essential for taking legislation successfully through a Parliament in which the Government cannot simply snap their fingers and assume that a majority will be there.”⁴⁵
41. **We welcome the Prime Minister’s commitment to a greater use of Green Papers and White Papers. A more structured approach to policy development and consultation can only improve the quality and consistency of legislation. In addition, we draw particular attention to the recommendation in our 2011 report, *The Process of Constitutional Change*, in which we concluded that “We regard it as essential that, prior to the introduction of a bill which provides for significant constitutional change, the government ... publish green and white papers.”⁴⁶ This has not always been the case in the recent past, and we hope that in the future a more rigorous approach will be taken towards the process of legislating for constitutional change.**
42. **The then Leader of the House of Commons commented that proper policy development processes are essential for taking legislation through a Parliament in which the “parliamentary arithmetic” is such that the Government cannot be assured of pushing legislation through. While a Government with a large majority will always have an easier time passing its legislation through Parliament, the quality of legislation should not be dependent on the composition of the House of Commons. It is in the interest of all parties that there are procedural mechanisms to protect the quality of legislation, regardless of the political ‘strength’ of any particular government.**

44 Written evidence from Valerie Vaz MP ([LEG0030](#))

45 [Q 91](#) (David Lidington MP)

46 Constitution Committee, *The Process of Constitutional Change*, (15th Report, Session 2010–12, HL Paper 177), summary

CHAPTER 3: CONSULTATION AND PRE-LEGISLATIVE SCRUTINY

43. Public consultation is now an established feature of the legislative process. Likewise, it is now recognised that involvement by Parliament, before the introduction of a bill, can be as influential as its role scrutinising bills after introduction. In our 2004 report we argued that “Parliament’s influence may be greater *before* a bill is formally introduced ... We thus attach considerable importance to looking at Parliament’s capacity to influence Ministers at the pre-legislative stage.”⁴⁷
44. The Bingham Centre for the Rule of Law explained why pre-legislative scrutiny of Government is important:
- “Altering Government policy after significant investment of political and practical resources have been made by Ministers and at Cabinet level in the language of a Bill can be difficult. Engagement in the process of legislation at the stage when the policy which will underpin its terms is being formed is often most effective at ensuring the final law is evidence-based, effective and coherent.”⁴⁸
45. The upshot, as the Law Commission stated, is that “time invested at the consultation and policy development stage can ... lead to time and resource savings at later stages of the legislative process.”⁴⁹
46. There are a number of different stages at which the views of stakeholders and Parliament can be sought by Government,⁵⁰ which we address in turn below:
- Informal discussions with stakeholders throughout the policy development process;
 - Formal public consultation on green and white papers;
 - Informal consultation with stakeholders during the drafting process; and
 - Formal consultation on draft legislation.

Informal consultation during the policy formation process

47. The then Leader of the House of Commons, David Lidington MP, noted that informal consultation was an essential element of the policy development process:
- “Whilst not negating the need for formal consultation and pre-legislative scrutiny, it should be recognised that Government departments are continuously discussing proposals for legislation with public sector partners, the charity sector and industry. These conversations are vital as they allow for frank and confidential debates on new policies and proposals for legislation.”⁵¹

47 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173)

48 Written evidence from the Bingham Centre for the Rule of Law ([LEG0016](#))

49 Written evidence from the Law Commission of England and Wales ([LEG0013](#))

50 Opportunities for public consultation and stakeholder engagement may, of course, be limited in the case of emergency or fast-tracked legislation.

51 Written evidence from David Lidington MP ([LEG0010](#))

48. There were, however, divided views as to the merits of informal (and therefore selective) stakeholder consultation. MillionPlus, the Association for Modern Universities in the UK, argued that “self-selecting who to consult will hamper effective engagement”,⁵² while the Bingham Centre suggested that “The use of targeted and informal consultation is valuable as it enables expert stakeholder input into policy and legislative development early in the process, especially where time is limited.” They went on, however, to state that “there may be a good case to make use of online platforms to enhance and widen the pool of contributions at this stage. For example, it would be possible to publish immediately the list of organisations that have been invited to offer input and to open, even on short timeframes, input opportunities for others.”⁵³
49. At this stage, our witnesses were clear that to achieve effective consultation the Government should aim to enter into it with a genuinely open mind as to what might work, rather than with a pre-determined outcome.⁵⁴ This is not always the case. Emran Mian told us that, although he could think “of at least a couple of policy White Papers where there was a serious attempt by the Government to engage with some of the evidence against the proposition that they were putting forward ... On the whole ... government policy papers ignore, sideline or even at times ridicule evidence against the policy intention that they are pursuing.”⁵⁵
50. We recognise that there will be times when the Government’s path is already set—an obvious example being a policy that has been detailed in a manifesto—but early consultation should leave open the possibility of departments exploring alternative ways to achieve their policy goals. As the Chartered Institute for Taxation told us:
- “The result of starting consultations at too late a stage, with the central proposal already decided upon, is that other routes to achieve the objective more effectively are excluded, and also that unforeseen consequences can only be raised by outsiders after the government is committed to a course of action ... Tax technical people often feel that they are in a damage limitation exercise.”⁵⁶
51. While external support in policy development can clearly be helpful, we heard concerns that a loss of in-house expertise had led to an inappropriate reliance on external stakeholders for policy development. The Tobacco Manufacturers’ Association (TMA) told us that “the loss of in-house departmental expertise as a result of central government retrenchment ... has led to a situation in which policy development is informally contracted out to other organisations.”⁵⁷ The TMA argued that this can lead to “regulatory capture of government departments that have been denuded of their policy expertise by politically-oriented and often taxpayer-funded campaign groups.”⁵⁸

52 Written evidence from the MillionPlus ([LEG0004](#))

53 Written evidence from the Bingham Centre for the Rule of Law ([LEG0016](#))

54 See, for example, written evidence from the Chartered Institute of Taxation ([LEG0018](#)), the Institute of Chartered Accountants in England and Wales ([LEG0024](#)), and the Law Commission of England and Wales ([LEG0013](#))

55 [Q 33](#)

56 Written evidence from the Chartered Institute of Taxation ([LEG0018](#))

57 Written evidence from the Tobacco Manufacturer’s Association ([LEG0014](#))

58 *Ibid.*

52. **Informal discussions with stakeholders are an important element of the policy development process. Policy should not and cannot be developed in a vacuum, and early and sustained engagement with a wide range of stakeholders to capture a diversity of views can help ensure that policy meets the needs of those it most affects.**

Formal consultation on green and white papers

53. Once informal consultation has resulted in potential policy proposals, they should be published as a Green Paper to allow a wide range of interested bodies and stakeholders to comment. The consultation on a Green Paper should be followed by a White Paper setting out how the Government intends to proceed.
54. Witnesses suggested that ensuring the consultation process follows a predictable timetable makes it far easier for stakeholders and the public to comment on and contribute to the process of refining policy proposals. As the Bingham Centre for the Rule of Law noted in the context of pre-legislative scrutiny (although the principle applies more widely to the whole policy development process):

“A lack of transparency and predictability around the timing of legislative proposals makes it extremely difficult for the public and interested parties to engage effectively with the pre-legislative process. This is especially the case for those working with disadvantaged and vulnerable groups, who are often heavily reliant on volunteer contributions, for whom adequate time to engage is crucial. It is not only the amount of time available for responses that is important; the scheduling can affect input where, for example, consultations are published at the very start of a holiday period and it is difficult for small civil society organisations to marshal volunteer or staff contributions to provide the best input possible.”⁵⁹

55. Until 2012, the code of practice governing government consultations recommended a 12-week period for consultations. In 2012, the Government launched a set of ‘Consultation Principles’, replacing the 2008 code of practice. That code replaced the default 12-week period with a principle that “consultations should last for a proportionate amount of time.”⁶⁰
56. The Bingham Centre concluded that this change had been unhelpful:
- “[t]here should be a return to the previous assumed period of at least 12 weeks for consultations and the position in the HM Government 2008 Code of Practice on Consultation. These standards should apply to all pre-legislative stages, including green papers and white papers.”⁶¹
57. They were not alone in expressing concern about the length of time allowed for consultations.⁶² The Institute of Chartered Accountants in England and Wales (ICAEW) also noted that “there appears to be a significant amount of evidence collecting taking place in consultations that have a short timeframe

59 Written evidence from the Bingham Centre for the Rule of Law (LEG0016)

60 Cabinet Office, *Consultation Principles*, first published July 2012 and updated January 2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf [accessed 19 October 2017]

61 Written evidence from the Bingham Centre for the Rule of Law (LEG0016)

62 See, for example, written evidence from the Chartered Institute of Taxation (LEG0018) and the Law Society of Scotland (LEG0025)

and, further, ask inappropriately open questions.”⁶³ Likewise, Dr Fox stated that “When there are consultations, often the Government’s own best practice guidelines around timescales for consultation, analysis and so on are breached, and obviously there are no penalties as a consequence.”⁶⁴

58. We note that the House of Lords Secondary Legislation Scrutiny Committee, in its 2013 report *The Government’s Review of Consultation Principles*, concluded that “we are concerned that ... the revised Principles still suggest a Government inclined to prioritise their administrative convenience over the interests of potential respondents.” That Committee went on to state that “We are clear that six weeks should be regarded as the minimum feasible consultation period, save in very exceptional cases.”⁶⁵ The Government response to that report simply stated that while the Government would not outline minimum consultation lengths, “timeframes should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response.”⁶⁶ **We endorse the view of the Secondary Legislation Scrutiny Committee that six weeks should be considered a minimum feasible consultation period, save in circumstances which would be generally recognised as exceptional.**

59. Witnesses expressed concern about other problems encountered by organisations and individuals looking to respond to Government consultations. Some witnesses argued that the number of consultations put forward by Government made it difficult for many organisations to respond effectively.⁶⁷ The Law Society of Scotland meanwhile drew our attention to the need for consultations to be framed in ways that made them accessible to the public:

“pre legislative consultation requires to be undertaken in a clearer and more accessible way. It is relatively easy for professional organisations, campaigning bodies, experts in the relevant fields, and those accustomed to civil service and political structures to respond to consultation papers. It is less easy for those whose interaction with government or legislative authorities is sporadic. There are issues concerning the language used in consultation in consultation papers, the assumptions made of prior knowledge and understanding of the constitutional and legislative backdrop [that] militate against a broad range of participation from a broad range of people.”⁶⁸

60. Another concern among our witnesses was the importance of ensuring that stakeholders had relevant consultations brought to their attention in a timely manner.⁶⁹ ICAEW noted that:

“At present it is not always easy to find out what consultations and inquiries are open in respect of potential legislation. We note particular difficulties when a piece of legislation is drafted by a department that

63 Written evidence from the ICAEW ([LEG0024](#))

64 [Q 5](#)

65 Secondary Legislation Scrutiny Committee, *The Government’s Review of Consultation Principles* (17th Report, Session 2013–14, HL Paper 75)

66 Secondary Legislation Scrutiny Committee, *The Government’s Review of Consultation Principles: Government Response* (25th Report, Session 2013–14, HL Paper 111)

67 See, for example, written evidence from the Law Society of Scotland ([LEG0025](#)) and the Chartered Institute of Taxation ([LEG0018](#))

68 Written evidence from the Law Society of Scotland ([LEG0025](#))

69 See, for example, written evidence from the Law Society of Scotland ([LEG0025](#))

does not usually legislate in that particular area. For example legislation to require mandatory Gender Pay Gap reporting was published earlier this year by the Government Equalities Office. These proposals affected corporate reporting but were from a department not typically involved in legislating in this area.”⁷⁰

61. **We note that the Government publishes details of all government consultations on a single website⁷¹ which allows for the list of consultations to be filtered by subject area—this is a positive development. We would welcome, however, an explanation as to the recommended steps, if any, that must be taken by Government Departments to bring consultations to the attention of those with a relevant interest in the subject matter.**

Informal consultation during the drafting process

62. Evidence suggests that the drafting (as distinct from the policy content) of legislation can also benefit from the involvement of those it will eventually directly affect. The Bar Council told us it “would encourage the consistent and widespread use of pre-introduction consultation and pre-legislative scrutiny to allow full scrutiny of the policies and legislation when a Bill is formally introduced, particularly where this reaches expert users of the legislation.”⁷² Without this kind of informal consultation, the opportunities for stakeholders to comment directly on the drafting of legislation may be limited. As the Bar Council argued:

“The opportunities to be involved in this stage of the legislative process are limited. It may have been possible to respond to a Government consultation, and it may have been possible to send evidence to a Committee conducting pre-legislative scrutiny, where that takes place. In both cases, however, opportunities to comment on detailed drafting are practically limited, either because it may not have been published (in the case of Government consultations) or because the Committee is more interested in broader principles and limits the format for submissions (in the case of pre-legislative scrutiny).”⁷³

63. MillionPlus noted that “Whilst everybody accepts that the government will have a policy agenda that they are wanting to push through, if they do not consult the relevant sector stakeholders at all when drafting they will miss out on some practical implications of their proposals, which will in turn make the need for amendments more pressing—which slows down the legislative process and can reduce the time given to scrutiny in other areas.”⁷⁴
64. Sir Steve Webb gave us a practical example of such consultation from his time as pensions minister, stating that “Certainly at the DWP, because pensions law is so technical and because, as part of the cuts, we were sacking lots of people, including lawyers ... we drew heavily on the profession. There is something called the Association of Pension Lawyers, and we often ran

70 Written evidence from the Institute of Chartered Accountants in England and Wales (ICAEW) ([LEG0024](#))

71 Gov.uk, ‘Publications: all consultations’: https://www.gov.uk/government/publications?publication_filter_option=consultations [accessed 19 October 2017]

72 Written evidence from the Bar Council of England and Wales ([LEG0009](#))

73 *Ibid.*

74 Written evidence from MillionPlus ([LEG0004](#))

drafts by them and consulted them.”⁷⁵ He suggested that this consultation made it easier to take the legislation through Parliament as a result, noting that “because we had embraced the people who understand the technical details ... There was nothing that a government or opposition MP could say to us about the wording of Clause 72 that we had not already run by a pensions barrister or somebody.”⁷⁶

65. **Government departments should normally consult a wide range of stakeholders on the drafting of legislation. Once legislation has been introduced in Parliament, it is far harder for the wording to be changed. Early, informal consultation on the wording of draft legislation can mitigate the risks of unintended consequences and ensure that legislation has been thoroughly ‘stress tested’ by the time it is introduced. Yet, as with the earliest stages of policy development (see paragraph 52) it is also essential that departments have sufficient resource and expertise to ensure that they are not reliant on a narrow group of external stakeholders who may have a particular objective or interest in mind when contributing to the development of legislation.**

Parliamentary pre-legislative scrutiny of draft bills

66. In our 2004 report on *Parliament and the Legislative Process*, we recommended that it should be the norm for bills to be published in draft. In that report we gave a number of reasons for this recommendation:
- pre-legislative scrutiny of draft legislation by parliamentary committees has proven effective at improving such legislation;
 - the reports published and evidence taken by pre-legislative committees contribute to parliamentarians’ understanding of the legislation and enhances the quality of scrutiny during the formal legislative process;
 - pre-legislative scrutiny can resolve potential points of conflict early on and save time during later legislative stages;
 - it provides ministers, who may well be largely dependent on civil servants who consider it their task to defend the legislation as drafted, with alternative views; and
 - it provides a useful opportunity for the devolved administrations—Wales in particular—to consider how “Westminster legislation ... will affect the Assembly and its functions.”⁷⁷
67. These reasons remain valid, and a number of witnesses to this inquiry endorsed that recommendation.⁷⁸ It was also endorsed by the House of Lords Leader’s Group on Working Practices, which reported in 2011.⁷⁹ It has not, however, been adopted as standard practice in the 13 years since our 2004 report was published. The Government’s response to that report stated that:

75 [Q 80](#)

76 *Ibid.*

77 Constitution Committee, *Parliament and the Legislative Process: The Government’s Response* (6th Report, Session 2004–05, HL Paper 114)

78 See, for example, [Q 62](#) (Robert Khan) and written evidence from the Bingham Centre for the Rule of Law ([LEG0016](#)), the Better Government Initiative ([LEG0001](#)), and the Liberal Democrat Constitutional Affairs Team ([LEG0021](#))

79 House of Lords Leader’s Group on Working Practices, *Report of the Leader’s Group on Working Practices* (Session 2010–12, HL Paper 136), para 84

“The Government continues to be committed to pre-legislative scrutiny. Whilst it will not be possible nor necessarily desirable to sustain the recent year-on-year increase for an indefinite period, we will seek at least to maintain the proportion of bills published in draft.

The Government is not persuaded by the recommendation that the reasons for not having published a bill in draft should be outlined in the explanatory notes to a bill. In the case of emergency legislation the reasons for not publishing a bill in draft will be self-evident. In other cases, the reasons may include pressure of time, demands of parliamentary counsel, the priority of other bills. On that basis, any explanation in the notes would likely be formulaic and would not add to the transparency of decision making.”⁸⁰

68. We saw no evidence that this position has changed in the intervening period. The House of Commons Library found that “In total, 35 draft bills or substantial sets of clauses (excluding draft Finance Bills) were published by the Government in the 2010 Parliament. In the three Parliaments between 1997 and 2010, 75 draft bills or substantial sets of clauses were published: 17 in the 1997 Parliament; 33 in the 2001 Parliament; and 25 in the 2005 Parliament.”⁸¹ Of these, many, but not all, were subject to some form of parliamentary pre-legislative scrutiny—yet these represent but a fraction of the legislation passed by Parliament during the same period. For example, the 35 draft bills published during the 2010–15 Parliament (of which some were subsequently never introduced or given Royal Assent) represent only 29 per cent of the 121 Government Bills passed under the Coalition Government.⁸²

The value of pre-legislative scrutiny

69. Our previous report found considerable value in the work of pre-legislative scrutiny committees.⁸³ It noted that:

“The reports of the committees have not only affected the content of the bills brought before Parliament but have also been drawn upon by members in the debates on the bills ... The work of the committees is thus not something conducted in isolation of either House, but contributes to Members’ understanding of the issues surrounding the bills. This enhances the quality of the scrutiny during the legislative process itself.”⁸⁴

70. Our witnesses for this inquiry were, in general, supportive of pre-legislative scrutiny.⁸⁵ We heard a range of views, however, as to whether bills should routinely undergo pre-legislative scrutiny. The Bar Council were among those who felt that pre-legislative scrutiny ought to be used more widely, stating that it “would encourage the consistent and widespread use of pre-

80 Constitution Committee, *Parliament and the Legislative Process: The Government’s Response* (6th Report, Session 2004–05, HL Paper 114), paras 11–12

81 House of Commons Library, *Pre-legislative scrutiny under the Coalition Government: 2010–15*, Briefing Paper, [No. 05859](#), 13 August 2015, summary

82 House of Commons Library, *Pre-legislative scrutiny under the Coalition Government: 2010–15*, Briefing Paper [No. 05859](#), 13 August 2015; and House of Commons Sessional Returns: <https://www.parliament.uk/business/publications/commons/sessional-returns/> [accessed 19 October 2017]

83 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173), paras 22–23

84 *Ibid.*, para 24

85 See, for example, [Q 27](#) (Jill Rutter) and [Q 27](#) (Jonathan Breckon) and written evidence from the Bar Council of England and Wales ([LEG0009](#))

introduction consultation and pre-legislative scrutiny.”⁸⁶ Likewise, Dr Mark Goodwin and Dr Stephen Bates, Lecturers in Politics at the University of Birmingham, argued that “some process of pre-legislative scrutiny with strong parliamentary involvement either through Select Committees or Joint Committees ought to be the default setting for new legislation and the pathways for such scrutiny ought to be formalised.”⁸⁷

71. Current and former ministers were more qualified in their support, suggesting that the effectiveness of pre-legislative scrutiny depended on the context within which the legislation was being considered. Sir Steve Webb, a Minister of State for Pensions under the Coalition Government 2010–15, suggested that where a department had made extensive efforts to consult widely and to engage with relevant stakeholders before publishing legislation in draft, then the value that could be added by pre-legislative scrutiny was limited.⁸⁸ The then Leader of the House of Commons agreed that “sometimes there will have been quite detailed consultation between the Government and interest groups such as business groups or professions that are particularly affected by a proposal to change the law, without a formal PLS [pre-legislative scrutiny] process.” He added that the new-found governmental commitment to Green and White Papers meant that the policy-making process would inevitably involve more opportunities for “public examination and comment” compared with a situation where “the Government has moved straight from internal consideration to introducing a Bill.”⁸⁹
72. **However, while Green and White Papers are welcome parts of the policy consultation and development process, they are not substitutes for pre-legislative scrutiny of draft Bills. Draft Bills provide not just the policy intention but also set out the detail of how it will be implemented in law. Where a draft Bill is referred to a committee for pre-legislative scrutiny, it provides a better opportunity and more substantial mechanism for parliamentarians to scrutinise and influence draft legislation than a Green or White Paper affords.**
73. MillionPlus suggested that the degree to which any particular piece of draft legislation had been consulted on varied across Government. Consequently, the extent to which value could be added by pre-legislative scrutiny varied from bill to bill:
- “The practices in place to present draft legislation, once drafted, are good, and are very comprehensive ... However, before the stage whereby draft legislation is published, it is largely down to individual departments or individual Ministers or Secretaries of State as to how clear and accessible any process of drafting may be. In some cases, departments do not engage at all with stakeholders, and draft legislation is withheld until publication, which necessitates a greater need for questions to the government and amendments to draft legislation.”⁹⁰
74. Martin Hoskins, a former Specialist Adviser to Joint Committees on the draft Investigatory Powers Bill and the draft Communications Data Bill,

86 Written evidence from the Bar Council of England and Wales ([LEG0009](#))

87 Written evidence from Dr Mark Goodwin and Dr Stephen Bates ([LEG0006](#))

88 [Q 77](#)

89 [Q 95](#)

90 Written evidence MillionPlus ([LEG0004](#))

described the experience of witnesses who felt that Government had not engaged properly early in the process: “A number of the witnesses were delighted to come along to the Joint Committee because they had been speaking to the Minister for a long time, and they thought that the Minister simply was not listening to their arguments. They were desperately keen to find another audience to play out their arguments with.”⁹¹

75. Another factor that witnesses suggested affected the value of pre-legislative scrutiny was the profile and contentiousness of the legislation. Sir Steve Webb told us “that I am sure it is right that both the willingness of government to engage and the added value of the process is probably greater on the less contentious stuff.”⁹² Professor Paul Burstow, a Minister of State for Care Services under the Coalition Government, agreed that “the process works best in areas where there is not a very high level of political capital invested.”⁹³ He added: “the areas that benefit most from pre-legislative scrutiny are those where government does not have a vested interest in a particular given outcome to which it is absolutely wedded. The ability to be flexible and genuinely moved by the evidence and opinion of other experts is very important.”⁹⁴
76. Such flexibility can exist even on contentious legislation—the then Leader of the House of Commons noted, for example, that “the Investigatory Powers Bill was an incredibly controversial subject, but actually the process of pre-legislative scrutiny allowed a consensus to emerge on that matter.”⁹⁵ Yet at the same time he referred to the draft House of Lords Reform Bill 2011 and told us that:

“the Government published draft legislation alongside a White Paper and it went to pre-legislative scrutiny, but the political reality was that there were no majorities in the House of Commons in particular for a particular version of Lords’ reform, so the then Government withdrew that proposal.”⁹⁶

77. Yet another factor that witnesses suggested affected the effectiveness of pre-legislative scrutiny was the extent to which Bills relate to technically complicated matters. Sir Steve Webb suggested that he was “not sure that the format of pre-legislative scrutiny lent itself” to detailed examination of the wording of a technical bill.⁹⁷ However, the draft Investigatory Powers Bill was one such technical bill where pre-legislative scrutiny was considered valuable. Martin Hoskins argued that pre-legislative scrutiny allowed for at least “some independent assurance that Bills are technically fit for purpose. The beauty of pre-legislative scrutiny is that at least there is a draft Bill; at least there are words within which we can work. That is incredibly important.”⁹⁸ **We are convinced that pre-legislative scrutiny is also well-suited to technical bills. We see no reason why pre-legislative scrutiny by a committee would be any less effective at scrutinising technical legislation than the scrutiny of the legislative process itself. Indeed,**

91 [Q 77](#)

92 [Q 78](#)

93 [Q 77](#)

94 [Q 84](#)

95 [Q 95](#)

96 *Ibid.*

97 [Q 79](#)

98 [Q 84](#)

the greater time and focused scrutiny that can be applied during pre-legislative scrutiny should make it better at dealing with technical issues and considering the wording of legislation when required.

78. Finally, it was suggested to us that the main reason why legislation is published in draft on relatively few occasions is the pressure of time. The then Leader of the House of Commons, for example, told us that, “as a rule of thumb”, pre-legislative scrutiny was a good thing, but that “there is a trade-off between sometimes the time available for policy consultation and the time for formal pre-legislative scrutiny on draft legislation. There are the constraints of a parliamentary year and the pattern that both Houses follow in legislating.”⁹⁹ Chris Walker suggested that, in his experience, “the work and political deliberation that goes into preparing a Bill tends to go right up to the wire ... Obviously, you could lengthen the legislative timescale, but time is tight.”¹⁰⁰
79. Other witnesses, particularly those from a political background, agreed. Sir Steve Webb stated bluntly that: “sometimes you just have to get on and do stuff.”¹⁰¹ Professor Burstow said that: “There may be some very immediate political priorities that relate to a manifesto such that a Government, for many reasons, not least the desire to get legislation in place and implemented during the lifetime of a Parliament, may decide they do not want to add that additional [pre-legislative] stage.”¹⁰²
80. David Lidington MP confirmed to us that he would not go so far as to support a presumption that all legislation should be subject to pre-legislative scrutiny. He indicated, however, that he was “sympathetic to the idea that we should look for additional opportunities for pre-legislative scrutiny.”¹⁰³
81. The Commons Political and Constitutional Reform Committee concluded in 2013 that “not all bills are suitable for pre-legislative scrutiny.” They added, however, that they considered “pre-legislative scrutiny to be one of the best ways of improving legislation” and suggested that the Government should have to justify a decision not to publish a bill in draft.¹⁰⁴
82. **Green and White Papers provide an opportunity for public debate on proposed policy and pre-legislative scrutiny allows for a thorough examination of the details of that policy, and its implementation, in its legislative form. We believe, therefore, that pre-legislative scrutiny continues to be a valuable means of improving legislation. While not every Bill will require pre-legislative scrutiny, we recommend that the Government think critically about the value of pre-legislative scrutiny for all of its proposed legislation, irrespective of whether there have been prior policy papers or public consultations.**

The impact of pre-legislative scrutiny on subsequent parliamentary stages

83. Professor Burstow noted that: “pre-legislative scrutiny has been added to our process without much thought about the other stages, and whether

99 [Q 95](#)

100 [Q 33](#)

101 [Q 84](#)

102 [Q 77](#)

103 [Q 95](#)

104 House of Commons Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation* (First Report, Session 2013–14, HC Paper 85), para 115

they should in any way change as a result of that quality input at the outset through pre-legislative scrutiny.”¹⁰⁵ He argued that:

“If you have had pre-legislative scrutiny, do you still need to have the evidence-taking session in the Commons at the beginning of the Standing Committee? I do not think you do. If you had pre-legislative scrutiny and you have had the Government’s response, and for the sake of the argument they have taken on board some of the recommendations, that is a material consideration in the negotiation that takes place between Whips about the amount of time that is to be allocated for the Committee stage ...

If it is a genuine starting place for the legislative process, its output should genuinely influence every other stage and have a bearing on the length of time for those other stages. At the moment it does not, and that is probably why pre-legislative scrutiny is not used as much as it could be.”¹⁰⁶

84. We see much merit in this suggestion. It may make the process of pre-legislative scrutiny more attractive if alterations are made to quicken the passage of a bill later in the legislative process. Sir Steve Webb also suggested that in some cases pre-legislative scrutiny made it simply unnecessary for a separate evidence-taking stage in Public Bill Committee:

“I have looked at the record of the people who gave oral evidence to the pre-legislative scrutiny and to the Bill Committee. There were 14 witnesses to the pre-legislative scrutiny. About three months later, seven of those 14 then walked back through the same door to give the same evidence to the Bill Committee. A further two, interestingly, sent their deputies because they thought it was a waste of time for them to come back to say the same things about the same Bill to the same people.”¹⁰⁷

In addition, he noted that “because nobody wants to be on pensions bills” there was also some overlap between the membership of the pre-legislative select committee and the Public Bill Committee.¹⁰⁸

85. Other witnesses made similar points. Martin Hoskins, for example, said that those giving evidence were often “asked almost the same questions.” The solution, he suggested, was “a process whereby each Committee can recognise the validity of the evidence that has been given by another Committee.”¹⁰⁹ If this was adopted, the Public Bill Committee process might begin with a private session to review the evidence received by the pre-legislative scrutiny committee, and to reflect on its report, prior to the formal consideration of the Bill.
86. In addition to making pre-legislative scrutiny more attractive as a way of smoothing the passage of a bill through Parliament, witnesses also suggested that taking pre-legislative scrutiny into account when timetabling the bill through Parliament might mitigate concerns about the resource implications of pre-legislative scrutiny. Professor Burstow told us that “Currently we cannot underestimate the extent to which government departments, which

105 [Q 77](#)

106 [QQ 84 & 87](#)

107 [Q 77](#)

108 [Q 79](#)

109 [Q 86](#)

are downsizing significantly ... have less capacity to manage this sort of process from end to end. That is more likely to make them advise Ministers not to have pre-legislative scrutiny, because it adds to the burden of doing the piece and getting legislation through.”¹¹⁰ David Cook, Second Parliamentary Counsel, echoed those comments: “from a technical point of view, pre-legislative scrutiny is resource-intensive ... that is no reason not to have pre-legislative scrutiny, but both for that and for the Bill teams involved there is quite a lot of resource, as well as parliamentary resource, involved.”¹¹¹

87. **At present, pre-legislative scrutiny is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation to the other stages of scrutiny which legislation undergoes. Pre-legislative scrutiny should be considered an integral part of the wider legislative process. This may mean adapting other parts of the process to take account of pre-legislative scrutiny when it occurs. We do not, in this report, prescribe how this might occur,¹¹² but as one example we recommend that the business managers of the House of Commons and the House of Lords should take into account whether a bill has undergone pre-legislative scrutiny when considering how much parliamentary time to allocate to the bill when it is passing through Parliament.**

Effectiveness of pre-legislative scrutiny committees

88. Witnesses made a number of proposals for making pre-legislative scrutiny committees more effective. Some suggested that Joint Committees were particularly effective mechanisms for pre-legislative scrutiny.¹¹³ Others proposed an enhanced power to request information and analysis from the Government—Sir Steve Webb, for example, felt that committees might have “some superior right to scrutinise, ask questions and obtain data and analysis.”¹¹⁴
89. Professor Burstow, meanwhile, argued for more secretariat resource, so that committees could “look in much more granular detail at the assumptions that sit behind impact assessments that Ministers sign. They ought to form a much more forensic part of the examination of the deliverability of legislation than they do currently.”¹¹⁵ Sir Steve Webb agreed with the importance of scrutinising impact assessments, which he described as “often where the bones were buried”, and suggested that draft impact assessments ought to be published alongside draft bills.¹¹⁶
90. Finally, it was suggested that both the Government and the Opposition should have the ability to nominate legislation for pre-legislative scrutiny.¹¹⁷ Presumably this would involve the opposition being able to nominate one or more bills announced in the Queen’s Speech for pre-legislative scrutiny. We are unconvinced that this would be feasible; not least because of the potential

110 [Q 84](#)

111 [Q 95](#)

112 Our previous report explored some practical options. See Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173), paras 33–48

113 [Q 84](#) (Sir Steve Webb) and written evidence from Dr Mark Goodwin and Dr Stephen Bates ([LEG0006](#))

114 [Q 82](#)

115 [Q 82](#)

116 [Q 82](#)

117 [Q 84](#)

for opposition parties to use this tactic to frustrate or delay the introduction and passage of legislation they were opposed to.

91. **There is a case for greater resources to be made available for committees undertaking pre-legislative scrutiny, in order to facilitate a detailed legal, policy and financial examination of the proposals in a draft Bill and its associated documents, including impact assessments.**

Manifesto bills

92. We asked witnesses whether there was a noticeable difference in the quality of legislation brought forward following a general election, as opposed to that introduced later in the parliamentary cycle. Our concern was twofold. First, that political parties' manifesto policies might not be subject to the same rigorous evidence-based policy development process as those developed in Government; and secondly, that legislation implementing those policies might be rushed through in the first session of a Parliament without undergoing proper pre-legislative consultation and scrutiny (see Chapter 3 above). For example, the Childcare Bill 2015–16, introduced shortly after the 2015 election, was described as a “skeleton” bill, on which the Government still wished “to consult on matters of detail” and to “consult widely ... before finalising a delivery model.” The Delegated Powers and Regulatory Reform Committee said that: “While the Bill may contain a *legislative* framework, it contains virtually nothing of substance beyond the vague ‘mission statement’.”¹¹⁸
93. Concerns were also expressed to us that bills implementing manifesto commitments are less likely to face a serious challenge in either House of Parliament, as both Houses recognise the public mandate behind a Government manifesto commitment.
94. Our witnesses expressed a number of different concerns. Sir Richard Mottram noted that manifesto commitments could be of variable quality and clarity: “some of them are driven by and grounded in experts outside government, and are very well founded; [but] some may not have a research base.”¹¹⁹ Other witnesses suggested that legislation introduced in the first session of Parliament could feel rushed. Dr Fox said that: “it has always been the case that the Government want to make their mark with a rush to get an early Bill into Parliament. It is partly about managing time and not wasting too much up front.”¹²⁰ In support of this assertion, she pointed to the Academies Bill and the Public Bodies Bill as examples of legislation introduced soon after a general election with limited consultation, or while the Government was still consulting on the content of the policy.
95. Chris Walker agreed that there could be a tension between political commitments and evidence-based policy-making:

“To give an example, a certain party might have a particular election manifesto; that party subsequently gets elected to government and discovers that actually the commitment in the manifesto does not have the evidence-based credentials that it wanted. As the Civil Service

118 Delegated Powers and Regulatory Reform Committee, *Second Report* (Session 2015–16, HL Paper 12), paras 7–8

119 See, for example, [Q 5](#) (Sir Richard Mottram)

120 [Q 3](#)

scrutinises it and draws up the evidence, it can often point in exactly the opposite direction. That is an example of where there can be tension and where, inevitably, there can be a degree of retrofitting so that, rather than evidence-based policy, there is policy-based evidence.¹²¹

96. We heard that the tension between manifesto pledges and proper evidence-based policy-making was particularly acute when manifestos outlined not only a policy objective, but also specified the means by which that policy would be achieved—leaving a new Government little room for manoeuvre when it came to implementing the policy.¹²² Jill Rutter elaborated:
- “you might tie yourself—particularly if you are not a governing party forming a manifesto—to very specific means without being able to discuss them with the people who will have to implement them ... One of the pieces of advice we [the Institute for Government] give is that they should set out strategic objectives, priorities and so on, but not tie themselves to very specific commitments, because they might find when they get into government that there is a better idea.”¹²³
97. It was also suggested that manifesto bills are less likely to be referred for pre-legislative scrutiny. Some of the reasons for this are practical—a Government needs to introduce a legislative programme in the first session of a Parliament which means a number of bills will have to be introduced without having gone through pre-legislative scrutiny. Other reasons are political: there is, for example, an expectation that significant manifesto commitments are implemented as soon as possible. And as Professor Burstow noted, “you have to look at ... to what extent there is a clear political commitment to deliver the measure, where interaction in a pre-legislative scrutiny Committee will not help because there is not going to be much ability to shift the ground anyway.”¹²⁴
98. We recognise that the content of party manifestos is, as David Lidington MP noted, “political territory.”¹²⁵ Nonetheless, the manifesto of the winning party at a general election has a significant impact on the legislation passed in the subsequent Parliament. Sir Richard Mottram pointed out that “what we now have is a sort of system that says that what is in the manifesto will be implemented, and there is now huge machinery in Whitehall to ensure that every commitment in the manifestos is shown to be implemented, to show that the Civil Service is doing it.”¹²⁶
99. The Electoral Commission currently provides Policy Development Grants to help parties develop policies to include in manifestos in elections for the European Parliament, the UK Parliament, the devolved legislatures and local government. The total grant is £2m a year, divided among eligible

121 [Q 30](#)

122 See, for example, [Q 24](#) (David Halpern) and written evidence from the Institute for Government, the Alliance for Useful Evidence and Sense about Science ([LEG0008](#))

123 [Q 24](#)

124 [Q 81](#)

125 [Q 93](#)

126 [Q 3](#)

parties¹²⁷ by a formula weighted according to the proportion of the registered electorate where each party contests elections and the weighted share of the vote received by each party in each part of the UK.¹²⁸ This provides parties with some rather minimal funding although, as Sir Steve Webb noted, there is “a world of difference” between planning a policy in opposition and implementing it in Government. He explained:

“To take universal credit as an example, the Centre for Social Justice had spent years writing reports and clever people were thinking clever thoughts, but faced with the brutality of implementing a detailed benefit reform, there was still a huge amount of work that had to be done in government to write that flagship legislation. One of the reasons the programme suffered was that the policy, the legislation and the implementation were all being done at the same time, which caused real practical problems.”¹²⁹

100. There are clear rules restricting the party in Government from calling upon the Civil Service to support party business such as manifesto writing. Yet as Akash Paun from the Institute for Government has previously written:

“In a single-party administration ... officials are often asked to carry out analysis or provide advice on policy ideas that the party of government may then incorporate into its manifesto. As one official reflected: ‘Ministers at any stage can ask for policy advice on something ... It’s incredibly easy, you just have to ask the right questions, because it’s always your right as a minister to request advice from the Civil Service.’ This means civil servants can be called upon by ministers to support—indirectly and wholly within the rules—the development of the governing party’s election manifesto.”¹³⁰

101. The party in government can therefore test its policy suggestions within the Civil Service before they appear in its manifesto. There is no such mechanism for testing or verifying manifesto policies proposed by opposition parties. As Jill Rutter noted, parties might tie themselves “particularly if [they] ... are not a governing party forming a manifesto—to very specific means without being able to discuss them with the people who will have to implement them.”¹³¹
102. One suggestion for mitigating concerns about the quality of legislation introduced by new governments was for the state to provide additional support to opposition parties in the run-up to the election, in particular in allowing the civil service to advise on how policy proposals might be implemented.

127 The Electoral Commission’s website states that “To be eligible for the grant, a party must have at least two sitting Members of the House of Commons and have taken the oath of allegiance provided by the Parliamentary Oaths Act 1866. There are currently eight political parties eligible for the grant: Conservative Party; Democratic Unionist Party – D.U.P.; Labour Party; Liberal Democrats; Plaid Cymru – The Party of Wales; Scottish National Party (SNP); SDLP (Social Democratic & Labour Party); UK Independence Party (UKIP)” The Electoral Commission, ‘Public funding for parties’, <http://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/public-funding-for-parties> [accessed 19 October 2017]

128 The Electoral Commission, ‘Public funding for parties’

129 Q 76

130 Akash Paun, Institute for Government, *One Service, Two Guv’nors: How Whitehall serves the Coalition in the final year*, 6 May 2014: <https://www.instituteforgovernment.org.uk/blog/one-service-two-guvnors-how-whitehall-serves-coalition-final-year> [accessed 19 October 2017]

131 Q 24

This is not a new idea. Indeed, James Lloyd, then Director of the Strategic Society Centre, stated the idea succinctly in 2012:

“bad policy analysis by opposition parties costs real money when they come into power, whether in the form of mopping up after policy disasters have occurred, or wasted staff salaries as civil servants spend years trying to show Ministers why their ideas are unworkable. There’s also an opportunity cost: we all need governments to govern when in power, not spend their first couple of years subjecting their ideas to proper scrutiny for the first time, and then trying to work out what the right answer is.”¹³²

103. Sir Richard Mottram told us that:

“if you have fixed-term Parliaments, there is a case for giving the Opposition help in the run-up to the election in thinking about what it is they are seeking to do and giving them support. This is obviously sensitive because of the political impartiality of the Civil Service, parliamentary counsel and so on, which is vital, but could there be mechanisms whereby they are given more assistance? This is what they do in Scotland, and we think there is a case for doing that. If you are rushing things in, at least in the period before you come into power, you would have extended the process, which already exists and is familiar to a number of people round the table, of shadow Ministers being able to consult senior civil servants and giving them a bit of help so the process of rushing is less risky.”¹³³

104. The then Leader of the House of Commons was not in favour of this proposal, noting that it might compromise, or be seen to compromise, the impartiality of the Civil Service if some civil servants were attached to an opposition party for a certain amount of time before a general election. He suggested that he would prefer that the opposition party was provided with additional resources, rather than blurring the role of the Civil Service.¹³⁴

105. **The content of party manifestos is a matter for political parties and will heavily shape the legislative programme at the start of each new Parliament.**

106. It was suggested to us that independent bodies like the Office for Budget Responsibility could have a role in assisting other opposition parties to cost and assess their policy proposals. David Halpern told us that:

“There has always been a case for having a Department for the Opposition, where you would give them some access to evidence in another way. In the Netherlands, the equivalent of the OBR does fact checking and looks at the economics and the numbers beyond that, to see whether or not something is likely to be effective and at what cost. It is theoretically possible to put all those things in place.”¹³⁵

132 James Lloyd, Director of the Strategic Society Centre, ‘Civil servants advising opposition parties: can we afford not to do this?’, August 2012: <http://blogs.lse.ac.uk/politicsandpolicy/civil-servant-politics-lloyd/> [accessed 19 October 2017]

133 [Q 3](#)

134 [Q 93](#)

135 [Q 24](#)

107. David Lidington MP rejected this suggestion, stating that “Ultimately, it is for political parties to carry out an assessment of their own policies and to commission experts to provide external validation, which takes us back to the question of whether political parties need access to more state funds to do that, which is a legitimate argument to have.”¹³⁶

CHAPTER 4: THE QUALITY OF LEGISLATION

108. As we stated at the start of this report, the Office of Parliamentary Counsel describe ‘good law’ as law that is “necessary, effective, clear, coherent and accessible.” Of these, we addressed the criterion of ‘necessity’ earlier in this report (see paragraphs 7–14). The question of ‘effectiveness’ is affected by the quality of the policy development process (which we addressed in Chapters 2 and 3), but is a matter which we will consider in greater detail during the later stages of our inquiry on the legislative process. In this chapter, therefore, we will consider the extent to which legislation is clear, coherent and accessible.
109. Ensuring the clarity of legislation is not merely a matter of ‘good law’. The first of Lord Bingham of Cornhill’s eight principles of the rule of law, set out in his book on the subject, is that “The law must be accessible and so far as possible intelligible, clear and predictable.”¹³⁷ And as the British Academy pointed out “intelligibility is of particular importance to English law ... due to the role in the application of law played by non-specialist laypeople as members of a jury.” We therefore asked our witnesses to what extent the criteria set out by the Office of Parliamentary Counsel are actually being met.

The clarity of existing legislation

110. Much of the evidence we received commented on particular areas of the law—and we include some specific comments on tax law and immigration law below. From those witnesses who offered a more general appraisal, the overall message was that the quality of legislation was variable.¹³⁸ The Bar Council, for example, told us that “On the whole, legislation introduced into Parliament is well drafted.” They noted, however, that there was “a great deal of variation” and that “even where amending legislation makes the law more effective, it might at the same time make the law less coherent or less accessible.”¹³⁹ Robert Khan, Director of Public Affairs at the Law Society of England and Wales, commented that:

“I think legislation has improved over historical time. Certainly we do not see the ‘herewiths’ and ‘theretofores’ that we used to see. The language is far more accessible. However, a lot of our members say that, for example, when statutory instruments amend statutory instruments it becomes very hard to follow. There are particular examples in the tax field or in the Immigration Rules. There was a recent case where Lord Justice Jackson described the rules as having now ‘achieved a degree of complexity which even the Byzantine Emperors would have envied’, so there are certainly some issues.”¹⁴⁰

111. These sentiments were echoed by the Institute of Chartered Accountants in England and Wales (ICAEW), who stated:

“Some radical and very welcome changes to the legislative framework have been made—for example we would highlight the Bribery Act 2010 which we consider to be exemplary ... In other areas much is left to be desired. In particular we might highlight tax legislation.”¹⁴¹

137 Tom Bingham, *The Rule of Law* (London, Allen Lane, 2010)

138 See, for example, [Q 57](#) (Michael Clancy)

139 Written evidence from the Bar Council of England and Wales ([LEG0009](#))

140 [Q 57](#)

141 Written evidence from the Institute of Chartered Accountants in England and Wales (ICAEW) ([LEG0024](#))

112. The British Academy focused on the volume and complexity of legislation, noting that “Laws made too frequently undermine John Locke’s requirement for a society to have ‘known law’—if law changes too frequently it cannot be known. Whilst the parliamentary process is, in theory, more accessible than ever before, the laws thus resulting may not be, in part due to the sheer amount of law produced and the frequency of its production.”¹⁴²
113. Witnesses pointed to immigration law, tax law and sentencing as examples of areas where the complexity of law had developed to the point that it was a serious threat to the ability of lawyers and judges to apply it consistently—not to mention raising rule-of-law concerns as to the ability of the general public to understand the law to which they are subject.
114. The ICAEW commented on the current state of tax law in the UK:
- “ICAEW has been tracking the length of the Finance Acts for some years now, illustrating their increasing length and complexity. At 649 pages long, Finance Act 2016 is the second longest ever, and adds to a tax code that by 2009 had already been reported to have surpassed the length of India’s as the world’s longest. These lengthy documents highlight the increasing complexity for taxpayers of an ever expanding tax code. In our opinion this unduly lengthy and complex legislation is partly a reflection of it having been rushed through parliament, with an unfortunate lack of scrutiny.
- It is also unfortunate that the lessons of the Tax Law Rewrite project have not been remembered. For a short period, legislation was drafted in better English, making it more manageable. Lack of resource is presumably why this is no longer happening, but the consequences for those who seek to apply it, accountants, lawyers and the general public who are governed by it, are that it takes longer to work with and interpret, and mistakes are made.”¹⁴³
115. Likewise, the Chartered Institute of Taxation noted that “The quality of Tax Information and Impact Notes (TIINs) is felt by our members to have deteriorated.” They also expressed concerns about the legislation itself, drawing our attention to the increasing volume and complexity of tax legislation and adding specifically that: “One factor that makes tax law less clear than it might be is inconsistency of terms and definitions used in legislation. Terms such as ‘dwelling’ and ‘residential property’, for example, are defined differently for different taxes and sometimes even in relation to different sections of law relating to the same tax.”¹⁴⁴
116. Witnesses were particularly scathing about the clarity of immigration law. Alison Harvey, Legal Director of the Immigration Law Practitioners’ Association (ILPA), noted that, quite aside from ILPA’s disagreement with the objectives of some immigration legislation, “there is a whole separate vein of frustration about the quality and clarity of legislation.”¹⁴⁵ Judge Julian Phillips, a Resident Judge of the First-tier Tribunal in the Immigration and Asylum Chamber, described how the complexity of immigration law had

142 Written evidence from the British Academy ([LEG0022](#))

143 Written evidence from the Institute of Chartered Accountants in England and Wales (ICAEW) ([LEG0024](#))

144 Written evidence from the Chartered Institute of Taxation ([LEG0018](#))

145 [Q 36](#)

grown over time: “When the current Immigration Rules, HC 395, were introduced as a consolidating set of rules in 1994, they were about 100 pages long. By 2004, they had grown to just under 150, so there was a 50% increase in the first 10 years, but in the next 10 years or so there was a 400% increase on top of that.”¹⁴⁶

117. Peter Jorro, a Barrister in Garden Court Chambers, told us that the situation was so bad that “senior judges in the Court of Appeal ... are criticising how abstruse the law has become in this area and are crying out for clarity.”¹⁴⁷ Sir Ernest Ryder, Senior President of Tribunals, was equally forthright:

“We have had eight immigration Acts in 12 years, three EU directives and approximately—my apologies for being approximate—30 statutory instruments. The Immigration Rules themselves have been amended 97 times over the same period, which is approximately eight times a year, and are four times larger, and in a smaller typeface, than they were 10 years ago.

The Immigration Rules no longer contain all or indeed most of the policy that is to be implemented, which is of course their primary purpose. The policy is separately provided in—if I may say so—rather dense and unconsolidated guidance that one can access through the Home Office website, but that generally does not show you the previously existing guidance on the same topic, or how the guidance has changed. If you are an unwitting litigant whose first language is not English and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible.”¹⁴⁸

118. Judge Michael Clements, President of the First-tier Tribunal in the Immigration and Asylum Chamber, explained the impact of such law on the judiciary: “The complexity of the law is such that, when I first started some 15 years ago, one would expect to deal with a number of appeals every day. Nowadays, one is pushed to do more than two. The work is more complex and the rules are more complex, and that has a knock-on effect on workload and dealing with listing.”¹⁴⁹
119. Professor David Ormerod explained for us some of the consequences of such complexity:

“To go back to sentencing, there has been an independent survey that suggests that around 30% of appeals in the Court of Appeal Criminal Division on sentencing involve an unlawful sentence. That is because of a mistake by the judge as to the powers available in relation to the sentencing determination. The cost of that is astronomical.”¹⁵⁰

120. Sir David Bean, Chairman of the Law Commission, agreed: “Legislation should be sufficiently clear to avoid money being wasted on pointless litigation or appeals that would never have happened if the drafting had been better in the first place.”¹⁵¹

146 [Q 42](#)

147 [Q 36](#)

148 [Q 42](#)

149 [Q 42](#)

150 [Q 104](#)

151 [Q 102](#)

121. We recognise that parliamentary counsel face conflicting pressures when drafting legislation. Mark Ryan set out the issue clearly:

“There is ... an inherent tension in drafting legislation which is crystal clear (but somewhat simplistic and lacking in necessary detail with the result that the courts become involved in the lacuna) and legislation which is so detailed (for the purposes of the law/courts) that it becomes impenetrable to the non-lawyer. Ultimately, the question is who is the clarity aimed at: the lawyer/courts or the lay general public?”¹⁵²

122. There is clearly a strain in attempting to achieve both accessibility and precision. Yet we agree with Professor Ormerod, Commissioner for Criminal Law and Evidence at the Law Commission, who argued that it was necessary, as far as possible, to bear both audiences in mind: “Clearly, the policy must be robust and the representation of that policy in the legislative formula must be faithful. You have to look beyond that, however, to the ultimate user of the legislation. The litigant, the citizen, the trader, the businessman or whoever it may be must have the capacity to understand that legislation.”¹⁵³ Valerie Vaz MP also stressed the importance of ensuring that the public “understand new legislation.”¹⁵⁴

123. **There are areas of the law where significant strides have been made in drafting clear, accessible legislation. It is evident, however, that there remain large bodies of law which are remarkably inaccessible and difficult for practitioners to comprehend, let alone the average citizen. Quite aside from the obvious rule of law concerns that arise, such law leads to costly and unnecessary strains on the resources of the justice system.**

124. Concerns have also been raised about the inaccessible nature of legislation with respect to the needs of those scrutinising it in Parliament. Lord Lisvane, in his Statute Law Society lecture noted that while the term “accessibility” was generally used in the context of public access to an up-to-date statute book, he was concerned about a “different sort of accessibility; an uncertainty at the primary legislation stage about what the law will actually end up saying on matters of real importance to the individual.” He used the example of the Childcare Bill 2015, quoting the House of Lords Delegated Powers and Regulatory Reform Committee which stated of that Bill that “it contains virtually nothing of substance beyond the vague ‘mission statement’ in Clause 1(1).” Lord Lisvane added that “Parliament [was] asked to accept that the nature of childcare, the terms on which it was to be made available, what it was going to cost, and who was going to administer it, should all be contained in subordinate legislation to be consulted upon after Royal Assent.”¹⁵⁵

125. This is not a new issue, and it is one which this Committee has drawn attention to numerous times in recent sessions, including in relation to the Childcare Bill 2015 referenced above.¹⁵⁶ Indeed, in our *Sessional report 2015–16*, we noted that:

“broadly drawn delegated powers leave ministers with significant discretion as to the content of subsequent delegated legislation. This can

152 Written evidence from Mark Ryan, Coventry University ([LEG0005](#))

153 [Q 102](#)

154 Written evidence from Valerie Vaz MP ([LEG0030](#))

155 Lord Lisvane, ‘Why is there so much bad legislation?’, *Statute Law Society Annual Lecture*, 28 February 2017

156 Constitution Committee, [Childcare Bill \[HL\]](#) (3rd Report, Session 2015–16, HL Paper 16)

inhibit parliamentary scrutiny of primary legislation as members of both Houses are unable to assess how key elements of the policies before them will be implemented. Allied to this is a tendency for delegated legislation to be used for policy changes that would be more appropriately be carried out through primary legislation, subject as it is to more thorough parliamentary scrutiny and amendment.”¹⁵⁷

126. **We have highlighted in many of our recent legislative scrutiny reports our concerns about the use of delegated powers and we will return to these issues in more detail at a later stage of this inquiry. We have consistently stressed our concerns about the extent and nature of the use of delegated powers in primary legislation. This is not only in the context of ensuring an appropriate division of power between Parliament and the Executive, but also in terms of ensuring that Parliament can fulfil its responsibility of effectively scrutinising legislation and holding the Executive to account. This is a key political issue in respect of the legislation to deliver Brexit.**

Making the law clearer and more accessible

Consultation during the drafting phase

127. We heard various suggestions as to how the clarity of legislation could be improved. We have already stated the benefits of consulting stakeholders about the policy aspects of draft legislation, including on how it is drafted (see above paragraphs 62–65). It may also be helpful, however, for consultation to take place on the way in which legislation is framed (as opposed to on the policy it contains). This does not appear to be a common occurrence at present. Robert Khan told us simply: “I cannot say that in recent memory the Law Society in England and Wales has ever been consulted directly or has interacted with a parliamentary draftsman.”¹⁵⁸ Andrew Walker, Vice Chairman-Elect of the Bar Council, told us that the Bar Council was similarly uninvolved in the drafting process:

“Our law reform committee had one session a few years ago with parliamentary counsel to seek an interchange on the way things were drafted. My feeling was that there was so much awkwardness on the part of parliamentary counsel that its usefulness was limited. They did not really want to engage for fear that we were seen to be influencing them in some way.”¹⁵⁹

128. Dr Farrington from the University of Cambridge suggested the use of “a substantial group of volunteers who could read draft legislation and identify issues regarding clarity.”¹⁶⁰ Daniel Greenberg, meanwhile, put forward the idea of “giving intervener status in the legislative process to key stakeholders ... so that their contributions at drafting level, policy level and enforcement level are not just one more consultation response, but are actually treated as key components of the legislative process as it takes place as you scrutinise the Bill.”¹⁶¹

157 Constitution Committee, *Sessional Report 2015–16* (1st Report, Session 2016–17, HL Paper 9)

158 [Q 61](#)

159 [Q 61](#)

160 Written evidence from Dr Conor Farrington, University of Cambridge ([LEG0012](#))

161 [Q 54](#)

129. The ICAEW meanwhile noted that the law contained a “number of inconsistencies or contradictions. In the insolvency world for example, (heavily EU influenced) employment law requires insolvency practitioners to ‘meaningfully’ consult employees, which, if followed, might be at odds with their legal obligations to act in the interests of all creditors.” They suggested that the solution was more analysis early in the process to consider whether existing legislation could be amended to cover the point and to ensure that all potential implications have been taken into account.¹⁶²
130. Sir Stephen Laws, former First Parliamentary Counsel, was sceptical of the value of consulting on the drafting of legislation. He explained why:

“I remember drafting privatisation Bills in the 1980s when all the parties to the sell-off were represented by firms of solicitors, and we had some very difficult meetings at which solicitors for the companies or existing corporations came along. We had long discussions that purported to be about the drafting but were in fact about the policy. It would have been much better if we had not been there so that both the department and the consultees could not divert the discussion in our direction to talk about something that was made out to be drafting when the real issue was one of policy.”¹⁶³

Clearer departmental instructions

131. Other witnesses felt that the problem lay not with the clarity of drafting, but with the clarity of policy. Andrew Walker noted that “Policy clarity seems to me something that we really require ... If the policy is clear, the drafting will be easier. It is the same as any other legal exercise. If your instructions are clear, you know where you are heading and you can perform the task much more easily.”¹⁶⁴ Dr Fox agreed, stating that parliamentary counsel “can produce a good draft only if their instructions are clear.”¹⁶⁵ Likewise, Daniel Greenberg told us that the key factors influencing the quality of the drafting of legislation were “clear policy and proper training. If the policy is not clear, no drafter can produce a decent piece of legislation; and very often the policy is not clear.”¹⁶⁶ Other witnesses expressed similar views.¹⁶⁷
132. Lord Lisvane has expressed similar views, stating that “[i]n my experience the drafting of Government Bills is of a uniformly high standard ... What often gets in the way is the obscurity of drafting instructions from Government Departments.” He concluded that the result is often that ambiguity in policy, or unresolved differences within Government, are subsequently sidestepped by inserting wide regulation-making powers “in the hope that later agreement can be given effect by subordinate legislation.”¹⁶⁸ The Chartered Institute of Taxation suggested publishing departmental instructions provided to

162 Written evidence from the Institute of Chartered Accountants in England and Wales (ICAEW) ([LEG0024](#))

163 [Q 64](#)

164 [Q 57](#)

165 [Q 4](#)

166 [Q 52](#)

167 See, for example, [Q 57](#) (Andrew Walker) and written evidence from the Immigration Law Practitioners’ Association ([LEG0029](#))

168 Lord Lisvane, ‘Why is there so much bad legislation?’, *Statute Law Society Annual Lecture*, 28 February 2017

the Office of Parliamentary Counsel as a way of clarifying the “intention” behind tax legislation.¹⁶⁹

Consolidation

133. Witnesses generally agreed that consolidation was still a “desirable activity”,¹⁷⁰ and in the most complex areas of the law we were told it was now “increasingly imperative.”¹⁷¹ Alison Harvey emphasised that “consolidation ... would make a huge difference” to immigration law.¹⁷² Sir Ernest Ryder agreed, noting that “codification” would be the simplest route to improving the quality of immigration law.¹⁷³

134. Professor David Ormerod, meanwhile, described the situation in relation to sentencing law:

“Sentencing is a good example in that it is an area in which there is almost perennial amendment. However, that does not diminish the need for consolidation; in fact it could be argued to enhance that need. Officials have been very candid in telling us that they can no longer accurately and confidently predict the impact of further legislative change, given that the sentencing landscape is so confused, spread across hundreds of statutes ... So clearing the landscape and having a single statute in which all the provisions relating to sentencing procedure appear will make it easier in future for valuable policy changes to be identified and assessed for their impact.”¹⁷⁴

135. Yet despite widespread agreement as to the value of, and need for, consolidation, there has been little progress in recent years. As the Law Commission noted, “It is striking to note that in the period between the 1965 Act [which founded the Law Commission] and the end of 2006 Parliament passed over 200 consolidation Acts, but in the last ten years there have only been two such Acts: the Charities Act 2011 and the Cooperative Societies and Community Benefits Act 2014.”¹⁷⁵

136. The Law Commission stated that over the last half century since it was founded “the value of consolidation has in our view if anything increased.” They gave two reasons for this:

“The first is that unlike a Queen’s Printer’s copy, a statute in digital form can be readily updated when the legislation is amended. Secondly, statute law is accessible free of charge on the internet, so that (provided that the website is kept up to date) a single Act of Parliament containing all the statute law on one subject can be a useful resource available to the public as well as to lawyers.”¹⁷⁶

137. Although the legislation.gov.uk website can track changes made to legislation, this does not help those seeking to understand the law in a particular area if relevant legislation is spread across a number of different statutes and

169 Written evidence from the Chartered Institute of Taxation ([LEG0018](#))

170 [Q 103](#) (Sir David Bean). See also, for example, [Q 59](#) (Andrew Walker) and written evidence from the Law Society of Scotland ([LEG0025](#))

171 [Q 37](#) (Peter Jorro)

172 [Q 38](#)

173 [Q 46](#)

174 [Q 103](#)

175 Written evidence from the Law Commission of England and Wales ([LEG0032](#))

176 *Ibid.* See also, [Q 103](#) (Sir David Bean)

instruments. As Sir David Bean noted in relation to immigration law, “There is no way that you could know what to look for on legislation.gov.uk since the primary statutes are in 14 different places.”¹⁷⁷ Once an area of law is consolidated, however, a single statute can then be amended consistently by future legislation.¹⁷⁸

138. It was clear, however, that there is little appetite in Government for consolidation.¹⁷⁹ The Law Commission felt that “there is now little support for devoting the scarce and expensive resource of parliamentary counsel to the drafting of traditional consolidations.”¹⁸⁰ Robert Khan suggested lack of political enthusiasm was a prime consideration, noting that: “we need to be realistic. No Minister ever made their reputation by saying, ‘I think I want to ... bring in more consolidation’, even though perhaps they should have that aspiration.”¹⁸¹ Sir Ernest Ryder noted that attempts had previously been made to consolidate immigration law “which sadly failed, almost certainly on the basis that it was just too difficult to achieve the end result.”¹⁸²
139. David Lidington MP acknowledged “that immigration law has become very complex and spread between many different statutes and regulations.” He put forward, however, two arguments against consolidation. First that, following the consolidation of education law in the Education Act 1996, “Within two years, more than half of its 580 clauses and 39 schedules had been replaced by legislation brought in by a different Government ... [I]t just shows that you can commit a lot of resource to consolidation and, if the politics changes, you question whether it really got you anywhere at all.”¹⁸³
140. Second, he suggested that “there is discomfort, particularly I think among Commons politicians with their voters in mind, in resorting to consolidation on areas which are intrinsically areas of political controversy”, noting that a consolidation bill denies Parliament the opportunity “to debate and to consider amendments, rather than just consolidation, on areas of policy that are of acute political interest to parliamentarians.”¹⁸⁴ The Bar Council also suggested to us that, conversely, the tendency of politicians to focus on policy debates is why “departments are unwilling to risk re-stating areas of law for fear that old battles will be reopened.”¹⁸⁵
141. The first argument misses the point of consolidation which is, in the words of the Law Commission “to draw together different enactments on a topic into a single Act”¹⁸⁶ with the aim of clarifying the statutory landscape. So long as subsequent legislation amends the consolidated act, the benefits persist regardless of any subsequent legislation. As regards the Minister’s second argument, we are unconvinced that the law should be denied the very real benefits of consolidation because politicians want to be free to debate

177 [Q 107](#)

178 This clearly relies on the legislation.gov.uk website being kept up to date, which is not the case at present (see, for example, Daniel Greenberg’s comments in response to [Q 49](#)). We will consider the extent to which the law is made available to the public at a later stage of this inquiry.

179 See, for example, [Q 104](#) (Professor David Ormerod)

180 Written evidence from the Law Commission of England and Wales ([LEG0032](#))

181 [Q 60](#)

182 [Q 46](#)

183 [Q 96](#)

184 *Ibid.*

185 Written evidence from the Bar Council of England and Wales ([LEG0009](#))

186 Law Commission, ‘Consolidation’: <http://www.lawcom.gov.uk/consolidation/> [accessed 19 October 2017]

controversial issues. The consolidated bill procedure¹⁸⁷ was introduced precisely to ease the passage of consolidated legislation that does not make substantive changes to law.

142. Elizabeth Gardiner, First Parliamentary Counsel, introduced another concern: that of resourcing. She told us that consolidation is “incredibly resource-intensive”, and that Government is always “looking to prioritise that resource.” Asked specifically about immigration consolidation, she responded that: “I am not aware that it is on the agenda just now. The Law Commission has a consolidation programme, but I am not aware it is on the agenda.”¹⁸⁸ The Law Commission meanwhile, suggested that its funding was “very limited”, and that if it was “to undertake a new consolidation or codification project, it would almost certainly have to be funded by the department making the request.”¹⁸⁹
143. In the absence of any real governmental effort to take forward consolidation, Elizabeth Gardiner detailed some of the steps the Office of Parliamentary Counsel are taking to try and overcome the increasing complexity of the statutory landscape. She told us that “if we thought an area had got particularly messy, and it was contained and we were making amendments in that area, we might decide that we could repeal a run of sections and restate them in a better way, which would be a mini-consolidation.” She stated that parliamentary counsel were also framing new legislation, where possible, as amendments to existing legislation; in effect “consolidating as we go.”¹⁹⁰
144. **We welcome the efforts made by the Office of Parliamentary Counsel to ‘tidy up’ the statutory landscape. Nonetheless, these do not replace the clear need for consolidation in a number of increasingly complex areas of the law. It cannot be seen as a satisfactory state of affairs when the Senior President of Tribunals states that his judges “cannot find” relevant law, and when they do find it “they do not necessarily understand it.”**¹⁹¹
145. **We recognise that consolidation is not a politically attractive use of parliamentary time and the scarce resource of parliamentary counsel. Yet consolidation is a more valuable activity now than ever before. The legislation.gov.uk website will, in effect, allow the law to be consolidated on a rolling basis in the future. This is a positive development. It will, in the longer term, make the law more accessible to both practitioners and the wider public. However, this will only be effective once an area of law is consolidated—it will not help resolve a situation where the relevant legislation is spread across the statutory landscape. Likewise it is clear that at a time when the resources of the court system are under pressure, both in terms of finance and in terms of staffing, consolidation offers the possibility of cost savings**

187 Bills which do nothing more than consolidate legislation without changing the law (‘consolidation bills’) are subject to special parliamentary procedures which are intended to allow them to pass through Parliament with little or no debate. The only substantive debate such bills receive is at second reading in the House of Lords (in which all consolidation bills are introduced), following which they are committed to a Joint Committee for detailed scrutiny. Subsequent stages in the House of Lords and all stages in the Commons are usually formal and without debate.

188 [Q 96](#)

189 [Q 104](#)

190 [Q 96](#)

191 [Q 43](#)

and increased efficiency. Weighed up against these benefits, the Government’s arguments seem thin indeed.

146. Sir David Bean, Chairman of the Law Commission, made clear that in his view “consolidation remains a desirable activity.”¹⁹² He told us that the Law Commission’s work on consolidation is currently limited because its “funding is very limited.”¹⁹³ He elaborated:

“If we were to undertake a new consolidation or codification project, it would almost certainly have to be funded by the department making the request. You have had a good deal of evidence, for example, about immigration law; both the primary statutes and immigration rules are in a terrible state, as witnesses have told you. There are two jobs to be done. One is the streamlining of the rules and the other is the consolidation of the primary statutes. For either of those, we would need funding from the Home Office to be able to do it because it is a big task—but a very worthwhile one, I think.”¹⁹⁴

147. **We recommend that the Government should, as a priority, provide the Law Commission with the necessary resources to start consolidating those areas of the law where consistent application of the law is now under threat from the sheer complexity of the existing statute book. The Government should subsequently ensure that the small amount of parliamentary time required is made available to pass the necessary consolidation bills to implement the Law Commission’s work. The evidence we received suggested that consolidating immigration and sentencing law in particular would offer real benefits not only in relation to the clarity and ease of application of the law, but in terms of cost and efficiency savings within the justice system.**

The use of technology

148. Drafting new legislation so that it simply amends existing law improves the accessibility of enacted law (since everything is collected in one place). It can, however, make the legislation itself more inaccessible, since it can only be understood in the context of the law that it amends. Daniel Greenberg demonstrated this by referring to the Small Charitable Donations and Childcare Payments Bill 2016 (now an Act), which amended the Small Charitable Donations Act 2012. He stated:

“Is it clear and coherent? The first proposition: “In section 2 ... in subsection (1) for the words from ‘if—’ to the end substitute ‘if it is not an excluded charity for that tax year (see subsection (3))’”. There is no real chance that you or other readers have the foggiest idea what is going on.”¹⁹⁵

149. If, as we recommend, there is a move to maintain a single authoritative Act relating to a particular field of law which is amended by subsequent legislation, thought will need to be given to ways in which legislation passing through Parliament can be made more accessible to those seeking to understand its effect. Clearly the explanatory notes to bills address these issues to some extent, setting out what the effect of a bill’s provisions will be and providing

192 [Q 103](#)

193 [Q 104](#)

194 *Ibid.*

195 [Q 49](#)

the necessary context in the case of the Small Charitable Donations and Childcare Payments Bill. Yet the technology is clearly available to consider more innovative ways of approaching this issue. For example, could an interactive website allow both the public and law-makers to peruse the text of a bill alongside a Keeling schedule (i.e. the text of any legislation as it would be amended by that bill)?

150. **We will return to this issue in more detail at a later stage of our inquiry, when we consider the passage of legislation through Parliament, but we note that both Houses of Parliament should see it as a priority to improve the accessibility and clarity of legislation passing through Parliament—not just for the benefit of the wider public, but in order to assist parliamentarians in scrutinising the increasingly complex and voluminous legislation coming before it.**

151. The opportunity also exists, at this stage, for Parliament to consider whether the capabilities offered by technology are being restricted by the fact they are being used within the context of existing processes which have been in place for, in many cases, hundreds of years. Professor Susskind, President of the Society for Computers and Law and IT Adviser to the Lord Chief Justice of England and Wales, told us in his opening remarks that:

“the least likely outcome in our world is that nothing will change as a result of technology. Yet that is the premise upon which many organisations base their future strategy. I am urging you to say, ‘We can expect considerable change, so the question is about the next step and how to take our thinking further—how we can both automate and innovate in the legislative process’.”¹⁹⁶

152. There is no doubt that changes have been made over the years to take advantage of developing technologies: some small, others significant. Opportunities for public engagement with the work of Parliament have developed significantly, while Parliament is vastly more transparent about its work and processes. Yet little thought has been given at a more strategic level to considering how Parliament might incorporate and adapt to developing technologies. Professor Susskind suggested a number of possibilities to us. In the short term, these include using technology to improve the way existing legislative processes run: integrated bill management tools or systems to analyse public sentiment in relation to particular policy proposals or bills. In the longer term, a paradigm shift may be necessary. Potential developments include “personalised updating” when systems “will automatically notify people of new laws or changes in old law that directly affect them”; “embedded legislation” when laws are built into the technology running organisations, processes and products—meaning they cannot be broken (for example, by ensuring that cars cannot be driven above the speed limit); and “real-time monitoring of the actual impact of legislative changes (using social media and machine learning).”¹⁹⁷

153. We do not intend in this report to try to set out how, or whether, the legislative process might be revolutionised or transformed by technology. We note that, to date, technology has been used to evolve existing processes, rather than revolutionise the way Parliament works and legislates. While we will consider some of these issues in more detail at a subsequent stage of this inquiry, any

196 [Q 112](#)

197 Written evidence from Professor Richard Susskind ([LEG0031](#))

move to change more drastically the underlying processes of the legislative process would have to be a collaborative effort between the Government and both Houses of Parliament.

The role of the Office of Parliamentary Counsel

154. Our witnesses were generally in agreement that parliamentary counsel had a particular role in upholding both the quality of legislation and in ensuring that legislation was constitutionally appropriate. Sir Stephen Laws, former First Parliamentary Counsel, explained how parliamentary counsel shaped legislation in anticipation of parliamentary scrutiny:

“You make the decision on the basis that there will be some things that Parliament will want to subject to the full range of scrutiny that it applies to a parliamentary Bill. There are some things that Parliament will be content to see approved by statutory instrument. That is the basis on which you decide what goes in the clause and what goes in the schedules; that is the basis on which you decide whether or not it would be acceptable to make a particular topic the subject of subordinate legislation.”¹⁹⁸

155. Parliamentary counsel were seen as being able to speak frankly to ministers in a way that civil servants could not always do. Dr Ruth Fox told us that:

“parliamentary counsel see themselves as the guardians of the statute book. They would not draft in such a way that they thought was fundamentally wrong, and if they were pushed by Ministers to do so they have the same recourse that accounting officers have in registering a concern and effectively seeking ministerial instruction to do it, even if they do not wish to.”¹⁹⁹

156. Sir Richard Mottram added that “In my experience, they can say things to Ministers that civil servants in the department are not willing to say, which may or may not make them popular, for example that the Bill is a complete mess, dressed up in parliamentary counsel language.”²⁰⁰ Valerie Vaz MP agreed that parliamentary counsel had a role upholding the quality of legislation. She told us that counsel “can revert to ministers” if new legislation did not conform to the standards of ‘good law’.²⁰¹

157. Former parliamentary counsel Daniel Greenberg agreed that parliamentary counsel had an important role in this regard, stating that they saw themselves as “the front line in maintaining the rule of law.” He was less convinced, however, by the effectiveness of counsel in maintaining those standards, telling us that there was “a lack of evident rigour.”²⁰² He concluded that over the 20 years he worked for parliamentary counsel he felt that the ability or willingness of counsel to stand up to ministers had declined.²⁰³

198 [Q 75](#)

199 [Q 4](#)

200 [Q 4](#)

201 Written evidence from Valerie Vaz MP ([LEG0030](#))

202 [Q 50](#)

203 [Q 51](#)

158. Other witnesses also told us that the role of parliamentary counsel had changed over time, although they generally regarded those changes as positive. Sir Richard Mottram recalled that:

“There used to be a time when parliamentary counsel were considered to be incredibly austere figures to be consulted only when necessary, and they were themselves slightly separate from others ... In my experience, all this changed. We created joint teams that were working on policy development with the [departmental] lawyers ... and often parliamentary counsel would be consulted at a very early stage informally.”²⁰⁴

He concluded that parliamentary counsel were now “much more open and proactive in championing the importance of good law-making.”²⁰⁵

159. Dr Ruth Fox agreed, but suggested that the involvement of parliamentary counsel “varied from Bill to Bill.” It depended upon “the willingness of draftsmen to want to engage at ministerial level and be willing to sit around a table with Ministers, the Bill team and departmental lawyers and thrash it out. Some liked that; some really did not.”²⁰⁶ Yet, she added, early involvement by parliamentary counsel might ease some of the tensions that could appear between ministers who felt “the draftsmen were being too conservative in their approach” and counsel who perceived that ministers “wanted to draft their own legislation ... and perhaps did not understand the legal realities of the way in which our legislation is drafted.”²⁰⁷ David Cook agreed that by working as a team with departments, it was usually the case that issues could be resolved at an early stage.²⁰⁸
160. As we noted above, the clarity of drafting instructions is one of the key ingredients contributing to clearly drafted legislation. Daniel Greenberg was clear on parliamentary counsel’s responsibility in this regard: “Our primary role in drafting legislation is to help them go back and unpick what they are really trying to do, and rewrite the instructions, in effect.” He added that instructions could be “batted ... backwards and forwards” between the Office of Parliamentary Counsel (OPC) and the departments, but “that is the way it ought to work. Things have not gone wrong when the drafter looks at something and says, ‘Hold on, I do not understand this’. That is working right, and it is fine.”²⁰⁹ Sir Stephen Laws, a former First Parliamentary Counsel, agreed, telling us that “If we cannot understand what people want, obviously we have to ask them. Part of the skill of the job is to try to elicit what the real intention is.”²¹⁰
161. In the event that parliamentary counsel are unable to resolve such issues at departmental level, it is vital that they have access to political ‘back-up’. One source of such support is the Attorney General, whom witnesses described as having a function supporting parliamentary counsel in their role ensuring that legislation was constitutionally appropriate.²¹¹ David Cook explained that “There is always the long-stop option of being able to

204 [Q 4](#) (Sir Richard Mottram)

205 *Ibid.*

206 [Q 4](#) (Dr Ruth Fox)

207 *Ibid.*

208 [Q 97](#)

209 [Q 53](#)

210 [Q 65](#)

211 See, for example, [Q 51](#) (Daniel Greenberg)

consult the Attorney General” on such matters.²¹² Daniel Greenberg told us that Counsel’s ability to refer matters to the Attorney General could be effective and “was taken very seriously by departmental lawyers.”²¹³ David Lidington MP agreed, noting that in the case of constitutional issues such as retrospectivity or Henry VIII powers, he “would expect the Attorney or the Advocate General to challenge a department to demonstrate the necessity.”²¹⁴

162. In addition, our witnesses suggested that the Leader of the House of Commons had a particular responsibility for the quality of legislation introduced to Parliament, by virtue of their chairmanship of the PBL Cabinet Committee. Sir Stephen Laws added that the relationship went further, because “since 2010 the First Parliamentary Counsel has been head of the Government in Parliament group in the Cabinet Office. The Leaders and Chief Whips of both Houses see First Parliamentary Counsel as their permanent secretary, so there is a much closer relationship.”²¹⁵ The then Leader of the House of Commons agreed that he had a responsibility to champion the quality of legislation, and that the Government was “making a very conscious effort to apply rigorous standards.”²¹⁶ He described his relationship with parliamentary counsel:

“I will have a regular relationship with Elizabeth and her team and the legislation team in the Cabinet Office, who will brief me regularly on the progress of the preparation of Bills as they are going through the preparatory stage and of the Bills that are actually before Parliament. We will try to sort out any difficulties at the official working level, if possible, but sometimes we will conclude, “I need to speak to the Bill Minister or to the Secretary of State direct”, to try to get a particular decision fixed.”²¹⁷

163. Some witnesses suggested that the degree of political influence wielded by the Leader was an important aspect in his ability to uphold legislative standards in the face of pressure from his political colleagues. Sir Richard Mottram suggested that the Leader of the House of Commons could be “outranked by some very big beasts” who simply overruled any concerns that might be raised about the quality of their legislation.²¹⁸ Daniel Greenberg told us that the dynamics of influence in the Cabinet were “critical to ensuring that people care about the quality of legislation.”²¹⁹ He suggested that the “The Leader needs to be a big beast”, and one who recognised “the importance of legislation ... [and] the rule of law.”²²⁰ He summarised the situation as: “If I do not care about the quality of legislation, I appoint a small beast as Leader of the House. If I care about it, I appoint a big beast.”²²¹ Sir Stephen Laws disagreed, arguing that the influence wielded by the Leader of the House depended more on “how difficult parliamentary handling is.”²²²

212 [Q 97](#)

213 [Q 51](#)

214 [Q 99](#)

215 [Q 68](#)

216 [Q 90](#)

217 *Ibid.*

218 [Q 2](#)

219 [Q 54](#)

220 [Q 54](#)

221 [Q 54](#)

222 [Q 68](#)

164. It is clear that the Office of Parliamentary Counsel has relatively limited resources. The Bingham Centre noted that: “the Office of Parliamentary Counsel only has a team of around 50 lawyers ... whereas Government as a whole is estimated to have around 2,000.”²²³ The then Leader of the House of Commons David Lidington MP acknowledged that while the OPC formally reported to the Prime Minister as Head of the Cabinet Office, he also had responsibilities in this regard: “I see it as part of my responsibility both to flag any concerns I might have about the capacity of the OPC and to make clear to the Cabinet and to the Prime Minister if I believe there are any constraints in relation to the OPC.”²²⁴
165. **Parliamentary counsel have a duty to ensure that legislation introduced into Parliament meets their own criteria for ‘good law’, as well as ensuring that legislation is constitutionally appropriate. There is an established mechanism that ensures that, where they have concerns about either the content or drafting of legislation, they are able to call upon the support of the Leader of the House of Commons and the Attorney General in discussions with the relevant department. We support this process—and it underlines, once again, the obligation on those two ministers in upholding the quality and integrity of the legislative process.**

The use of external parliamentary counsel

166. The Committee heard evidence about the occasional efforts in the past by ministers to use external parliamentary counsel. Dr Ruth Fox explained that:
- “in a couple of instances in our legislative case studies there were clearly tensions ... where Ministers felt the draftsmen were being too conservative in their approach to the way in which they were drafting, and there were suggestions from Ministers that they wanted to bring in external drafting assistance to put pressure on draftsmen to draft more in the direction they wanted.”²²⁵
167. Witnesses generally felt that this had not worked well. Sir Richard Mottram noted that such experiments “were not very successful for all sorts of reasons.”²²⁶ Sir Stephen Laws suggested that his experience during the 1990s demonstrated that drafting was “a specialist trade. What you get from a central service is a cadre of people with a consistent approach; and consistency is a large part of how to achieve coherence and clarity.”²²⁷
168. **The drafting of legislation is a specialised skill. While there is no doubt that external expertise and advice can be used to good effect to inform the drafting of legislation, this should not be done as a way of sidestepping the concerns of parliamentary counsel.**

‘Christmas tree’ bills

169. We asked our witnesses about ‘Christmas tree’ bills—that is, bills which seem intended to focus on a specific area of the law but then incorporate multiple provisions that deal with matters not directly related to the principal

223 Written evidence from the Bingham Centre for the Rule of Law ([LEG0017](#))

224 [Q 90](#)

225 [Q 4](#)

226 [Q 4](#)

227 [Q 70](#)

purpose of the legislation, or bills with a scope which is so widely defined as to allow a very broad range of topics to be included. Witnesses suggested that ‘Christmas tree’ bills were the result of “the dynamics of departments”, as departments took the opportunity to add proposals to the bill that had not previously been considered important enough for space in the legislative timetable. Sir Richard Mottram described the process within departments:

“Departments often have lots of stuff lying around that they have been dying to get into a Bill for ages. Again, this will be very familiar to the former Ministers round the table. They will say, “I have this thing. I can never get it to the top of the list, but now I have a Bill”, as Lord MacGregor said, “that has real political imperative behind it, so I am definitely going to get it in”, and then civil servants come along and say to the Minister, “Why not add these few clauses about this? It is sort of related.” Then some awkward person says, “You have to change the title”, and so it is changed. This is very bad practice, is it not? A Bill should be about something that has a defined set of purposes and everything not related to it should not be in the Bill. But it is a bureaucratic dynamic ... [These proposals] are not just baubles; they are valuable.”²²⁸

170. The Bingham Centre acknowledged that these kind of bills were “understandable given constraints on parliamentary time” before concluding that “they should be discouraged as bad practice ... [bills] should avoid covering a diversity of unrelated reforms.”²²⁹ Among the concerns raised by such large, sprawling bills is the risk that controversial clauses will pass without proper scrutiny simply because of the size of the bills being considered by both Houses. This risk can be exacerbated when significant policy changes are added as amendments to a bill late in the process—and this often seems to happen at report stage in the House of Lords.
171. **Parliamentary time is a scarce resource, and there is an incentive for departments with a slot in the legislative programme to incorporate as many legislative proposals as possible in each of their bills. However, it is harder for Parliament properly to scrutinise wide-ranging legislation that covers a number of diverse and disparate issues—particularly when some of those issues may have been introduced at a late stage during the parliamentary process. We recommend that the Parliamentary Business and Legislation Cabinet Committee should consider, as part of its “testing”²³⁰ process, the extent to which the scope of a bill will affect Parliament’s ability properly to scrutinise the legislation.**

Oversight of legislative standards

Parliamentary Business and Legislation Cabinet Committee

172. The importance of the Leader of the House of Commons and the Attorney General is underscored by their membership of the PBL Cabinet Committee. This Committee, which also includes the Leader of the House of Lords and

228 Q 3

229 Written evidence from the Bingham Centre for the Rule of Law Part One (LEG0016)

230 Q 89 (Elizabeth Gardiner)

the chief whips of both Houses, considers issues “relating to the Government’s parliamentary business and implementation of its legislative programme.”²³¹

173. The then Leader of the House of Commons assured us that “It is certainly the intention of the current crop of business managers that we bring forward Bills in a state that means that their policy intent is clear and that they have been tested and examined internally by the departments to make sure that they deliver what they say on the tin ... [W]e are making a very conscious effort to apply rigorous standards.”²³² Elizabeth Gardiner agreed, stating that “the testing through the PBL process helps us to keep the Bills on track and to ensure that to the greatest degree they meet all those requirements [of ‘good law’].”²³³
174. Lord Lisvane explained in his lecture to the Statute Law Society that a “Bill’s first significant encounter is with the Parliamentary Business and Legislation Committee of the Cabinet ... I think that there is general agreement that that encounter should be a demanding one. Certainly the Prime Minister has said that she sees PBL as the most difficult committee for a Minister to appear before.” He concluded however, that “The area in which I remain to be convinced is, simply, the quality of what is to be put before Parliament. If PBL were an effective gatekeeper for this, some legislative turkeys would never appear in the form they did.”²³⁴ In reaching this conclusion, he cited concerns (referred to above in paragraph 124) about legislation that was introduced without sufficient detail to allow Parliament properly to scrutinise it. Ruth Fox also suggested to us that the PBL Committee was not an effective brake on “ministers who want to push their bills through ... in effect Parliament has to take from government whatever it throws at it whenever it decides it is ready to throw it.”²³⁵
175. The PBL Committee is the main gatekeeper for Parliament in this regard. While we suggest below (paragraphs 177–183) additional mechanisms to safeguard the quality of legislation, the PBL Committee will remain the primary obstacle which legislation must pass before it enters Parliament. We welcome the recognition of the former Leader of the House of Commons of the importance of his then role in this regard, and yet we recognise that the effectiveness of the PBL Committee depends to a large extent on the personal attitude and influence of the Leader of the House of Commons in particular. As Lord Lisvane noted, “is PBL really an effective gatekeeper? Or, perhaps more accurately, is it looking out for the right things; and, if it does not do so, who will? ... this is not about individuals but about changes in Parliamentary and political culture.”²³⁶
176. **We concluded in paragraph 42 that “it is in the interest of all parties that there are procedural mechanisms to protect the quality of legislation, regardless of the political ‘strength’ of any particular government.” One of these procedural mechanisms is the scrutiny**

231 Cabinet Office, *List of Cabinet Committees and their members as at 20 July 2017*: <https://www.gov.uk/government/publications/the-cabinet-committees-system-and-list-of-cabinet-committees> [accessed 19 October 2017]

232 [QQ 89](#) and [90](#)

233 [Q 89](#)

234 Lord Lisvane, ‘Why is there so much bad legislation?’, *Statute Law Society Annual Lecture*, 28 February 2017

235 [Q 2](#)

236 Lord Lisvane, ‘Why is there so much bad legislation?’, *Statute Law Society Annual Lecture*, 28 February 2017

of legislation before introduction by the Parliamentary Business and Legislation Cabinet Committee. Its members, and its Chair, the Leader of the House of Commons, have a particular responsibility to ensure that they not only consider the interests of the Government in seeing its legislation pass through Parliament, but that they apply standards that promote the development of ‘good law’ and uphold the interests of Parliament and its ability properly to scrutinise the legislation laid before it.

A Legislative Standards Committee

177. The PBL Committee, and the Leader of the House of Commons in particular, will continue to play an important role in upholding the standard of legislation. Yet it is also in the interest of all parties to ensure that standards of legislation do not depend so heavily on the regularly changing holders of the office of the Leader of the House of Commons.²³⁷
178. In our 2004 report, we recommended the employment of a “clear and transparent checklist” to ensure that draft bills met “certain standards.”²³⁸ This recommendation was built upon in 2011 by the House of Lords Leader’s Group on Working Practices, which recommended “the establishment of a Legislative Standards Committee, either as a Joint Committee or as a Select Committee of the House of Lords, to assess, immediately after introduction and before second reading, the technical and procedural compliance of Government bills with standards of best practice in bill preparation.”²³⁹ A very similar proposal was put forward by the House of Commons Political and Constitutional Reform Committee (PCRC) in 2013.²⁴⁰
179. A number of witnesses were supportive of this proposal, including the Bingham Centre, which supported the “adoption of parliamentary-endorsed benchmarks and standards that can be applied at all stages of the legislative process”,²⁴¹ and the Better Government Initiative, which had previously supported the idea during the PCRC’s inquiry in 2013. The Better Government Initiative told us that:

“There is a broad measure of agreement among those with an interest in improving the quality of legislation about the scope of any standards. In our view either the Bill itself or accompanying material should provide adequate information on:

- the purpose of the Bill;
- the reason why new legislation is needed;
- the costs, risks and intended benefits in terms suitable for post-legislative scrutiny;

237 There have been 13 different holders of the office of the Leader of the House of Commons in the 17 years between 2000 and the publication of this report.

238 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–4, HL Paper 173), page 21

239 House of Lords Leader’s Group on Working Practices, *Report* (Session 2010–12, HL Paper 136) para 97

240 House of Commons Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation* (First Report, Session 2013–14, HC Paper 85), Chapter 4

241 Written evidence from the Bingham Centre for the Rule of Law ([LEG0016](#))

- the consultation process, explaining why the proposed option has been adopted and providing evidence, including from the front line, of how it will work in practice;
 - the effects, if any, on Scotland, Wales and Northern Ireland.”²⁴²
180. Dr Ruth Fox and Sir Richard Mottram both suggested that Parliament should take steps to enforce certain legislative standards, before it considered legislation introduced by the Government—perhaps by means of a legislative standards committee. Dr Ruth Fox argued that: “government should not be able to bring forward a Bill that does not have the impact assessments ready and accompanying it at the time it is brought forward. It should not be able to bring a Bill where the consultational aspects of it are still going on.”²⁴³
181. Some witnesses were sceptical of the value of such a committee,²⁴⁴ such as Jill Rutter, who was concerned that any set of standards might “degenerate” into a tick-box exercise. She added that:
- “We have seen that with impact assessments, to an extent; you make all your policy decisions and then commission the impact assessment from a bunch of outside consultants at the end of the process, because you know you have to do it ... You know that it is done right at the end of the process, rather than what you really want, which is people regarding it as an integrated part of the conversation.”²⁴⁵
182. **The concept of applying a set of legislative standards to government bills, perhaps through a new legislative standards select or joint committee, is not new. The principle has been endorsed by a series of select committees and other institutions over more than a decade. We continue to believe that there would be merit in producing a set of standards that legislation must meet before it can be introduced. We endorse the recommendations of the House of Lords Leader’s Group on Working Practices and of the House of Commons Political and Constitutional Reform Committee and support the creation of a legislative standards committee.**
183. The recommendations in this report aim to ensure that when legislation is introduced in Parliament it is (where possible) evidence-based; it has been subjected to thorough public and expert scrutiny; and it has been tested by both Government and Parliament with an eye to constitutional propriety and the importance of facilitating proper parliamentary scrutiny. In the later stages of this inquiry we will turn our attention more closely to the passage of legislation through Parliament and its publication and dissemination after Royal Assent.

242 Written evidence from the Better Government Initiative ([LEG0001](#))

243 [Q 2](#)

244 See also, for example, [Q 28](#) (Jonathan Breckon)

245 [Q 28](#)

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The policy development process

1. We recognise that the initiative for new policy may come from empirical evidence, political pressure or principles; and often a mixture of all three. This is an inevitable result of our democratic system. While we recognise that there are occasions on which it will be necessary for ministers to initiate legislation in the absence of a detailed evidence base (see paragraphs 31–37 later in this chapter), we do not believe that such decisions should be taken lightly, or be viewed as an easy option when the Government feels it must be seen to do something. We welcome the then Leader of the House of Commons’ assurance that he “tests” the necessity of legislation when considering the Government’s forward legislative programme. We consider later in this report whether there is a need for a legislative standards committee which would, among other things, require civil servants and ministers to justify, and be shown to justify, whether legislation is necessary to achieve a particular policy goal (see paragraphs 172–183). (Paragraph 14)
2. We welcome the fact that the process of policy development within Government now includes embedded mechanisms that place an emphasis on gathering and evaluating evidence. (Paragraph 19)
3. We recommend that the Government should routinely publish the evidence base for legislative proposals. If a robust evidence base is not available, the Government should explain why it is nevertheless appropriate to proceed. (Paragraph 22)
4. We recognise the value of piloting, both as a means of experimenting with different policy variations in order to create an evidence base for policy-making and as a way to trial the impact of new policies before they are rolled out nationwide. (Paragraph 27)
5. In some cases, piloting new policies will require the law to be applied differently in different areas—to take a high-profile example, the piloting of universal credit means that individuals will have different entitlements to benefits depending on whether they live in an area piloting universal credit. There are also, of course, variations in the law in different parts of the country as a result of devolution from which lessons could be learned. (Paragraph 28)
6. There are, however, areas of the law where such experimentation should only be undertaken after thorough consideration of the constitutional implications of introducing variation. For example, the equal and consistent application of the criminal law is a fundamental tenet of the constitution and an important principle of the rule of law. We would not wish to see that principle diminished. (Paragraph 29)
7. We recognise that Parliament may authorise the Government to pilot any policy it chooses, but it may help ensure a more consistent approach if the Government were to set out guidance as to when piloting is appropriate or desirable. (Paragraph 30)
8. We recognise that MPs and ministers receive valuable information and insight on policy issues through communications with constituents, businesses, interest groups and others. The political judgement they bring to bear on

policy on the basis of that knowledge is beneficial to the legislative process. (Paragraph 31)

9. Ministers are responsible for the policies they oversee, and they are accountable to Parliament and to the electorate for their decisions. Empirical evidence, where available, is a valuable input in the policy-making process, but it is not the only factor that politicians may take into account. Civil servants have a duty to ensure that ministers are aware of any relevant evidence—even when that might be politically inconvenient. We recommend that the Government should routinely publish the evidence base for legislative or policy proposals, as recommended in paragraph 22, as this should help ensure that ministers have an accurate picture of relevant evidence before decisions are taken. (Paragraph 37)
10. We welcome the Prime Minister’s commitment to a greater use of Green Papers and White Papers. A more structured approach to policy development and consultation can only improve the quality and consistency of legislation. In addition, we draw particular attention to the recommendation in our 2011 report, *The Process of Constitutional Change*, in which we concluded that “We regard it as essential that, prior to the introduction of a bill which provides for significant constitutional change, the government ... publish green and white papers.” This has not always been the case in the recent past, and we hope that in the future a more rigorous approach will be taken towards the process of legislating for constitutional change. (Paragraph 41)
11. The then Leader of the House of Commons commented that proper policy development processes are essential for taking legislation through a Parliament in which the “parliamentary arithmetic” is such that the Government cannot be assured of pushing legislation through. While a Government with a large majority will always have an easier time passing its legislation through Parliament, the quality of legislation should not be dependent on the composition of the House of Commons. It is in the interest of all parties that there are procedural mechanisms to protect the quality of legislation, regardless of the political ‘strength’ of any particular government. (Paragraph 42)

Consultation and legislative scrutiny

12. Informal discussions with stakeholders are an important element of the policy development process. Policy should not and cannot be developed in a vacuum, and early and sustained engagement with a wide range of stakeholders to capture a diversity of views can help ensure that policy meets the needs of those it most affects. (Paragraph 52)
13. We endorse the view of the Secondary Legislation Scrutiny Committee that six weeks should be considered a minimum feasible consultation period, save in circumstances which would be generally recognised as exceptional. (Paragraph 58)
14. We note that the Government publishes details of all government consultations on a single website which allows for the list of consultations to be filtered by subject area—this is a positive development. We would welcome, however, an explanation as to the recommended steps, if any, that must be taken by Government Departments to bring consultations to the attention of those with a relevant interest in the subject matter. (Paragraph 61)

15. Government departments should normally consult a wide range of stakeholders on the drafting of legislation. Once legislation has been introduced in Parliament, it is far harder for the wording to be changed. Early, informal consultation on the wording of draft legislation can mitigate the risks of unintended consequences and ensure that legislation has been thoroughly ‘stress tested’ by the time it is introduced. Yet, as with the earliest stages of policy development (see paragraph 52) it is also essential that departments have sufficient resource and expertise to ensure that they are not reliant on a narrow group of external stakeholders who may have a particular objective or interest in mind when contributing to the development of legislation. (Paragraph 65)
16. However, while Green and White Papers are welcome parts of the policy consultation and development process, they are not substitutes for pre-legislative scrutiny of draft Bills. Draft Bills provide not just the policy intention but also set out the detail of how it will be implemented in law. Where a draft Bill is referred to a committee for pre-legislative scrutiny, it provides a better opportunity and more substantial mechanism for parliamentarians to scrutinise and influence draft legislation than a Green or White Paper affords. (Paragraph 72)
17. We are convinced that pre-legislative scrutiny is also well-suited to technical bills. We see no reason why pre-legislative scrutiny by a committee would be any less effective at scrutinising technical legislation than the scrutiny of the legislative process itself. Indeed, the greater time and focused scrutiny that can be applied during pre-legislative scrutiny should make it better at dealing with technical issues and considering the wording of legislation when required. (Paragraph 77)
18. Green and White Papers provide an opportunity for public debate on proposed policy and pre-legislative scrutiny allows for a thorough examination of the details of that policy, and its implementation, in its legislative form. We believe, therefore, that pre-legislative scrutiny continues to be a valuable means of improving legislation. While not every Bill will require pre-legislative scrutiny, we recommend that the Government think critically about the value of pre-legislative scrutiny for all of its proposed legislation, irrespective of whether there have been prior policy papers or public consultations. (Paragraph 82)
19. At present, pre-legislative scrutiny is seen as an optional extra to the legislative process: it may or may not take place and it does so in relative isolation to the other stages of scrutiny which legislation undergoes. Pre-legislative scrutiny should be considered an integral part of the wider legislative process. This may mean adapting other parts of the process to take account of pre-legislative scrutiny when it occurs. We do not, in this report, prescribe how this might occur, but as one example we recommend that the business managers of the House of Commons and the House of Lords should take into account whether a bill has undergone pre-legislative scrutiny when considering how much parliamentary time to allocate to the bill when it is passing through Parliament. (Paragraph 87)
20. There is a case for greater resources to be made available for committees undertaking pre-legislative scrutiny, in order to facilitate a detailed legal, policy and financial examination of the proposals in a draft Bill and its associated documents, including impact assessments. (Paragraph 91)

21. The content of party manifestos is a matter for political parties and will heavily shape the legislative programme at the start of each new Parliament. (Paragraph 105)

The quality of legislation

22. There are areas of the law where significant strides have been made in drafting clear, accessible legislation. It is evident, however, that there remain large bodies of law which are remarkably inaccessible and difficult for practitioners to comprehend, let alone the average citizen. Quite aside from the obvious rule of law concerns that arise, such law leads to costly and unnecessary strains on the resources of the justice system. (Paragraph 123)
23. We have highlighted in many of our recent legislative scrutiny reports our concerns about the use of delegated powers and we will return to these issues in more detail at a later stage of this inquiry. We have consistently stressed our concerns about the extent and nature of the use of delegated powers in primary legislation. This is not only in the context of ensuring an appropriate division of power between Parliament and the Executive, but also in terms of ensuring that Parliament can fulfil its responsibility of effectively scrutinising legislation and holding the Executive to account. This is a key political issue in respect of the legislation to deliver Brexit. (Paragraph 126)
24. We welcome the efforts made by the Office of Parliamentary Counsel to ‘tidy up’ the statutory landscape. Nonetheless, these do not replace the clear need for consolidation in a number of increasingly complex areas of the law. It cannot be seen as a satisfactory state of affairs when the Senior President of Tribunals states that his judges “cannot find” relevant law, and when they do find it “they do not necessarily understand it.” (Paragraph 144)
25. We recognise that consolidation is not a politically attractive use of parliamentary time and the scarce resource of parliamentary counsel. Yet consolidation is a more valuable activity now than ever before. The legislation.gov.uk website will, in effect, allow the law to be consolidated on a rolling basis in the future. This is a positive development. It will, in the longer term, make the law more accessible to both practitioners and the wider public. However, this will only be effective once an area of law is consolidated—it will not help resolve a situation where the relevant legislation is spread across the statutory landscape. Likewise it is clear that at a time when the resources of the court system are under pressure, both in terms of finance and in terms of staffing, consolidation offers the possibility of cost savings and increased efficiency. Weighed up against these benefits, the Government’s arguments seem thin indeed. (Paragraph 145)
26. We recommend that the Government should, as a priority, provide the Law Commission with the necessary resources to start consolidating those areas of the law where consistent application of the law is now under threat from the sheer complexity of the existing statute book. The Government should subsequently ensure that the small amount of parliamentary time required is made available to pass the necessary consolidation bills to implement the Law Commission’s work. The evidence we received suggested that consolidating immigration and sentencing law in particular would offer real benefits not only in relation to the clarity and ease of application of the law, but in terms of cost and efficiency savings within the justice system. (Paragraph 147)

27. We will return to this issue in more detail at a later stage of our inquiry, when we consider the passage of legislation through Parliament, but we note that both Houses of Parliament should see it as a priority to improve the accessibility and clarity of legislation passing through Parliament—not just for the benefit of the wider public, but in order to assist parliamentarians in scrutinising the increasingly complex and voluminous legislation coming before it. (Paragraph 150)
28. Parliamentary counsel have a duty to ensure that legislation introduced into Parliament meets their own criteria for ‘good law’, as well as ensuring that legislation is constitutionally appropriate. There is an established mechanism that ensures that, where they have concerns about either the content or drafting of legislation, they are able to call upon the support of the Leader of the House of Commons and the Attorney General in discussions with the relevant department. We support this process—and it underlines, once again, the obligation on those two ministers in upholding the quality and integrity of the legislative process. (Paragraph 165)
29. The drafting of legislation is a specialised skill. While there is no doubt that external expertise and advice can be used to good effect to inform the drafting of legislation, this should not be done as a way of sidestepping the concerns of parliamentary counsel. (Paragraph 168)
30. Parliamentary time is a scarce resource, and there is an incentive for departments with a slot in the legislative programme to incorporate as many legislative proposals as possible in each of their bills. However, it is harder for Parliament properly to scrutinise wide-ranging legislation that covers a number of diverse and disparate issues—particularly when some of those issues may have been introduced at a late stage during the parliamentary process. We recommend that the Parliamentary Business and Legislation Cabinet Committee should consider, as part of its “testing” process, the extent to which the scope of a bill will affect Parliament’s ability properly to scrutinise the legislation. (Paragraph 171)
31. We concluded in paragraph 42 that “it is in the interest of all parties that there are procedural mechanisms to protect the quality of legislation, regardless of the political ‘strength’ of any particular government.” One of these procedural mechanisms is the scrutiny of legislation before introduction by the Parliamentary Business and Legislation Cabinet Committee. Its members, and its Chair, the Leader of the House of Commons, have a particular responsibility to ensure that they not only consider the interests of the Government in seeing its legislation pass through Parliament, but that they apply standards that promote the development of ‘good law’ and uphold the interests of Parliament and its ability properly to scrutinise the legislation laid before it. (Paragraph 176)
32. The concept of applying a set of legislative standards to government bills, perhaps through a new legislative standards select or joint committee, is not new. The principle has been endorsed by a series of select committees and other institutions over more than a decade. We continue to believe that there would be merit in producing a set of standards that legislation must meet before it can be introduced. We endorse the recommendations of the House of Lords Leader’s Group on Working Practices and of the House of Commons Political and Constitutional Reform Committee and support the creation of a legislative standards committee. (Paragraph 182)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Lord Brennan*
 Baroness Corston†
 Baroness Dean of Thornton-Le-Fylde*
 Baroness Drake†
 Lord Dunlop†
 Lord Hunt of Wirral
 Lord Judge
 Lord Lang of Monkton (Chairman until 2 May 2017)*
 Lord MacLennan of Rogart
 Lord MacGregor of Pulham Market
 Lord Morgan
 Lord Norton of Louth
 Lord Pannick
 Baroness Taylor of Bolton (Chairman since 22 June 2017)

* Member of the Committee until 2 May 2017

† Member of the Committee since 22 June 2017

Declarations of interest

Lord Beith
No relevant interests
 Lord Brennan
No relevant interests
 Baroness Corston
No relevant interests
 Baroness Dean of Thornton-le-Fylde
No relevant interests
 Baroness Drake
Lay Member, Employment Appeal Tribunal
 Lord Dunlop
No relevant interests
 Lord Hunt of Wirral
Former Secretary of State for Wales 1990-3 and 1995
Partner DAC Beachcroft LLP
Chairman, Society of Conservative Lawyers
 Lord Judge
No relevant interests
 Lord Lang of Monkton
No relevant interests
 Lord MacGregor of Pulham Market
No relevant interests
 Lord MacLennan of Rogart
No relevant interests
 Lord Morgan
No relevant interests

Lord Norton of Louth

Chair, Commission to Strengthen Parliament (2000)

Lord Pannick

No relevant interests

Baroness Taylor of Bolton (Chairman)

No relevant interests

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

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/legislative-process-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with ** gave both oral evidence and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

*	Dr Ruth Fox, Hansard Society	QQ 1–15
**	Sir Richard Mottram, Better Government Initiative	
*	Jill Rutter, Institute for Government	QQ 16–28
**	Jonathan Breckon; Alliance for Useful Evidence	
**	Dr David Halpern, Behavioural Insights Team, Cabinet Office	
*	Emran Mian, Social Market Foundation	QQ 29–35
*	Chris Walker, Independent Housing Consultant	
**	Alison Harvey, Immigration Law Practitioners' Association	QQ 36–41
*	Peter Jorro, Barrister, Garden Court Chambers	
*	Sir Ernest Ryder, Senior President of Tribunals	QQ 42–48
*	Judge Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber	
*	Julian Phillips, Resident Judge of the First-tier Tribunal, Immigration and Asylum Chamber	
*	Daniel Greenberg, former Parliamentary Counsel	QQ 49–56
**	Michael Clancy OBE, Law Society of Scotland	QQ 57–62
*	Robert Khan, Director of Public Affairs, Law Society of England and Wales	
*	Andrew Walker QC, Vice Chairman-Elect of the Bar Council and the Vice Chairman of the Bar Council Law Reform Committee	
*	Sir Stephen Laws, former First Parliamentary Counsel	QQ 63–75
*	The Rt Hon Steve Webb, former MP and Minister of State for Pensions	QQ 76–88
*	The Rt Hon Professor Paul Burstow, former MP and Minister of State for Health, and Chair of the Joint Committee on the Draft Care and Support Bill	
*	Martin Hoskins, former Specialist Adviser to the Joint Committees on the Draft Investigatory Powers Bill and the Draft Communications Data Bill	

- ** Rt Hon David Lidington MP, Leader of the House of Commons [QQ 89–101](#)
- * Elizabeth Gardiner, First Parliamentary Counsel
- * David Cook, Second Parliamentary Counsel
- ** Sir David Bean, Chairman, the Law Commission [QQ 102–112](#)
- * Professor David Ormerod, Law Commissioner for Criminal Law and Evidence
- ** Professor Richard Susskind OBE [QQ 113–121](#)

Alphabetical list of all witnesses

- ** Alliance for Useful Evidence ([QQ 16–28](#)) [LEG0026](#)
- Bar Council of England and Wales [LEG0009](#)
- Dr Stephen Bates, University of Birmingham [LEG0006](#)
- ** Better Government Initiative ([QQ 1–15](#)) [LEG0001](#)
- Bingham Centre for the Rule of Law [LEG0016](#)
[LEG0017](#)
- British Academy [LEG0022](#)
- * Rt Hon. Professor Paul Burstow, former MP and Minister of State for Health, and Chair of the Joint Committee on the Draft Care and Support Bill ([QQ 76–88](#))
- Chartered Institute of Taxation [LEG0018](#)
- * Judge Michael Clements, President of the First-tier Tribunal, Immigration and Asylum Chamber ([QQ 42–48](#))
- * David Cook, Second Parliamentary Counsel ([QQ 89–101](#))
- Dr Conor Farrington, University of Cambridge [LEG0012](#)
- * Dr Ruth Fox, Hansard Society ([QQ 1–15](#))
- * Elizabeth Gardiner, First Parliamentary Counsel ([QQ 89–101](#))
- Dr Mark Goodwin, Lecturer in Politics, University of Birmingham [LEG0006](#)
- * Daniel Greenberg, former Parliamentary Counsel ([QQ 49–56](#))
- ** Dr David Halpern, Behavioural Insights Team [LEG0028](#)
([QQ 16–28](#))
- * Martin Hoskins, former Specialist Adviser to the Joint Committees on the Draft Investigatory Powers Bill and the Draft Communications Data Bill ([QQ 76–88](#))
- ** Immigration Law Practitioners’ Association ([QQ 36–41](#)) [LEG0029](#)

	Institute of Chartered Accountants in England and Wales (ICAEW)	LEG0024
**	Institute for Government (QQ 16–28)	LEG00008
**	Law Commission of England and Wales (QQ 102–112)	LEG0032
*	Law Society of England and Wales (QQ 57–62)	
**	The Law Society of Scotland (QQ 57–62)	LEG0025
*	Sir Stephen Laws, former First Parliamentary Counsel (QQ 63–75)	
	Professor Cristina Leston-Bandeira, University of Leeds	LEG0011
	Liberal Democrat Constitutional Affairs Team	LEG0021
**	Rt Hon. David Lidington MP, Leader of the House of Commons (QQ 89–101)	LEG0010
*	Emran Mian, Social Market Foundation (QQ 29–35)	
	MillionPlus	LEG0004
	NESTA	LEG0007
*	Professor David Ormerod, Law Commissioner for Criminal Law and Evidence (QQ 102–112)	
*	Judge Julian Phillips, Resident Judge of the First-tier Tribunal, Immigration and Asylum Chamber (QQ 42–48)	
	Mark Ryan, Coventry University	LEG0005
*	Sir Ernest Ryder, Senior President of Tribunals (QQ 42–48)	
**	Professor Richard Susskind (QQ 113–121)	LEG0031
	Dr Louise Thompson, University of Surrey	LEG0011
	Tobacco Manufacturers’ Association	LEG0014
	Rt Hon. Valerie Vaz MP, Shadow Leader of the House	LEG0030
*	Andrew Walker QC, Vice Chairman-Elect of the Bar Council and the Vice Chairman of the Bar Council Law Reform Committee (QQ 57–62)	
*	Chris Walker, Independent Housing Consultant (QQ 29–35)	
*	Rt Hon. Steve Webb, former MP and Minister of State for Pensions (QQ 76–88)	
	Dr Edgar A. Whitley, London School of Economics and Political Science	LEG0019 LEG0023

APPENDIX 3: CALL FOR EVIDENCE

The Constitution Committee is beginning a large-scale inquiry into the legislative process. This follows its major 2004 report on *Parliament and the Legislative Process*.²⁴⁶ The Committee is interested in how bills are prepared by Government and scrutinised in Parliament; whether and how outside organisations and the public are involved in the process; and how the legislative process is, or could be, affected by new technology and by the UK's withdrawal from the EU.

The inquiry will take place over the next year and will be broken down into four distinct parts, each addressing a stage or significant factor in the legislative process. These are:

- (1) Preparing legislation for introduction in Parliament;
- (2) The passage of legislation through Parliament;
- (3) The delegation of powers; and,
- (4) The period after Royal Assent.

For each of these stages, the Committee will be looking at the issues and questions set out below. We will issue separate calls for evidence for each stage so as to enable those wishing to engage with the inquiry to do so in relation to each stage in turn, or only in relation to those stages about which they are best able to comment. Each call for evidence will address the same overarching issues in relation to the legislative process.

Stage 1: Preparing legislation for introduction in Parliament

We are now seeking evidence relating to the first stage of the legislative process: 'Preparing legislation for introduction in Parliament'. This stage includes policy development and consultation, legislative drafting and pre-legislative scrutiny. At this stage, the Committee is focusing on primary, rather than delegated, legislation.

The Committee would welcome written submissions on any aspect of this topic, and particularly on the issues and questions set out below.

We welcome contributions from all interested individuals and organisations. For this stage of the inquiry, we are particularly interested in hearing from people and groups who have engaged with either Government consultations or parliamentary pre-legislative scrutiny investigations.

Questions

Creating good law

The Office of the Parliamentary Counsel describe "good law" as "law that is: necessary; clear; coherent; effective; [and] accessible."²⁴⁷

- (1) How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?

246 Constitution Committee, *Parliament and the Legislative Process* (14th Report, Session 2003–04, HL Paper 173)

247 Cabinet Office: Guidance – Good Law: <https://www.gov.uk/guidance/good-law>

- (2) Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?
- (3) Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

Brexit

Following the UK’s withdrawal from the EU, Parliament will have to legislate across a range of areas previously legislated for at an EU level.

- (4) What impact will the UK’s withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?
- (5) Will there be changes required to how the Government and Parliament deal with legislation following Brexit?

Technology

New technologies—and particularly developments in information technology—have changed the way that people access information and share their opinions, experiences and insights.

- (6) How effectively do Parliament and the Government make use of technology at this stage of the legislative process?
- (7) How could new or existing technologies be used to support the development and scrutiny of legislation?

Public involvement and engagement

Engagement with those affected by new legislation, or those with expertise that can assist the development and scrutiny of legislation, is an important factor in ensuring that legislation is effective in meeting its policy objectives.

- (8) To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?
- (9) What factors inhibit effective engagement?
- (10) What mechanisms could be used to increase or improve engagement with the public and stakeholders?

Information provision

Informing the public, stakeholders and parliamentarians about potential legislation is an important part of effective law-making.

- (11) How effectively is information about potential legislation disseminated at this stage in the process?
- (12) How useful is the information that is disseminated and how could it be improved?

Parliamentary involvement

Parliament is central to the legislative process, but its involvement varies across the different stages of the legislative process.

- (13) To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?
- (14) Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?