



HOUSE OF LORDS

Select Committee on the Constitution

8th Report of Session 2007–08

**Pre-Legislative
Scrutiny in the
2006–07 Session:
Follow-up**

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Pre-Legislative Scrutiny in the 2006–07 Session: Follow-up

1. On 28 January we published a report on *Pre-Legislative Scrutiny in the 2006–07 Session* (HL Paper 43), which provided statistics on the volume of draft bills and commentary on the trends that they revealed. We intend to repeat this exercise at the end of every session, in order to maintain pressure on this and any future government to make ever greater use of the pre-legislative scrutiny process.
2. The report made the following key recommendations:
 - In order to aid parliamentary scrutiny of the legislative process, and to avoid the confusion that currently prevails, we strongly urge the Government to publish criteria on how the statistics on legislation and draft legislation—including clauses published in draft—should be collated. Moreover, we urge them to draw up comprehensive figures at the end of every session on the basis of the criteria provided.
 - We reaffirm our strong support for pre-legislative scrutiny and our desire to see it used more routinely. Whilst welcoming the Government’s stated support for pre-legislative scrutiny, we note with concern the decline both in the absolute number and in the proportion of bills published in draft in each session. Building on the positive signals in this year’s Queen’s Speech, we call on the Government to commit to increase the number of draft bills published per session to at least the 2003–04 level.
 - Whilst welcoming the Government’s acknowledgement of the importance of publishing draft bills in good time, the Committee continues to be concerned that this is not happening in practice. We call on the Government to ensure that all draft bills are published in good time (allowing twelve weeks for scrutiny at the very minimum, and if possible considerably more), and wherever possible that their release is spread throughout the parliamentary year. Moreover, we urge the Government not to undermine the scrutiny process by launching additional consultations once pre-legislative scrutiny is already underway, or indeed after it has been completed.
3. The Government responded to the report in the form of a letter from Baroness Ashton of Upholland, Leader of the House of Lords, on 20 March. The response is reprinted as an appendix to this report. We look forward to debating our report and the Government’s response in the House in due course.

APPENDIX: GOVERNMENT RESPONSE TO THE HOUSE OF LORDS CONSTITUTION COMMITTEE'S REPORT, "PRE-LEGISLATIVE SCRUTINY IN THE 2006-07 SESSION"

The Government is grateful for the Committee's report on Pre-Legislative Scrutiny in the 2006-07 session. This letter responds to the conclusions contained within the report.

Statistics on draft bills

The Committee makes a number of points about the collection of statistics on draft bills and other legislation, drawing on the information provided to the chairman of the Committee in a parliamentary answer in November 2007.¹ The Committee suggests that it would be helpful for the Government to publish criteria on how statistics on legislation and draft legislation should be collated.

The Committee notes that information available in different publications (some governmental, some parliamentary) does not always appear identical. This however reflects the different contexts for the information and the different needs of users. Government does not collate information of this kind for its own official use, but does of course seek to provide information on request where possible. This will reflect the form of the request and the information which is available. The figures for the number of bills introduced each session are obtained from parliamentary sources.² The criteria for assembling statistics on legislation and draft legislation in different circumstances will be for the bodies which seek to use the statistics to decide.

Figures for draft bills given by Government have been given on a consistent basis. These include all known cases where what was published³ was substantially a complete bill (usually, but not always, published as a Command Paper⁴ and including the additional features of a full bill such as a long title). The totals in the parliamentary answer of November last year for the numbers of draft bills published in each session reflect those published elsewhere in parliamentary answers and in such publications as the list of draft bills published by the House of Commons Library (with whom Cabinet Office officials liaise regularly).⁵ Any differences in the headline numbers or descriptions in the parliamentary answer reflect the need to avoid double counting (where parts of bills were published over more than one session) and to make clearer that where bills had sometimes been described in the past as 'draft clauses' they were nonetheless intended to be complete or substantially complete bills (rather than the partial publication of limited numbers of clauses in the sense used elsewhere in the November parliamentary question and in the Committee's report).⁶

¹ Lords Hansard 29 November 2007 WA 134-5.

² Sessional Returns of the House of Commons and the House of Lords public bill sessional statistics.

³ Including occasionally cases where clauses were published in more than one tranche, such as the Company Law Reform Bill in session 2004-05.

⁴ The Police (Northern Ireland) Bill in session 2002-03 and the Terrorism Bill in session 2005-06 are examples of draft bills not published as Command papers, both being cases where the drafts were published relatively shortly before the introduction of effective bills.

⁵ SN/PC/02822 (last updated 26 November 2007).

⁶ The Commons Liaison Committee's figure for 2005-06 is only different from the figure given in the Government's November 2007 answer because that Committee (as it explained in the footnote to its paragraph 14) excluded one of the draft bills from its total for its own specific reasons.

To assist the Committee, and for greater clarity, the full list of draft bills published since 1997 underlying the numbers in the parliamentary answer, and consistent with lists published elsewhere, is attached.

Officials would as ever be happy to discuss any areas (whether in relation to bills introduced or draft bills) where the Committee is uncertain about the figures given.

Systematic information on ‘draft clauses’ in the sense implied by the Committee is not held. The Committee is understood to be asking about cases where some clauses may have been drafted and published for discussion, short of being a full draft bill. Such cases will include cases where Departments expose drafts or partial drafts for public comment, as is routinely the case with some aspects of tax legislation. Draft clauses are also sometimes prepared for inclusion in consultation papers. A recent example is the draft clauses contained in the Consultation paper on war powers and on treaties;⁷ in this case the clauses could feature in a later draft bill. There is thus no consistent form in which draft clauses might be published or discussed with stakeholders. The Government has no reason to keep track of such instances centrally and does not do so.

Trends in pre-legislative scrutiny

The Government has indicated previously its commitment to pre-legislative scrutiny as a part of the overall legislative process. The Committee notes its concern at the lower number of bills published in draft in the last three sessions and invites the Government to make a commitment to increasing the number to the level reached in 2003–04.

The Government also has been disappointed at the lower numbers of draft bills published in recent sessions. But, as has been indicated in the past (for example in the reply to the Commons Liaison Committee in 2007), it will not be possible to give a general undertaking to publish most bills in draft or regularly to achieve the figures reached in 2003–04. The main practical obstacle remains the need to have the freedom to bring forward much legislation on a timetable which does not allow for publication of the proposed legislation in draft form. As the Committee notes, the number planned for publication in the current session is significantly higher than in the preceding sessions.

Timing and conduct of pre-legislative scrutiny

The Committee understandably draws attention to the importance of draft bills being published in good time for them to receive parliamentary scrutiny, and to the fact that this has not always happened. The Government remains committed to the principle set out in the Cabinet Office *Guide to Legislative Procedure* that there should ideally be at least three months available to a parliamentary committee to conduct pre-legislative scrutiny. Ideally also draft bills would be published at different times during the parliamentary year.

The Government accepts that this has not always been achieved and that this can create difficulties for parliamentary committees and individual members of either House. It is inevitably the case that the highest priority in legislative support work—which involves the commitment of the resources both of legislating departments and of parliamentary counsel—is given to bills which have been introduced or are being prepared for introduction. There will on occasion

⁷ Cm 7239.

therefore be slippage in the intended publication times of draft bills. On other occasions, timing considerations may mean that there is a choice between publication late in the session or not publishing in draft at all.

The Government also recognises the point made by the Committee that where possible it is desirable for further consultation exercises on related matters to be avoided while the consultation on a draft bill is taking place. In the case cited by the Committee (the draft Local Transport Bill in 2007), the Government noted in its response to the Transport select committee that:

“When we published the draft Bill we made it clear that we would be considering whether further modifications to the traffic commissioner system might be necessary to ensure effective delivery of their functions. Our approach allowed the consultation and pre-legislative scrutiny on the vast majority of the Bill’s measures to go ahead while we finalised our traffic commissioner proposals. We appreciate that there has been limited time for the Committee to analyse the proposals in the second consultation ...”⁸

But where such circumstances occur Departments will where possible seek to assist committees in carrying out scrutiny in a shorter timescale. It is grateful for the occasions on which Committees have cooperated to make this possible.⁹

Appendix: bills published in draft since 1997

1997–98

Pension Sharing on Divorce

Criminal Justice (Terrorism and Conspiracy)

Limited Liability Partnerships

1998–99

Financial Services and Markets

Food Standards

Local Government (Organisation and Standards)

Electronic Communications

Freedom of Information

Political Parties, Elections and Referendums

1999–2000

Commonhold and Leasehold Reform

Football

Insolvency

International Criminal Court

Regulatory Reform

Water

⁸ Transport Committee, 13th Special report of Session 2006–07, HC 1053, p 1.

⁹ The draft Local Transport Bill, published in May 2007, was again a case in point. The Government noted in its response to the Commons Transport select committee’s report: “We are grateful for the efforts of the Committee—and those who gave evidence—in completing the scrutiny process in advance of the summer recess, and recognise the importance of publishing draft bills in time to allow for proper pre-legislative scrutiny. On this occasion, we believe that we struck the right balance between having comprehensive proposals on which to consult and allowing adequate time for scrutiny”.

2000–01

Export Control and Non-Proliferation

Proceeds of Crime

2001–02

Communications

Companies

Extradition

Justice (Northern Ireland)

Local Government

Mental Health

NHS (Wales)

2002–03

Civil Contingencies

Corruption

Electricity (Trading and Transmission)

Gender Recognition

Housing

Mental Incapacity

Nuclear Sites and Radioactive Substances

Police (Northern Ireland)

Public Audit (Wales)

2003–04

Animal Welfare

Charities

Civil Service

Criminal Defence Service

Disability Discrimination

Gambling (part published in 2002–03)

Identity Cards

Mental Health

Regional Assemblies

School Transport

Single European Currency

Transport (Wales)

2004–05

Children (Contact) and Adoption

Commissioner for Older People (Wales)

Company Law Reform

Corporate Manslaughter

Natural Environment and Rural Communities

2005–06

Terrorism

Tribunals, Courts and Enforcement

Coroners

Legal Services

2006–07

Climate Change

Human Tissue and Embryos

Local Transport

Regulatory Enforcement and Sanctions

