



HOUSE OF LORDS

Select Committee on the Constitution

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15th Report of Session 2010–12

# The Process of Constitutional Change

Report

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### *Select Committee on the Constitution*

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

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

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Evidence is published online at [www.parliament.uk/hlconstitution](http://www.parliament.uk/hlconstitution) and available for inspection at the Parliamentary Archives (020 7219 5314)

References in footnotes to the Report are as follows:

- Q                    refers to a question in oral evidence;
- CRP 1            refers to written evidence as listed in Appendix 2.

## **SUMMARY**

The constitution is the foundation upon which law and government are built. Yet the United Kingdom has no agreed process for constitutional change. We do not accept that the government should be able to pick and choose which processes to apply when proposing significant constitutional change. We therefore recommend in this report the adoption of a clear and consistent process. Our recommendations are not intended to restrict the government's right to initiate constitutional change, but to hold ministers to account for their decisions.

We regard it as essential that, prior to the introduction of a bill which provides for significant constitutional change, the government:

- consider the impact of the proposals upon the existing constitutional arrangements,
- subject the proposals to detailed scrutiny in the Cabinet and its committees,
- consult widely,
- publish green and white papers, and
- subject the bill to pre-legislative scrutiny.

We examine these processes in this report, as well as considering the desirability of public engagement and building consensus. We also stress the importance of not rushing parliamentary scrutiny of legislation once introduced into Parliament and of conducting comprehensive post-legislative scrutiny of significant constitutional legislation once passed.

We recommend that the minister responsible for a significant constitutional bill in each House set out the processes to which a bill has been subjected in a written ministerial statement. The processes which we recommend are intended to form a comprehensive package from which the government should depart only in exceptional circumstances and where there are clearly justifiable reasons for so doing. Our proposals will, if accepted, focus the minds of ministers and help to bring about a cultural change in Whitehall regarding constitutional legislation. We believe that our approach is pragmatic and achievable, enabling the flexibility of the United Kingdom's current constitutional arrangements to be retained whilst enhancing and underpinning those arrangements.



# The Process of Constitutional Change

## CHAPTER 1: INTRODUCTION

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### The importance of process

1. The constitution is the foundation upon which law and government are built. The fundamental nature of the constitution means that it should be changed only with due care and consideration. Since the constitution matters, so does the process by which the constitution is changed. As we stated in our recent report on the Fixed-term Parliaments Bill:

“Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policy-making process. Moreover, we believe that a proper process is the foundation upon which successful policy is built: the lack of a proper process makes an ineffective outcome more likely.”<sup>1</sup>
2. A good process does not necessarily equate to a good outcome, nor will the outcome of every proposed change be anticipated at the time the change is made. But where there is consensus on the process to which a proposed constitutional change has been subjected, that change will be more widely acceptable, whether or not the merits of the change are universally agreed. Furthermore, when scrutinising a proposed change, it will be easier to focus on those merits if there is a settled agreement about the process. We therefore believe that the constitutional process is important and that an agreement should be reached as to what that process should be.

### A decade of constitutional change

3. The Constitution Committee was first appointed by the House of Lords in February 2001. In one of our first reports, *Changing the Constitution: the Process of Constitutional Change*, we examined “the present means of achieving constitutional change, looking in particular at whether the process within Government is open and efficient and whether the means of parliamentary scrutiny are adequate.”<sup>2</sup> In the ten years since, we have frequently returned to this issue, particularly in the context of a number of reports on specific bills.
4. At the time of our establishment, the United Kingdom had just been through a period of significant constitutional change, including the passing of the Scotland Act 1998, the Government of Wales Act 1998, the Northern Ireland Act 1998, the Human Rights Act 1998, the House of Lords Act 1999 and the Freedom of Information Act 2000. Proposals for further significant change have often been on the agenda since then, in particular following the May 2010 general election. Professor Robert Blackburn stressed, in evidence given to us last October, that “Looking back over the past ten years or so,

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<sup>1</sup> Constitution Committee, 8th Report (2010–2011): *Fixed-term Parliaments Bill* (HL Paper 69), para 160.

<sup>2</sup> Constitution Committee, 4th Report (2001–02) (HL Paper 69), para 4.

process has been a constant problem in constitutional reform.”<sup>3</sup> We do not single out for criticism the present Government’s approach to constitutional change—the principles we identify apply to all governments. Nor does this report examine the pros and cons of individual proposals.

5. In this report we first set out what we mean by constitutional change, followed by an analysis of current practice and our proposal for a new constitutional process. We emphasise the importance of working with the grain of current constitutional conventions and practices rather than attempting to establish a new legal order for constitutional change. We believe that our approach is pragmatic and achievable, enabling the flexibility of the United Kingdom’s constitutional arrangements to be retained whilst enhancing and underpinning those arrangements.

### **The meaning of constitutional change**

#### *Terminology*

6. In our initial call for evidence for this inquiry we referred to the process of constitutional “reform”. However, it has become clear during our evidence taking that this word carries an implication that proposals should be seen as positive developments. As Professor Sir Jeffrey Jowell stated: “The notion of reform often implies that you are moving in some way to a higher plane or a better world. One may disagree.”<sup>4</sup> For that reason, we have followed the precedent of the Committee’s members ten years ago by using the term “constitutional change” rather than “constitutional reform”.

#### *The difficulty of defining a constitutional change*

7. It was common ground amongst our witnesses that, because the United Kingdom does not have a codified constitution, no watertight definition of a constitutional change to which a special process may apply can be given. A number of our witnesses pointed to the fact that the UK constitution consists not only of statutes, but of conventions, practices and underlying principles such as parliamentary sovereignty and the rule of law.<sup>5</sup> Democratic Audit summarised the difficulty which this presents for the establishment of a constitutional change process:

“Conventions may ... change without any specific single action being taken, for instance the gradual development of the principle that prime ministers can be appointed only from the House of Commons. It is also arguable that the personal styles of particular politicians—in particular prime ministers—can bring about at least temporary changes to the way in which the constitution operates, possibly with more lasting consequences.”<sup>6</sup>

8. Professor Feldman distinguished between this “sort of inevitable, constant change, which is not part of a large overarching plan”<sup>7</sup> and “trying to give effect to [the fundamental values of the constitution] through a new, better

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<sup>3</sup> Constitution Committee, 5th Report (2010–2011): *The Government’s Constitutional Reform Programme* (HL Paper 43), Q 9.

<sup>4</sup> Q 61; see also Q 93 (Professor Wright), CRP 6, para 3 (Professor Brazier).

<sup>5</sup> CRP 2, paras 5–7 (Professor Sir Jeffrey Jowell), CRP 7, para 11 (Democratic Audit).

<sup>6</sup> CRP 7, para 14 (Democratic Audit).

<sup>7</sup> Q 58.

and more appropriate mechanism.”<sup>8</sup> It is primarily the second type of change with which this report is concerned. Although such changes do not necessarily require legislation (for example, prior to 2010 the government could re-organise the Civil Service under the Royal Prerogative and may still make other significant machinery of government changes by simple executive decision), they will require a specific, decisive act by the government to which a proper process should be applied.

9. Having limited our field of inquiry to specific, decisive acts of constitutional change, we recognise that the majority of change proposals will require legislation. The doctrine of parliamentary sovereignty means, as David Howarth told us, that: “there is no uncontroversial method of distinguishing constitutional legislation from other legislation. In form, all primary legislation is the same.”<sup>9</sup> We believe that constitutional legislation is qualitatively different from other forms of legislation and that the process leading to its introduction should recognise this difference. We therefore attempt in Chapter Three to set out a process which should apply to significant constitutional legislation. We recognise that such a process could also apply to other legislative proposals.

### *Significant constitutional change*

10. In this Committee’s first report ten years ago we offered our own working definition of the constitution as being:

“the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.”<sup>10</sup>

In addition we set out what we considered to be the five basic tenets of the UK constitution: sovereignty of the Crown in Parliament; the rule of law, encompassing the rights of the individual; the union state; representative government; and membership of the Commonwealth, the European Union and other international organisations.<sup>11</sup> We consider that this definition has stood the test of time; but we recognise that it is not definitive.

11. Professor Sir Jeffrey Jowell preferred to offer no working definition of the constitution, stating that “When you examine legislation, you know what is constitutional. We may not be able to define it, but when we see it, we know it.”<sup>12</sup> At a broad level we agree with this, but consider that it is helpful to provide some guidance as to what sort of measures we would consider to be constitutional. Professor Sir John Baker provided the following list of constitutional proposals in relation to which special measures might be applied:

- any alteration to the structure and composition of Parliament;
- any alteration to the powers of Parliament, or any transfer of power, as by devolution or international treaty, which would in practice be difficult to reverse;

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<sup>8</sup> *Ibid.*

<sup>9</sup> CRP 3, para 2.

<sup>10</sup> Constitution Committee, 1st Report (2001–2002): *Reviewing the Constitution: Terms of Reference and Method of Working* (HL Paper 11), para 20.

<sup>11</sup> *Ibid.*, para 21.

<sup>12</sup> Q 76; see also CRP 4, para 12 (Mark Ryan).

- any alteration to the succession to the Crown or the functions of the monarch;
  - any substantial alteration to the balance of power between Parliament and government, including the conferment of unduly broad or ill-defined powers to legislate by order;
  - any substantial alteration to the balance of power between central government and local authorities;
  - any substantial alteration to the establishment and jurisdiction of the courts of law, including any measure that would place the exercise of power beyond the purview of the courts, or which would affect the independence of the judiciary;
  - any substantial alteration to the establishment of the Church of England;
  - any substantial alteration to the liberties of the subject, including the right to *habeas corpus* and trial by jury.<sup>13</sup>
12. This list is not exhaustive and the categories of constitutional change are not closed. For example, Richard Gordon QC also provided a list which, in addition to many of the changes listed above, included the constitutional relationship between the Civil Service and the executive and the operational status of political parties.<sup>14</sup> Moreover, as Professor Flinders put it, in relation to all of these areas “there will always be some fuzziness at the boundaries”.<sup>15</sup> However, we found this list to be of assistance in determining the basic framework of what is constitutional.
13. Not all constitutional change is of equal significance. We consider that a two-stage test should apply to proposals for a constitutional change process. In the words of Professor Sir Jeffrey Jowell: “you should take it case by case. You ask whether it is constitutional and whether it is so significant that it really ought to merit further delay and discussion.”<sup>16</sup>
14. There is a degree of subjectivity in determining what is constitutionally significant. However, in the majority of cases it should not be difficult to determine whether a significant change is being proposed. For example, changes to the electoral system are accepted as being constitutional but, whilst an overhaul of the voting system (such as from first-past-the-post to AV) is clearly significant, minor changes to the rules by which counting officers operate would be less so. We note that under section 3 of the Legislative and Regulatory Reform Act 2006, ministers are not permitted to make a provision removing or reducing regulatory burdens unless that provision “is not of constitutional significance.”<sup>17</sup> We believe that Parliament and the executive are able to determine whether a proposed constitutional change is significant.

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<sup>13</sup> Q 3.

<sup>14</sup> Q 4.

<sup>15</sup> Q 112.

<sup>16</sup> Q 52. It is worth noting that many bills can incorporate issues of constitutional significance whilst primarily being concerned with non-constitutional or technical matters. An example of this is the Police Reform and Social Responsibility Bill currently before Parliament. In our report on the Bill we drew attention to the constitutional importance of police independence, but made no comment on many of the Bill’s other provisions. Constitution Committee, 14th Report (2010–2012): *Part 1 of the Police Reform and Social Responsibility Bill* (HL Paper 143), paras 4–9.

<sup>17</sup> Section 3(2)(f).

15. **A clear and consistent process should apply to all significant constitutional change. We offer no watertight definition of what is constitutional, but continue to rely on the working definition offered in our first report of 2001. The list provided by Professor Sir John Baker, whilst neither exhaustive nor closed, provides, in our view, a useful guide to the principal measures which would fall under the rubric of significant constitutional change.**

**The conduct of this inquiry**

16. We launched this inquiry in February 2011 and received written evidence from a large number of witnesses. We held a seminar with constitutional experts on 16 March to assist us in setting the context for the inquiry<sup>18</sup> and heard oral evidence from:
- Rt Hon Nick Clegg MP, the Deputy Prime Minister;
  - Richard Gordon QC, Brick Court Chambers;
  - Professor Sir John Baker, Downing Professor of the Laws of England, University of Cambridge;
  - Professor Sir Jeffrey Jowell, University College London, Director of the Bingham Centre for the Rule of Law;
  - Professor David Feldman, Rouse Ball Professor of English Law, University of Cambridge;
  - Professor Tony Wright, University College London, and a former MP;
  - David Howarth, University of Cambridge, and a former MP;
  - Dr Alexandra Kelso, Lecturer in Politics, University of Southampton;
  - Professor Matthew Flinders, Professor of Parliamentary Government and Governance, University of Sheffield;
  - Professor Graham Smith, Professor of Politics, University of Southampton;
  - Professor Stephen Coleman, Professor of Political Communication, University of Leeds.
17. The Committee's Legal Advisers, Professor Adam Tomkins, University of Glasgow, and Professor Richard Rawlings, University College London, have acted as Specialist Advisers to the Committee for this inquiry.
18. We are grateful to all our witnesses and advisers for their assistance in our work.
19. **We recommend this report to the House for debate.**

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<sup>18</sup> The seminar was held under the Chatham House rule. A list of the participants and a note of the issues raised during the seminar is contained in Appendix 4.

## CHAPTER 2: THE CURRENT PRACTICE OF CONSTITUTIONAL CHANGE

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### The strengths of current practice

20. The way in which the UK's constitutional arrangements may be changed is more flexible than in virtually any other western democracy. Our witnesses argued that the UK constitution is able to respond promptly when a need for change arises, thus avoiding the constitutional stasis sometimes seen elsewhere.<sup>19</sup> The Deputy Prime Minister emphasised that "We have a suppleness, a fluidity and a pragmatism to our arrangements, which many constitutional experts around the world recognise is a strength."<sup>20</sup>
21. The participants in our seminar also stressed that the fluid definition of what is constitutional can itself be a strength. For example, the equalisation of constituency boundaries and the referendum on the voting system introduced by the Parliamentary Voting System and Constituencies Act 2011 were clearly regarded as significant constitutional measures; in countries with a codified constitution, important details such as these may not be included within the constitutional settlement.<sup>21</sup>
22. We recognise these strengths. However, current practice places too great an emphasis on the need for flexibility. Some constraints should be placed on this flexibility in order to overcome the weaknesses which we outline in the next section.

### Criticisms of current practice

#### *Lack of constraints on the government*

23. Aside from the limited power of the House of Lords under the Parliament Acts to delay or reject legislation, there is no formal system of checks and balances by which the integrity of the UK constitution can be safeguarded and protected. Thus there is little to constrain the ability of a government which commands a majority in the House of Commons to get its way. This lack of constraint in turn means that the process by which constitutional change is considered lies essentially within the gift of the government of the day.<sup>22</sup>
24. There is no formal, established convention as to the process by which proposals for significant constitutional change should be considered. Democratic Audit warned that this creates:
 

"an obvious danger that there will not be sufficiently broad ownership of the constitutional settlement, and that an individual party or coalition of parties will be able to skew the process of constitutional change to serve their own interests."<sup>23</sup>
25. We believe that both government and Parliament should recognise the need for constraints on the process of constitutional change so that a situation

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<sup>19</sup> CRP 4, para 2 (Mark Ryan), CRP 6, para 9 (Professor Brazier), CRP 9 (Law Society of Scotland).

<sup>20</sup> Q 196.

<sup>21</sup> See Appendix 4.

<sup>22</sup> CRP 1, para 9 (Professor Flinders), CRP 6, para 19 (Professor Brazier), CRP 13, para 10 (Unlock Democracy); see also Q 29 (Professor Sir John Baker).

<sup>23</sup> CRP 7, para 4.

whereby the government is effectively able to change the constitution at will may be avoided. In order to retain the strength of current practice—the flexibility inherent within the UK constitution—it is necessary to avoid the imposition of a new system which prevents governments from initiating constitutional change. However, as Professor Feldman stressed, all those involved in the constitutional process:

“should respect the principle of constitutionality, which may be formulated as follows: everyone acting in a public capacity should respect the fundamental rules, values and traditions of the Constitution for the time being, unless there are principled, constitutional advantages to changing them which outweigh the merits of constitutionality.”<sup>24</sup>

26. **We agree that government operates within a constitutional framework which should be respected and treated with care by all those who seek to change it. Governments should continue to have the right to initiate constitutional change, but this needs to be tempered by a realisation that constitutional legislation is qualitatively different from other legislation.**

*Failure to have regard to wider constitutional arrangements*

27. We are concerned that in recent years little attention has been paid to the need for an overarching view of the workings of the UK constitution and the impact of any one proposal upon the rest of the constitution. Some witnesses regretted the lack of a holistic approach to constitutional change.<sup>25</sup> David Howarth told us that

“we have no structural thinking going on about the interaction between the composition of the Houses [of Parliament], the electoral systems, the courts and so on. We have no thinking about how all this fits together into a system of government”.<sup>26</sup>

This Committee has recently criticised the way in which the present Government proposed to reduce the number of MPs seemingly without any considered prior assessment of their role and function.<sup>27</sup>

28. Professor Feldman drew attention to the Constitutional Reform and Governance Bill, introduced towards the end of the last Parliament, which had incorporated a diverse range of constitutional measures. He called it “another example of messy reform. As originally introduced to Parliament, the Bill contained a rag-bag of reform measures without any coherent, unifying principle.”<sup>28</sup> This Committee concluded: “This is no way to undertake the task of constitutional reform.”<sup>29</sup>
29. Continuous constitutional change will inevitably lead to difficulties if little thought is given to the constitution as a whole and how its various parts interact with one another.<sup>30</sup> A number of our witnesses examined the case for a

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<sup>24</sup> CRP 10, para 27.

<sup>25</sup> Q 123 (Professor Flinders), CRP 7, paras 2, 12 (Democratic Audit).

<sup>26</sup> Q 96.

<sup>27</sup> Constitution Committee, 7th Report (2010–2011): *Parliamentary Voting System and Constituencies Bill* (HL Paper 58), paras 29, 36, 57.

<sup>28</sup> CRP 10, para 59.

<sup>29</sup> Constitution Committee, 11th Report (2009–2010): *Constitutional Reform and Governance Bill* (HL Paper 98), para 47.

<sup>30</sup> CRP 14 (Professor Sir John Baker), CRP 17 (Law Society of England and Wales).

fundamental review of the United Kingdom’s constitutional arrangements.<sup>31</sup> Whilst we do not argue in favour of such a review in this report, **we stress that the potential impact on the existing constitutional arrangements should be considered when significant constitutional changes are proposed.**

*Lack of coherence within government*

30. Some witnesses questioned whether the policy making process within government was sufficiently coherent. This issue was addressed by this Committee in our first report on the constitutional change process ten years ago, where we expressed our concern “at the lack of a culture of dealing with constitutional issues [within government].”<sup>32</sup> The evidence we have received points to this lack of coherence remaining a serious problem. David Howarth argued that “the system of government we have in this country is extraordinary in terms of its incoherence.”<sup>33</sup> He set out the problem as he saw it:

“The relevant parts of government shift around. It is my impression that there is expertise but it is in different places. ... the relevant parts are the part that deals with Parliament ... There is the part in the Treasury that deals with parliamentary processes to do with money ... Then there is the expertise in what is now the Ministry of Justice about the judiciary. Then there is the Cabinet Secretary’s own expertise ... Finally, there are all the people in this democratic unit and that democratic unit that do the day-to-day work for whichever minister is responsible, now the Deputy Prime Minister. That is diffuse across government.”<sup>34</sup>

31. Professor Flinders stated that the current Government “lacks a central oversight capacity”.<sup>35</sup> Although a recent report by the Constitution Unit, University College London, stated that “the new Cabinet system is a great deal more collegiate,”<sup>36</sup> the same report also concluded that the Deputy Prime Minister’s Office “remains under-resourced and overstretched.”<sup>37</sup> The Deputy Prime Minister confirmed that he was the senior minister in charge of the Government’s entire constitutional change programme and that a senior official also took responsibility for that programme.<sup>38</sup> In addition, he argued that there are internal mechanisms to ensure collective consideration of constitutional change proposals:

“My experience in the last year is that there are very strong, robust, collective methods by which decisions are arrived at within government ... My experience is that the collective filters internally within government are working well ...”<sup>39</sup>

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<sup>31</sup> QQ 1–2, CRP 15 (Richard Gordon QC), Q 2 (Professor Sir John Baker), Q 79 (Professor Wright), Q 80, CRP 3, paras 19–21 (David Howarth), CRP 7, para 1 (Democratic Audit), CRP 13, paras 2–3 (Unlock Democracy).

<sup>32</sup> Constitution Committee, *Changing the Constitution: The Process of Constitutional Change*, *op. cit.*, para 47. See also Constitution Committee, 4th Report (2009–2010): *The Cabinet Office and the Centre of Government* (HL Paper 30), para 214.

<sup>33</sup> Q 106.

<sup>34</sup> Q 104.

<sup>35</sup> Q 119.

<sup>36</sup> Constitution Unit, *Inside Story: How Coalition Government Works*, 3 June 2011.

<sup>37</sup> *Ibid.*

<sup>38</sup> QQ199–200.

<sup>39</sup> Q 179.

32. We have not undertaken a full review of the cohesiveness of the current Government's internal procedures in relation to constitutional change. However, we note that the draft Cabinet Manual published in December 2010 stated that "issues of a constitutional nature, including matters relating to the monarchy, reform of Parliament and changes to the devolution settlements" are "the kind of issues that would normally be considered by Cabinet."<sup>40</sup> In our report on the draft Manual we recommended that it should set out the conclusions of relevant parliamentary reports which specify the standards to be expected of government when taking bills through Parliament.<sup>41</sup> The Government, in their interim response to that report, agreed with this recommendation.<sup>42</sup>
33. We also note that the recent Report of the Leader's Group on Working Practices recommended the establishment of a Legislative Standards Committee, either as a joint committee or as a committee of the House of Lords, which would assess the technical and procedural compliance of government bills with standards of best practice in bill preparation.<sup>43</sup> The recommendation was welcomed by a number of Members of the House during the debate on the report, though the Leader of the House, Lord Strathclyde, expressed some reservations.<sup>44</sup> Whilst this recommendation relates to all government bills, and therefore goes wider than the scope of this report, we welcome any proposal which would have a beneficial impact on the quality of constitutional legislation by improving the preparation of bills across government.
34. **Internal government processes precede and directly impact upon subsequent legislative processes. As a basic minimum, the Cabinet Manual should set out for ministers and civil servants the requirements relating to both those internal processes and the process for significant constitutional change which we recommend in this report.**

*Lack of consistency in the use of particular processes*

35. There has been an inconsistent approach to the process of constitutional change. Whilst particular processes may be employed in relation to some proposals, they have been entirely absent in relation to others.<sup>45</sup> Democratic Audit argued that:
- "The constitutional reform process in recent decades has been both piecemeal and profound, driven by the executive but also subject, to varying and inconsistent degrees, to greater parliamentary scrutiny, the influence of judicial decision through the courts and popular consent via referendums."<sup>46</sup>
36. Furthermore there appears to be no consistent rationale as to the use or otherwise of such mechanisms. It is of particular concern when this inconsistency appears to derive more from political considerations than any

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<sup>40</sup> Draft Cabinet Manual, Cabinet Office, December 2010, para 150  
<http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-draft-manual.pdf>.

<sup>41</sup> Constitution Committee, 12th Report (2010–2011): *The Cabinet Manual* (HL Paper 107), paras 75–77.

<sup>42</sup> Letter from the Secretary of the Cabinet, Sir Gus O'Donnell, to the Chairman, 27 May 2011  
<http://www.parliament.uk/documents/lords-committees/constitution/CabinetManual/Gvtres270511.pdf>.

<sup>43</sup> Leader's Group on Working Practices, Report (2010–2012) (HL Paper 136), paras 97–98.

<sup>44</sup> HL Deb 27 June 2010 cols 1551–1628, see in particular cols 1624–1625.

<sup>45</sup> CRP 8 (Dr Kelso), CRP 7, para 12 (Democratic Audit), CRP 13, para 9 (Unlock Democracy).

<sup>46</sup> CRP 7, summary.

sense of constitutional principle.<sup>47</sup> The examples of good and bad practice to which we refer in this report demonstrate well this lack of consistency.<sup>48</sup> We therefore recommend in this report that a process be established which should apply consistently to all bills providing for significant constitutional change.

*Changes may be rushed*

37. There is a risk that changes to the constitution may be rushed through without any pause for thought as to their desirability or otherwise. The Parliamentary Standards Bill, which provided for the establishment of the Independent Parliamentary Standards Authority following the expenses crisis of 2008–09,<sup>49</sup> was one example of the way in which constitutional change is often proposed as a knee-jerk reaction to particular circumstances. This Committee concluded that “if Parliament cannot be seen to be scrutinising proposals with the thoroughness they deserve, public confidence in parliamentarians is likely to be further undermined.”<sup>50</sup> It is notable that the Act was substantially amended just eight months later by the Constitutional Reform and Governance Act 2010.<sup>51</sup> Professor Feldman, with reference to the proposed abolition of the office of Lord Chancellor in 2003, stated that:
- “The idea of a constitution where it is possible to have ... really significant reform ... without any sort of public discussion ... is, I think, shocking. It would simply not be regarded, in most countries of the world, as something that ought to be allowed.”<sup>52</sup>
38. When determining whether a significant constitutional change has been rushed, the entire process leading up to the change needs to be taken into account. One example of good constitutional practice frequently cited by our witnesses was the process by which Scottish devolution came about in the late 1990s.<sup>53</sup> The process combined a number of elements—including decades of public and political debate, the Scottish Constitutional Convention,<sup>54</sup> the Cook-Maclennan agreement,<sup>55</sup> a degree of political

<sup>47</sup> See Constitution Committee, *Fixed-term Parliaments Bill*, *op. cit.*, para 20.

<sup>48</sup> The examples which we cite in this report are examples of constitutional change which either took place, or where legislation was introduced, from 1997 until the present day. We recognise that examples of both good and bad practice existed before this time. This report is not a comprehensive guide to the process of every constitutional change which has occurred during this period, nor do we examine proposed bills which have not yet been introduced into Parliament. Appendix 5 provides a list of this Committee’s earlier reports which have been critical of aspects of the process relating to bills on which we have reported since our establishment.

<sup>49</sup> The background to the introduction of the Bill can be found in Constitution Committee, 17th Report (2008–09): *Parliamentary Standards Bill* (HL Paper 130).

<sup>50</sup> *Ibid*, para 23.

<sup>51</sup> See Constitution Committee, *Constitutional Reform and Governance Bill*, *op. cit.*, para 32.

<sup>52</sup> Q 63.

<sup>53</sup> Q 84 (Professor Wright, David Howarth), CRP 7, para 18 (Democratic Audit), CRP 5, para 3b (Professor Bochel *et al*), CRP 9 (Law Society of Scotland).

<sup>54</sup> The Scottish Constitutional Convention was established in 1989, with members including the Labour Party, Scottish Liberal Democrats, Scottish Democratic Left, Orkney and Shetland Movement, Scottish Green Party, Scottish Trades Union Congress, Regional, District and Island Councils, the Campaign for a Scottish Parliament, the main Scottish Churches, the Federation of Small Businesses, ethnic minority representatives, the Scottish Women’s Forum, individual trades unions and special interest organisations. The Convention operated by consensus and reported on 30 November 1990: [http://www.almac.co.uk/business\\_park/scc/scc-rep.htm](http://www.almac.co.uk/business_park/scc/scc-rep.htm)

<sup>55</sup> The Labour and Liberal Democrat parties agreed in October 1996 to establish a Joint Consultative Committee with the following terms of reference: “To examine the current proposals of the Labour and Liberal Democrat Parties for constitutional reform: to consider whether there might be sufficient common ground to enable the parties to reach agreement on a legislative programme for constitutional reform; to consider means by which such a programme might best be implemented and to make recommendations.” The report was published in 1997: <http://www.unlockdemocracy.org.uk/wp-content/uploads/2007/01/4-joint-consultative-committee-report.pdf>.

consensus, careful consideration of the detail in Cabinet committee<sup>56</sup> and a referendum of the Scottish people—which meant that Scottish devolution managed to be brought in relatively quickly by the Labour Government without the process feeling rushed. Similarly, the Human Rights Act 1998 and the Freedom of Information Act 2000 followed long campaigns in their favour.<sup>57</sup> These campaigns assisted in the relatively quick timeframe for the passing of those Acts.

39. We are concerned that the present Government have repeatedly cited the difficulties of undertaking pre-legislative scrutiny or consultation in the first parliamentary session because of their desire to make quick progress with their legislative programme. For example, we recently criticised the way in which both the Parliamentary Voting System and Constituencies Bill and the Fixed-term Parliaments Bill were introduced into Parliament without any prior consultation, pre-legislative scrutiny or sustained public demand.<sup>58</sup> The Deputy Prime Minister accepted that both Bills were subject to “less pre-legislative scrutiny than is ideal”<sup>59</sup> whilst the Minister for Political and Constitutional Reform, Mark Harper MP, in evidence given to the House of Commons Political and Constitutional Reform Committee, recently acknowledged that “... clearly, that piece of legislation [the PVSC Bill] was a little bit traumatic for the parliamentary process, because we had a timetable and it obviously did take place quite quickly.”<sup>60</sup>
40. **The desire to act quickly as a new government is no justification for bypassing a proper constitutional process.** As Professor Sir Jeffrey Jowell told us, “the time has come to simply take a little more care with constitutional reform.”<sup>61</sup>

### *Lack of consultation*

41. A number of witnesses expressed concern at the lack of consultation in relation to proposals for constitutional change. As the Hansard Society have argued, public consultation should:
- “take place as early in the policy-making process as possible. With policy still in flux it gives outsiders a greater chance of making their voice heard and influencing the final decision. Once a proposal is on the table the politics and the dynamics of the consultation process inevitably change; ministers and civil servants become more proprietorial towards it.”<sup>62</sup>
42. The wider public should be given the opportunity to respond to consultations: constitutional change proposals “potentially affect all citizens, and there should be some process through which they can be consulted,

<sup>56</sup> We discuss the use of Cabinet committees in more detail below, paras 81–85.

<sup>57</sup> See Michael Zander, *A Bill of Rights?* (4th ed, 1997), ch 1; David Feldman, *Extending the Role of the Courts: The Human Rights Act 1998* in Philip Norton (ed.), *A Century of Constitutional Reform* (2011); Des Wilson (ed.), *The Secrets File* (1984); Lord Scarman, *The Right to Know* (The Granada Guildhall Lectures, 1984).

<sup>58</sup> Constitution Committee, *Parliamentary Voting System and Constituencies Bill*, op. cit. paras 11–12; Constitution Committee, *Fixed-term Parliaments Bill*, op. cit., para 179.

<sup>59</sup> Q 188.

<sup>60</sup> Q 80, 12 May 2011 (to be published as HC Paper 358–ii) <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/c358-ii/c35801.htm>.

<sup>61</sup> Q 74.

<sup>62</sup> Ruth Fox and Matt Korris *Making Better Law: Reform of the Legislative Process from Policy to Act* (2010), p 57 (Chapter Two of this book contains a useful discussion of the requirements for the consultation process).

preferably before constitutional legislation is introduced.”<sup>63</sup> Significant constitutional change should be a matter of public debate. We are concerned, to give one example, that there was no such debate on the important question of whether proposed fixed-term Parliaments should last for four or five years.<sup>64</sup> Although subjected to full parliamentary scrutiny, the length of time between general elections clearly impacts greatly on all voters who should have been entitled to express their views.

43. It is particularly important to consult those individuals and bodies who will be directly affected by a proposed constitutional change. This Committee has previously criticised the failure to consult the judiciary when the proposal to abolish the role of Lord Chancellor was announced and when the Ministry of Justice was established.<sup>65</sup> Likewise, in relation to the Parliamentary Voting System and Constituencies Bill and the Fixed-term Parliaments Bill, we criticised the failure to consult the devolved institutions over potential clashes with their election dates.<sup>66</sup>
44. A number of our witnesses were also concerned at the lack of consultation with expert opinion. Professor Brazier warned that “leaving constitutional reform entirely to the judgement of politicians can allow constitutional bills to be enacted without independent and expert scrutiny.”<sup>67</sup>
45. Some of our witnesses expressed the view that consultation in recent years has become a tick-box exercise which has no effective impact on proposals. Professor Smith told us:

“One of the worst things that I see is when you have a consultation exercise—there are so many examples of this—and cannot show any relationship between the consultation exercise and the final decision, even if it is only a mention of the consultation exercise. I think that people are doing it just because you are expected to do it, and that is generally a problem.”<sup>68</sup>

46. **Consultation is important, both as a means to improve proposals for change but also to ensure that all those affected by a proposed change are given the opportunity to respond and influence the outcome. It is not a part of the process which should be overlooked or treated as a box-ticking exercise. There should be a significant period of public debate which informs the process by which the United Kingdom moves from one constitutional arrangement to another.**

### *Lack of consensus*

47. Some of our witnesses examined whether the apparent lack of consensus for most constitutional change is itself a weakness, noting that it can increase the acceptability of proposals for change and make them appear less partisan.<sup>69</sup>

<sup>63</sup> CRP 6, para 17 (Professor Brazier).

<sup>64</sup> Constitution Committee, *Fixed-term Parliaments Bill*, *op. cit.*, paras 57, 174.

<sup>65</sup> Constitution Committee, 6th Report (2006–2007): *Relations between the executive, the judiciary and Parliament* (HL Paper 15), paras 12, 67.

<sup>66</sup> Constitution Committee, *Parliamentary Voting Systems and Constituencies Bill*, *op. cit.*, para 23; Constitution Committee, *Fixed-term Parliaments Bill*, *op. cit.*, para 81.

<sup>67</sup> CRP 6, para 18 (Professor Brazier).

<sup>68</sup> Q 172; see also Q 145 (Professor Coleman), CRP 4, para 5 (Mark Ryan), CRP 5, para 6c (Professor Bochel *et al.*).

<sup>69</sup> CRP 5, para 7a (Professor Bochel *et al.*), CRP 7, para 35 (Democratic Audit), CRP 10, para 68 (Professor Feldman), CRP 13, para 11 (Unlock Democracy).

The same witnesses, however, argued that consensus should not be a necessary component of the constitutional process since it could be used to block reform.<sup>70</sup>

48. The Deputy Prime Minister accepted that:

“It is clearly ideal ... if you can proceed on a basis of consensus. History suggests that consensus is often rather elusive, and at the end of the day change ... ends up usually being a question of the executive of the day deciding that it wants to proceed and then proceeding. That does not mean that we should not make every single effort in order to seek greater consensus where we can.”<sup>71</sup>

49. The existence of consensus is a subjective political judgement. Moreover, consensus may be reached between two or more political parties, whilst not being universal. We do not consider that constitutional change will or should always proceed by consensus, however desirable. However, if sufficient time and widespread scrutiny is given to constitutional change proposals, a greater degree of consensus—or, at least, a general understanding of what the key issues are—is likely to be achieved. Furthermore, the search for consensus will bring about a greater understanding between the parties and acceptance of any resulting change. It is therefore an important part of the process in itself.

### Characterisation of the current practice of constitutional change

50. Legislating for significant constitutional change can be achieved relatively quickly, in a manner which is broadly acceptable to all concerned, even if some do not agree with the specific proposal. The problem lies in the fact that examples of good practice have been the exception rather than the norm.
51. **There are a number of weaknesses inherent in the current practice of legislating for constitutional change: lack of constraints on the government, failure to have regard to the wider constitutional settlement, lack of coherence within government, lack of consistency in the application of different processes, changes being rushed and lack of consultation. These weaknesses arise out of the fact that the United Kingdom has no agreed process for significant constitutional change.** The crux of this report is how the good standards occasionally observed in relation to the process of constitutional change can be applied more consistently.

### The desirability of establishing an agreed process

52. Our witnesses were broadly agreed that significant constitutional legislation is qualitatively different from legislation relating to other areas of law. In Professor Brazier’s words it “should be recognised as being special (or at least different in nature from)—and I say politically superior to—all other forms of law and public policy.”<sup>72</sup> This is because, as Professor Sir Jeffrey Jowell stated:

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<sup>70</sup> *Ibid.*

<sup>71</sup> Q 177.

<sup>72</sup> CRP 6, para 4; see also Q 85 (David Howarth), CRP 7, paras 3–5 (Democratic Audit), CRP 14 (Professor Sir John Baker).

“the constitution provides the rules of the game, the framework for all official decisions. If these decisions are to be accepted as legitimate, even though you may not agree with them, then the framework of decision-making must command respect and general acquiescence.”<sup>73</sup>

53. We agree that the distinct nature of constitutional change proposals means that there is a particular need for an agreed process to be applied.

54. Last October, the Deputy Prime Minister in evidence to this Committee argued that there had been:

“a loss of public faith in the way in which our political institutions reflect and express their views and articulate them in a representative democracy. What we are seeking to do, very simply, is to start trying to close that gap. That is why there is an emphasis in everything that we are proposing on greater accountability in the manner in which we conduct ourselves and the way in which politics is conducted, greater legitimacy in the political institutions that seek to represent people, and breaking up excessive concentrations of power and secrecy.”<sup>74</sup>

55. **We believe that a clear and consistent process for constitutional change is essential to achieving a realisation of the Government’s aims as set out above.** We go on in the next chapter to set out our recommendations for such a process.

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<sup>73</sup> CRP 2, para 2.

<sup>74</sup> Constitution Committee, *The Government’s Constitutional Reform Programme op. cit.*, Q 53.

## CHAPTER 3: OUR RECOMMENDED PROCESS FOR CONSTITUTIONAL CHANGE

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### The balance between flexibility and rigidity

56. Professor Flinders argued that:

“Distilled down to its simplest form, this inquiry is focused on the balance between constitutional flexibility and constitutional rigidity ... [This] constitutional balance ... may need to be shifted in favour of the latter through the insertion of more demanding procedural obstacles in the constitutional reform process.”<sup>75</sup>

We agree with this analysis. The question is the degree to which we should move towards a more rigid system.

57. A number of witnesses argued that we should recommend a new process which incorporated a more formal rigidity than is contained within the current constitutional settlement.
58. Some witnesses argued that the introduction of a codified written constitution would be the most effective way of introducing more rigidity to the process. Democratic Audit argued in favour of this, though they also acknowledged that this was “a long-term goal”.<sup>76</sup> Unlock Democracy were also supportive of a codified, written constitution, developed through “a wide-scale process of public discussion, debate and participation.”<sup>77</sup> Yet they were cautious of “starting to codify a process of constitutional change at a time when there is little in the way of consensus on what makes up our constitution.”<sup>78</sup> The Deputy Prime Minister informed us that he did “not anticipate any great initiative being undertaken on that front by this Government.”<sup>79</sup>
59. A codified constitution would likely require some form of super-majority before changes could be made to it. Even without a codified constitution it is possible to provide for specific procedural requirements within specific constitutional bills, including such measures as affirmative orders, sunrise and sunset clauses, and parliamentary super-majorities. Such requirements may be adopted on a case-by-case basis if Parliament so determines.
60. A number of witnesses made recommendations for a new independent body. David Howarth wanted “an official, representative constitutional convention” to draft a formal constitution.<sup>80</sup> Professor Brazier argued for a standing Royal Commission on the Constitution that would receive from the government draft proposals or ideas for major constitutional changes, and subject them to scrutiny.<sup>81</sup> Professor Wright called for “a democracy commission, set up for, say, 10 years with the prospect of permanence, to

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<sup>75</sup> CRP 1, paras 1 and 14.

<sup>76</sup> CRP 7, para 1.

<sup>77</sup> CRP 13, para 2.

<sup>78</sup> *Ibid.*, para 3.

<sup>79</sup> Q 196.

<sup>80</sup> CRP 3, para 19.

<sup>81</sup> CRP 6, paras 18–19.

keep our political system under continuing review.”<sup>82</sup> Richard Gordon QC argued that Parliament should set up an independent monitoring body to monitor the constitution.<sup>83</sup>

61. Other witnesses argued that the way in which parliamentary committees scrutinise constitutional matters should be bolstered. Unlock Democracy proposed that a parliamentary select committee “should determine which process any constitutional reform proposal should go through.”<sup>84</sup> The Law Society of Scotland also advocated a Joint Committee on Constitutional Bills which would report to both Houses on its findings in relation to “constitutional law measures”.<sup>85</sup>
62. The role of the House of Lords as a “constitutional long-stop” has long been recognised. The Royal Commission on Lords Reform stated that “This is one of the classic functions of a second chamber and one the House of Lords has on occasion played in the past ... ensuring that changes are not made to the constitution without full and open debate and an awareness of the consequences.”<sup>86</sup> Recognition of the importance of that function was a central justification for the establishment of this Committee. Professor Feldman argued that the House “has a proper role in safeguarding the constitution by ensuring, so far as possible, that constitutional changes are not introduced for partisan reasons and that arguments advanced are generally applicable and not motivated by party advantage.”<sup>87</sup>
63. Some witnesses argued that the role of the House of Lords should be strengthened in this respect. Mark Ryan stated that the House should “be given a more formal role and responsibility in relation to scrutinising constitutional measures and this function should continue to form part of the constitutional remit of any fully reformed second chamber.”<sup>88</sup> Professor Sir John Baker considered that “the House of Lords veto should be restored.”<sup>89</sup>
64. Some witnesses proposed the adoption of a form of rulebook for constitutional change<sup>90</sup> and it was suggested that this Committee could set out the measures to be adopted.<sup>91</sup> Professor Sir Jeffrey Jowell argued that the appropriate processes are already in place but that they should be “regularised”.<sup>92</sup> The Deputy Prime Minister agreed in part with this analysis:

“It is not rocket science. We kind of know what works best when dealing with any area of public policy that is controversial, fundamental, and an issue of considerable public concern. That is not an exhaustive list, but the building blocks of that are proper, deliberative, collective discussion, first within government, public engagement and consultation where

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<sup>82</sup> Q 79.

<sup>83</sup> Q 7.

<sup>84</sup> CRP 13, para 13.

<sup>85</sup> CRP 17.

<sup>86</sup> A House for the Future: Royal Commission on the Reform of the House of Lords CM 4534 (2000) (the Wakeham Commission), para 5.4.

<sup>87</sup> CRP 10, para 72.

<sup>88</sup> CRP 4, para 12.

<sup>89</sup> CRP 14.

<sup>90</sup> Q 72 (Professor Sir Jeffrey Jowell), CRP 10, paras 73–75 (Professor Feldman).

<sup>91</sup> Q 55 (Professor Sir Jeffrey Jowell); see also Q 78 (Professor Feldman).

<sup>92</sup> Q 63; see also Q 63 (Professor Feldman).

appropriate and possible, proper pre-legislative scrutiny in this place, and proper legislative scrutiny of the bills that come forward ... Those are the big links in the chain. I strongly believe that that is what we should get right.”<sup>93</sup>

### *Conclusion*

65. A constitutional development of the magnitude of the introduction of a codified written constitution should be considered only after a comprehensive examination of its implications has taken place. The Deputy Prime Minister has made it clear that this is not a priority for the present Government, and the arguments for and against go far beyond the scope of this inquiry. Similarly, the introduction of some form of constitutional commission would, we believe, be a step in the direction of a codified constitution and therefore is not appropriate for consideration at the present time.
66. Whilst we stress the important role played by the House of Lords in safeguarding the constitution against executive abuse, in the light of the recent White Paper on Lords Reform and the establishment of a Joint Committee on the draft Bill, this report is not the appropriate place for us to consider Lords powers or the conventions underpinning the relationship between the two Houses.
67. **We believe that the best way to proceed at the present time is to seek to strengthen the role that both Houses of Parliament and the existing parliamentary committees can play in relation to the process of constitutional change. This can best be done by ensuring that the government abide by what is currently accepted as best practice. We do not, however, accept that the government should continue to pick and choose which processes to apply to which proposals. We therefore recommend that a clear and consistent process be set down in a manner which retains flexibility whilst also holding the government to account for their decisions.**

### *Our proposal for written ministerial statements*

68. We consider that it is helpful for Parliament, when scrutinising legislation, to have before it a full explanation of the process to which a bill has been subjected. The way in which such an explanation is prepared should be designed to focus the minds of ministers on the detailed questions of whether a bill has been properly prepared prior to its introduction into Parliament. This is particularly important when dealing with bills providing for significant constitutional change. As Richard Gordon QC argued: “There has to be some dynamic that falls short of coercion but which is a trigger for action.”<sup>94</sup>
69. Our 2009 report, *Fast-track Legislation: Constitutional Implications and Safeguards*, which expressed concern at the *ad hoc* way in which governments had previously made the case for the fast-tracking of legislation,<sup>95</sup> recommended that, for each fast-tracked government bill, the minister responsible for the bill should be required to make an oral statement to the

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<sup>93</sup> Q 202.

<sup>94</sup> Q 30.

<sup>95</sup> Constitution Committee, 15th Report (2008–2009) (HL Paper 116), para 184.

House of Lords outlining the case for fast-tracking, accompanied by a written memorandum to be included in the explanatory notes.<sup>96</sup> The then Government agreed to this<sup>97</sup> and the current Government has continued the practice.<sup>98</sup>

70. Upon reflection, since explanatory notes are prepared only by the relevant department and not signed by a particular minister, we are concerned that the detailed information contained within them might not be given sufficient consideration by ministers. We note that under section 19 of the Human Rights Act 1998, the minister in charge of a bill in either House of Parliament:

“must make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (a ‘statement of compatibility’) or make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.”

The introduction of these statements has focused ministers’ minds on the question of compatibility and has brought about a cultural change in Whitehall. Although it would not be possible to give a one-line statement which would cover all questions of process, we consider that ministers should personally attest to the government’s view as to whether a bill provides for significant constitutional change and, if it does, to then set out the process leading to that bill’s introduction. This can best be achieved through the use of written ministerial statements which must be signed by a minister but which would allow for more detailed discussion than a one-line statement. Where the government do not consider that a bill provides for significant constitutional change, it would be necessary under our proposals for this to be stated explicitly.

71. **We recommend that when a government bill is introduced into either House of Parliament, the minister responsible for the bill in that House make a written ministerial statement. The minister responsible for the bill when introduced into the second House should also make a written ministerial statement. For ease of reference, a copy of each statement should be included in the relevant explanatory notes.**
72. **Both statements should set out whether, in each minister’s view, the bill provides for significant constitutional change and, if so:**
- **what is the impact of the proposals upon the existing constitutional arrangements;**
  - **whether and, if so, how the government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;**

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<sup>96</sup> *Ibid.*, para 185.

<sup>97</sup> Constitution Committee, 2nd Report (2009–2010): *Government Response to Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper 11), Appendix. See also HL Deb 10 November 2009 col 748 (Baroness Royall of Blaisdon, Leader of the House); HL Deb 7 January 2010 cols 2008–2009 (statement by Lord Davies of Oldham on first reading of the Video Recordings Bill).

<sup>98</sup> See, for example, the explanatory notes to the Loans to Ireland Bill 2010–2011 and to the Police (Detention and Bail) Bill 2010–2012 (see Constitution Committee, 16th Report (2010–2012): *Police (Detention and Bail) Bill* (HL Paper 178), para 5).

- **in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;**
  - **whether a green paper was published, what consultation took place on the proposals, including with the devolved institutions, and the extent to which the government agree or disagree with the responses given;**
  - **whether a white paper was published and whether pre-legislative scrutiny was undertaken and the extent to which the government agree or disagree with the outcome of that process;**
  - **what is the justification for any referendum held, or to be held, on the proposals; and**
  - **when and how the legislation, if passed, will be subject to post-legislative scrutiny.**
73. In preparing this written statement, each minister should take account of our discussion of these processes below. We place greater emphasis on some processes than on others. However, **we stress that this is intended to be a comprehensive package from which the government should depart only in exceptional circumstances and where there are clearly justifiable reasons for so doing. Where the government have not undertaken one or more specific parts of the recommended process, each minister should set out the reasons in their written statement.**
74. **We reserve our right to disagree with the government’s assessment, both as to whether a bill provides for significant constitutional change and as to whether the bill has been subjected to the proper process.** We note that during the scrutiny of a bill, Members of each House of Parliament may also disagree with the Government’s assessment.

### *Public engagement*

75. The following discussion focuses on public engagement at an early stage in the policy-making process. Forms of public engagement need not necessarily be initiated or managed by the government. We discuss public consultation which may take place at a later stage in the process below. We also discuss referendums in a separate section since these may be used at both an early or end stage of the process. It should be noted that many of the arguments we cite in favour of public engagement apply equally to other public processes.
76. One example of public engagement mentioned in positive terms by a number of our witnesses was the Canadian Province of British Columbia Citizen’s Assembly set up in 2004 to determine which type of electoral system should be put to the people in a referendum.<sup>99</sup> However, there are a large number of different models which may be used, and the extent to which particular public engagement models should be adopted is disputed.
77. Professor Smith argued in favour of public engagement on the following grounds:
- “If you are trying to change the constitution, then engaging citizens and involving them in a very strong sense is extremely important because you

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<sup>99</sup> QQ 117, 126 (Professor Flinders), Q 125 (Dr Kelso), QQ 137–138, 163 (Professor Smith), Q 165 (Professor Coleman), CRP 7, para 24 (Democratic Audit), CRP 8 (Dr Kelso).

are changing the division of power between the ruled and the rulers. Leaving that just to politicians—who, I am afraid to say, we know have their own self-interests—is problematic given that the people who legitimate a democratic system are the citizens themselves. If you are going to change the balance of power in any way, they have a right to be involved in that process.”<sup>100</sup>

78. The Deputy Prime Minister accepted the desirability of public engagement “as long as we do not unduly delay the overall timetable that we are seeking to meet”.<sup>101</sup> Professor Coleman, on the other hand, considered that a requirement to engage with the public “would change the way [the government] thought and stop them rushing into decisions ... [therefore] we would have more informed policy.”<sup>102</sup>
79. Dr Kelso suggested that: “There is certainly no way you are going to have a [substantial] process ... for absolutely every constitutional issue that comes about. But for some of the very big issues I think it may well be a worthwhile model to think about in the future.”<sup>103</sup> Professor Coleman argued that any new process should not be a one-off experiment but be allowed to develop as lessons were learned.<sup>104</sup> However, a number of witnesses, including the Deputy Prime Minister, argued that there was no one model appropriate to every constitutional change proposal.<sup>105</sup>
80. **We agree that public engagement during the policy-making process is a desirable element of the constitutional change process but that there is no one model which should be adopted for all proposed changes. Nor is public engagement at this stage of the process always a necessary requirement. However, if not undertaken, the government should be able to justify their decision not to conduct a public engagement exercise. If a public engagement exercise has been conducted, whether by the government or otherwise, each minister should set out in their written statement what account the government have taken of the results of that exercise in formulating their policies.**

### *Cabinet committees*

81. This Committee has previously stressed the importance of the Cabinet government model. Our report last year on *The Cabinet Office and the Centre of Government* affirmed “our belief in the importance of Cabinet government, which plays an essential role in upholding the principle of collective ministerial responsibility.”<sup>106</sup> We particularly highlighted the value of the Cabinet committee system, which, we asserted, “remains an essential part of the UK’s government structure, as part of the system of collective ministerial responsibility.”<sup>107</sup> This is particularly so with regard to proposals for constitutional change.

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<sup>100</sup> Q 135.

<sup>101</sup> Q 216.

<sup>102</sup> Q 165.

<sup>103</sup> Q 125; see also Q 210 (Deputy Prime Minister).

<sup>104</sup> Q 163.

<sup>105</sup> Q 210 (Deputy Prime Minister); see also CRP 6, para 6c (Professor Bochel *et al*), CRP 13, para 4 (Unlock Democracy).

<sup>106</sup> Constitution Committee, *op. cit.*, para 128.

<sup>107</sup> *Ibid.*, para 137.

82. We note that in relation to the process leading to the Scotland Act 1998, the Devolution to Scotland, Wales and the English Regions Cabinet Committee held 15 meetings over 11 weeks, considering 39 papers on such issues as legislative competence, the sovereignty of the UK Parliament, dispute resolution mechanisms, the West Lothian Question, the role of the devolved administrations in relation to the European Union, the proposed tax-varying power and budgetary issues.<sup>108</sup>
83. It is not clear whether the Cabinet system continues to subject constitutional change proposals to the same degree of scrutiny, although we note that an ongoing academic study of the Coalition Government has found that:
- “Cabinet and its committees have been greatly revived under the new government. Cabinet committees now meet, which under the last government never met. They are used as a forum for strategic and general policy discussions, as well as resolving the frequent differences which arise between Whitehall departments when addressing difficult policy problems.”<sup>109</sup>
84. The Deputy Prime Minister told us that the Cabinet’s Home Affairs Committee, which he chairs and which has responsibility for the present Government’s programme of political and constitutional reform, holds regular meetings, although their frequency “slightly depends on the business of government ... the rhythm might be once a week, or once every couple of weeks”.<sup>110</sup>
85. **We reaffirm our belief both in the importance of Cabinet government and in the essential role that the Cabinet committee system plays as part of the system of collective ministerial responsibility. These mechanisms are particularly important in relation to proposals for significant constitutional change. The government should ensure that proposals for significant constitutional change continue to be subject to rigorous internal government scrutiny in the Cabinet and its committees.**

*Publication of green papers and consultation*

86. In this report we use the term consultation to refer to the opportunity for all members of the public, along with the devolved institutions, experts and affected parties, to react to initial proposals made by the government and to comment on and seek to improve those proposals. Significant constitutional change proposals should be contained within a green paper which sets out the framework for the ensuing consultation process. In practice we recognise that the majority of responses made will be by experts and those with a specific interest in the subject matter.
87. The government Code of Practice on Consultation<sup>111</sup> sets out seven consultation criteria, including:
- Formal consultation should take place at a stage when there is scope to influence the policy outcome.

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<sup>108</sup> Derry Irvine, *A Skilful Advocate* in Wendy Alexander (ed.), Donald Dewar: *Scotland’s first First Minister* (2005), pp 125–9.

<sup>109</sup> *Inside Story: How Coalition Government Works*, *op. cit.*

<sup>110</sup> QQ 182–5.

<sup>111</sup> <http://www.bis.gov.uk/files/file47158.pdf> (July 2008).

- Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
  - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
  - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
  - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
88. We regard these criteria as minimum requirements in relation to proposals for significant constitutional change. The increased use and availability of online resources over the last decade can be used to make public consultations accessible to all those who wish to comment, but efforts still need to be made by governments to ensure that those affected by proposed changes are aware of the proposals. All citizens may be affected by significant constitutional change so particular care needs to be taken in promoting consultation exercises.
89. The Deputy Prime Minister told us that “my experience is that as long as the collective decision-making machinery of government is functioning effectively, transparently and deliberately, that is a good guarantee of proper scrutiny and deliberate consideration.”<sup>112</sup> We take the view that more is required.
90. **The nature of a significant constitutional change is that its impact will outlast whichever government initiated it. Whilst internal government processes are clearly important, the process of significant constitutional change is too important to be left solely to the government. Thus, in relation to any proposal for significant constitutional change, the government should initially set out their proposals in a green paper. The government should in each relevant case consult the devolved institutions. Ministers should consider the responses received and either change their proposals accordingly or explain in the written ministerial statement why they have chosen not to do so.**

*White papers and pre-legislative scrutiny*

91. Most of our witnesses agreed that it was desirable that constitutional change proposals be included in a white paper and, in the form of a draft bill, be subjected to pre-legislative scrutiny.<sup>113</sup> We examined the benefits of pre-legislative scrutiny in our 2004 report, *Parliament and the Legislative Process*,<sup>114</sup> noting that the process was of value to parliamentarians by “enhancing the capacity of Parliament to influence legislation at a formative stage”, to interested bodies and individuals “as they have the opportunity to contribute

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<sup>112</sup> Q 190.

<sup>113</sup> CRP 4, paras 5, 13 (Mark Ryan), CRP 5, para 8c (Professor Bochel *et al*), CRP 7, paras 41–42, 48 (Democratic Audit), CRP 9 (Law Society of Scotland), CRP 10, para 62 (Professor Feldman), CRP 15, para 13 (Richard Gordon QC), CRP 17 (Law Society of England and Wales).

<sup>114</sup> Constitution Committee, 14th Report (2003–2004) (HL Paper 173). This Committee also publishes sessional reports on the pre-legislative scrutiny which has been undertaken during the previous parliamentary session.

to the committee's deliberations", to the government since "it should lead to better legislation and, potentially save some time during the later legislative stages of the bills"<sup>115</sup> and to ministers who would subsequently find it easier to persuade officials of necessary changes.<sup>116</sup> These advantages, borne out by academic study,<sup>117</sup> are of particular relevance to significant constitutional legislation.

92. Our 2004 report concluded that:

"the Government should move from deciding which bills should be published in draft each session to deciding which bills should *not* be published in draft. Where the decision is taken not to publish a bill in draft, then the reasons should appear in the Explanatory notes to the bill."<sup>118</sup>

The then Government, in their response to that report, disagreed that the reasons for not conducting pre-legislative scrutiny should appear in the explanatory notes on the ground that:

"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 be likely to be formulaic and would not add to the transparency of decision-making."<sup>119</sup>

93. We do not accept this argument. Whilst the reasons for not publishing a bill in draft are likely to be clear in some cases, this does not prevent those reasons being briefly set out in a written ministerial statement. In other cases, the government have a duty to Parliament to set out their priorities clearly without resorting to formulaic assertions of the difficulties of scheduling parliamentary business. This is particularly so in relation to significant constitutional bills which require full parliamentary scrutiny and a consistent process notwithstanding other pressures on the parliamentary timetable.

94. We note that the recent report of the Leader's Group on Working Practices agreed with this Committee that pre-legislative scrutiny should be the norm, rather than the exception and concluded that:

"We recommend that there should be a presumption that bills embodying important changes of policy (particularly constitutional bills) should be subject to pre-legislative scrutiny. Where such bills have not previously been the subject of wide consultation, by means of green and white papers, this presumption should be a requirement. If the

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<sup>115</sup> On this specific point, see the analysis of Jennifer Smookler who concluded that pre-legislative scrutiny could make the ensuing parliamentary scrutiny of a bill more difficult for the government since it "may cause a bill to be challenged on a greater number of issues precisely because of the level of knowledge gained." *Making a difference? The Effectiveness of Pre-Legislative Scrutiny*, Parliamentary Affairs vol 59(3) [2006] p 533.

<sup>116</sup> Constitution Committee, *op. cit.*, paras 24–26.

<sup>117</sup> Jennifer Smookler concluded that: "the process appears to punch well above its weight ... [and] is consistent in achieving some substantive changes either at pre-legislative or legislative stages." *Making a difference? The Effectiveness of Pre-Legislative Scrutiny*, *op. cit.*

<sup>118</sup> Constitution Committee, *Parliament and the Legislative Process*, *op. cit.*, para 34.

<sup>119</sup> Constitution Committee, 6th Report (2004–2005): *Parliament and the Legislative Process: the Government's Response* (HL Paper 114), Appendix, para 5.

Government does not publish a bill in draft, it should formally explain and justify its approach to the House.”<sup>120</sup>

This recommendation was widely welcomed by Members of the House of Lords during their debate on the Leader’s Group report.<sup>121</sup>

95. Whilst this report is limited to the consideration of constitutional change, **we agree with the Leader’s Group and continue to believe that significant constitutional legislation should be subject to pre-legislative scrutiny. This requirement should be departed from only in exceptional circumstances; if the government do not publish a bill in draft, each minister should formally explain and justify that approach to Parliament in their written statement.**

### *The legislative process*

96. This Committee has previously examined the legislative process in some detail,<sup>122</sup> as well as specifically considering the case for fast-tracking legislation<sup>123</sup> (which may, in certain circumstances such as previously enacted bills relating to Northern Ireland, be justifiable in relation to constitutional legislation). We also note that changes have been made to certain House of Commons procedures in recent years, notably the introduction of programme motions,<sup>124</sup> and that further recommendations for change were made by the Wright Committee during the last Parliament.<sup>125</sup> Procedures and working practices in the House of Lords have recently been given careful consideration by the Leader’s Group on Working Practices which made a number of wide-ranging recommendations relating to the legislative process which have been widely welcomed in the House.<sup>126</sup> These procedures and practices apply to all legislation, without distinction. We do not, therefore, consider this report to be the appropriate place to re-examine the overall legislative process. However, whatever the House decides relating to the Leader’s Group proposals, we believe that additional care should be taken with bills providing for significant constitutional change.
97. There is one particular aspect of the legislative process which we believe is particularly unsuited to significant constitutional legislation. The Constitutional Reform and Governance Bill 2010 was subject to the wash-up<sup>127</sup> at the end of the last Parliament, reaching the House of Lords only a month before the expected date of dissolution. This Committee was highly

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<sup>120</sup> Leader’s Group on Working Practices, Report, *op. cit.*, para 84.

<sup>121</sup> HL Deb 27 June 2010 cols 1551–1628, see in particular col 1624 (Leader of the House, Lord Strathclyde).

<sup>122</sup> Constitution Committee, *Parliament and the Legislative Process*, *op. cit.*; Constitution Committee, 6th Report (2004–05): *Parliament and the Legislative Process: The Government’s Response* (HL Paper 114)

<sup>123</sup> Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, *op. cit.*; Constitution Committee, *Government Response to Fast-track Legislation: Constitutional Implications and Safeguards* *op. cit.*

<sup>124</sup> See House of Commons Library Standard Note, *Modernisation: Programming of Legislation* (2008) SN/PC/00569.

<sup>125</sup> House of Commons Reform Committee, 1st Report (2008–2009): *Rebuilding the House* (HC Paper 1117).

<sup>126</sup> Leader’s Group on Working Practices, Report, *op. cit.*, paras 70–156; HL Deb 27 June 2010 cols 1551–1628.

<sup>127</sup> The wash-up is the process whereby agreements are made between the Government and the Opposition as to which (parts of) Bills should be passed in the final few weeks before the end of a session or Parliament. See Ruth Fox and Matt Korris *Making Better Law: Reform of the Legislative Process from Policy to Act* (2010), p 41; *Wash-up 2010* House of Commons Library Research Paper 11/18 (11 February 2011), pp 11–14.

critical of the lack of time for parliamentary scrutiny, particularly in the House of Lords, that was thus afforded to the Bill.<sup>128</sup> We also criticised the fact that significant new provisions were added late in the legislative process<sup>129</sup> and that constitutionally significant amendments had not been considered in the Commons.<sup>130</sup> We considered it to be:

“extraordinary that it could be contemplated that matters of such fundamental constitutional importance as, for example, placing the civil service on a statutory footing should be agreed in the ‘wash-up’ and be denied the full parliamentary deliberation which they deserve.”<sup>131</sup>

This example demonstrates that care should be taken to ensure that a good level of parliamentary scrutiny is afforded to such legislation.

98. Whilst significant constitutional legislation may not require the use of special parliamentary procedures, we note that the committee stages of bills of “first-class constitutional importance” are by convention taken on the floor of the House of Commons whereas other bills are, on the whole, sent to a public bill committee.<sup>132</sup> There is thus a precedent for applying the existing parliamentary procedures differently to constitutional bills. Such bills should be afforded the best parliamentary scrutiny available (including pre- and post-legislative scrutiny). This can be done without devising any new procedures.
99. **We concluded earlier in this report that it is not possible to provide a watertight definition of significant constitutional legislation.<sup>133</sup> We stress the importance of proper parliamentary scrutiny of all bills, but we do not recommend that any new parliamentary procedures such as super-majorities should apply to significant constitutional bills. However, parliamentary scrutiny of such bills should not be rushed unless there are justifiable reasons for fast-tracking them, and, in particular, the government should not seek to pass significant constitutional legislation during the wash-up.**

### *Referendums*

100. Legislation may require a referendum prior to the implementation of a constitutional change. It is possible for a referendum to be either pre- or post-legislative; a further distinction should also be drawn between mandatory and advisory referendums. Our witnesses distinguished between referendums as being part of the process of approving a constitutional change and other public engagement exercises which enable the public to determine the package on offer.<sup>134</sup>
101. This Committee recently examined the use of referendums in the United Kingdom and concluded that whilst there were “significant drawbacks” to

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<sup>128</sup> Constitution Committee, *Constitutional Reform and Governance Bill op. cit.*, paras 40, 45–46; see also CRP 10, para 59 (Professor Feldman).

<sup>129</sup> *Ibid.*, para 4.

<sup>130</sup> *Ibid.*, para 39.

<sup>131</sup> *Ibid.*, paras 5, 40, 45–47.

<sup>132</sup> Erskine May, *Parliamentary Practice* (23rd ed, 2004), p 591.

<sup>133</sup> See above, para 15.

<sup>134</sup> CRP 8 (Dr Kelso); see above paras 75–80.

their use “they are most appropriately used in relation to fundamental constitutional issues”.<sup>135</sup> **We reaffirm our earlier assessment.**

### *Post-legislative scrutiny*

102. In our 2004 report, *Parliament and the Legislative Process*, this Committee also examined the benefits of post-legislative scrutiny: that it would bring to the attention of Parliament legislation which had failed to fulfil its intended purpose along with any unintended consequences; that it might make it possible to identify alternative means of achieving the original goals of the legislation; that it might impose a greater discipline on government; and that it would enable lessons to be learnt about the process leading up to the passing of the relevant Act.<sup>136</sup> In relation to significant constitutional legislation, we believe that post-legislative scrutiny would have the particular benefit of leading to an assessment of whether that legislation had had an adverse impact on other areas of the constitution.
103. That report argued that the case for the greater use of post-legislative scrutiny was “compelling” and that the problem with carrying it out was one primarily of limited resources.<sup>137</sup> We do not intend to rehearse the resources arguments here, but we note that the previous Government, in setting out their approach to post-legislative scrutiny in 2008, stated that the basis for a new process for post-legislative scrutiny should be for the Commons departmental committees themselves, on the basis of a Memorandum on appropriate Acts submitted by the relevant government department, to decide whether to conduct further post-legislative scrutiny of the Act in question.<sup>138</sup> We also note that the Leader’s Group on Working Practices has recently recommended that the House of Lords appoint a Post-legislative Scrutiny Committee to manage the process of reviewing up to four selected Acts of Parliament each year.<sup>139</sup> Neither mechanism in and of itself guarantees that significant constitutional legislation will be subject to comprehensive post-legislative scrutiny.
104. **We consider that comprehensive post-legislative scrutiny should be a requirement for all significant constitutional legislation. Each minister should set out the government’s plans for such scrutiny in their written statement.**

### **Conclusion**

105. **We believe that abiding by the processes outlined above will do much to remedy many of the weaknesses that exist in the current practice of constitutional change in the United Kingdom. The need to set out within a written ministerial statement the processes to which a bill has been**

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<sup>135</sup> Constitution Committee, 12th Report (2009–2010): *Referendums in the United Kingdom* (HL Paper 99), paras 62, 94. In our recent report on the Parliamentary Voting System and Constituencies Bill we concluded that a referendum could appropriately be held on whether to change the voting system from first-past-the-post to AV (*op. cit.*, para 17), but we recently criticised the potentially excessive use of referendums which might take place under the European Union Bill (13 Report (2010–2011) (HL Paper 121), paras 37–78).

<sup>136</sup> Constitution Committee, *Parliament and the Legislative Process*, *op. cit.*, paras 169–172.

<sup>137</sup> *Ibid.*, para 173.

<sup>138</sup> Post-legislative Scrutiny: the Government’s Approach, Cm 7320, March 2008, para 9.

<sup>139</sup> Leader’s Group on Working Practices, *op. cit.*, para 141; see also HL Deb 27 June 2010 cols 1551–1628, see in particular col 1624 (Leader of the House, Lord Strathclyde).

**subjected and the outcomes of those processes should, we believe, focus the minds of ministers and help to bring about a cultural change in Whitehall regarding constitutional legislation. The requirement to justify and explain any decision not to subject a bill to a particular process will help to underline the importance of each of the above processes.**

## **CHAPTER 4: THE ROLE OF THE CONSTITUTION COMMITTEE**

106. This report has been primarily concerned with significant constitutional change. The terms of reference of this Committee require us to examine all public bills for their constitutional implications. We perform this role by scrutinising and, if necessary, producing a report on, any bill with constitutional implications before it is given a second reading in the House of Lords.<sup>140</sup>
107. We take this opportunity to make two further recommendations which would assist us in this scrutiny work. Since the value of our work lies primarily in the assistance we provide to Members of the House during their consideration of a bill, we believe that these measures would also improve the parliamentary scrutiny of bills on which we report or in relation to which we write to the responsible minister.

### *Minimum interval between first and second readings*

108. The House of Lords *Companion to the Standing Orders* states that there should be a minimum interval of two weekends between the first and second readings of bills.<sup>141</sup> In practice, this often means that a bill is introduced one week and we must meet to consider it and, if necessary, agree a report the following week if we are to publish a report before second reading. This timescale constrains our ability to undertake the scrutiny work with which the House has tasked us.
109. **We recommend that the government, when introducing a bill providing for significant constitutional change into the House of Lords, allow a minimum of three weekends between first and second reading. We believe there will rarely be a sound justification for rushing a significant constitutional bill through Parliament and that an extension of one week would not unduly impact on the government's legislative timetable.**

### *Full and timely government responses to our reports*

110. In conducting our scrutiny of all public bills we would, if the government accept the earlier recommendations of this report, closely examine a written ministerial statement prepared by the government as outlined above. We reserve our right to disagree with the government's assessment, both as to whether a bill provides for significant constitutional change and as to whether the bill has been subjected to the proper process. There will also be bills in relation to which we accept the government's assessment that they do not provide for significant constitutional change but which nevertheless have constitutional implications which we will wish to draw to the attention of the House.
111. Towards the end of 2010 we published reports on two particularly significant constitutional bills: the Parliamentary Voting System and Constituencies Bill and the Fixed-term Parliaments Bill. In relation to the first of these bills, the Government did not respond to our report until 10 February, just a few days

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<sup>140</sup> Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working*, *op. cit.*, para 32.

<sup>141</sup> *Companion to the Standing Orders and Guide to the Proceedings of the House of Lords*, (2010), para 8.03(a).

before the Bill was enacted on 16 February and four months after our report was published.<sup>142</sup> In relation to the second Bill, the response was published just one day before second reading in the House of Lords, despite this being over two months after publication of our report and over five weeks after the Bill was brought from the House of Commons.<sup>143</sup> We note that the Government's responses to the House of Commons Political and Constitutional Reform Committee's reports on the first of these bills was even more unduly delayed.<sup>144</sup> The Government's responses thus proved to be of no value in assisting the House in its scrutiny of these bills.<sup>145</sup>

112. The government's guidance to departments on dealing with select committees, commonly known as the Osmotherly Rules, states that:

“Departments should aim to provide the considered Government response to both Commons and Lords Select Committee Reports within two months of their publication. Where a report is complex or technical in its nature, the response may on occasion require a little longer: the Committee should be kept informed.”<sup>146</sup>

113. We note that the Government have recently been able to respond to two other constitutionally significant bills, the Public Bodies Bill and the European Union Bill, within two or three weeks of our reports on those bills being published.<sup>147</sup> This demonstrates that quick responses are capable of being prepared, approved and issued when ministers and departments wish to fulfil their responsibilities to Parliament and its committees.
114. **Our bill scrutiny reports, unlike many committee reports which may follow a long and in-depth inquiry, will not raise issues which the government could not be expected to have previously considered. We therefore regard the two-month time limit for responses to general**

<sup>142</sup> Constitution Committee, *Parliamentary Voting Systems and Constituencies Bill*, *op. cit.*, published 12 November 2010; letter from the Chairman to Mark Harper MP, Minister for Political and Constitutional Reform, dated 9 February 2011, <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtrtoHarper09.02.11.pdf>; letter from the Minister to the Chairman dated 10 February 2011, <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtrfromHarper100211.pdf>; Government Response to the House of Lords Constitution Committee's Report on the Parliamentary Voting System and Constituencies Bill, Cm 8016, published 11 February 2011.

<sup>143</sup> Constitution Committee, *Fixed-term Parliaments Bill*, *op. cit.*, published 16 December 2010; Government Response to the Report of the House of Lords Constitution Committee, Cm 8011, published 28 February 2010; letter from the Chairman to Mark Harper MP, Minister for Political and Constitutional Reform, dated 7 March 2011, <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtrtoHarper07.03.11.pdf>; letter from the Minister to the Chairman dated 14 March 2011, <http://www.parliament.uk/documents/lords-committees/constitution/FTP/LetterfromMarkHarper140311.pdf>

<sup>144</sup> See press release by Chairman of the Political and Constitutional Reform Committee: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/news/government-response/>.

<sup>145</sup> See further, letter from the Chairman to Rt Hon Nick Clegg MP, Deputy Prime Minister, dated 7 March 2011, <http://www.parliament.uk/documents/lords-committees/constitution/Corres%20with%20ministers/LtrtoClegg070311.pdf>

<sup>146</sup> Departmental Evidence and Response to Select Committees, Cabinet Office, July 2005, para 99 [http://interim.cabinetoffice.gov.uk/media/cabinetoffice/propriety\\_and\\_ethics/assets/osmotherly\\_rules.pdf](http://interim.cabinetoffice.gov.uk/media/cabinetoffice/propriety_and_ethics/assets/osmotherly_rules.pdf).

<sup>147</sup> Constitution Committee, 6th Report (2010–2011): *Public Bodies Bill [HL]* (HL Paper 51), published 4 November 2011; letter from Lord Taylor of Holbeach to the Chairman, dated 19 November 2010, <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LetterfromLordTaylor191110.pdf>. Constitution Committee, *European Union Bill*, *op. cit.*, published 17 March 2011; Government response published 30 March, <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/GvtResEUBillReport.pdf>.

**committee reports to be longer than that which should be available to departments for responses to bill scrutiny reports. In the majority of cases, where we have published a bill scrutiny report before second reading, we would expect the government to respond to the report before the commencement of committee stage.**

## CHAPTER 5: SUMMARY OF RECOMMENDATIONS

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### Introduction

115. A clear and consistent process should apply to all significant constitutional change. We offer no watertight definition of what is constitutional, but continue to rely on the working definition offered in our first report of 2001. The list provided by Professor Sir John Baker, whilst neither exhaustive nor closed, provides, in our view, a useful guide to the principal measures which would fall under the rubric of significant constitutional change. (Para 15)
116. We recommend this report to the House for debate. (Para 19)

### The current practice of constitutional change

117. We agree that government operates within a constitutional framework which should be respected and treated with care by all those who seek to change it. Governments should continue to have the right to initiate constitutional change, but this needs to be tempered by a realisation that constitutional legislation is qualitatively different from other legislation. (Para 26)
118. We stress that the potential impact on the existing constitutional arrangements should be considered when significant constitutional changes are proposed. (Para 29)
119. Internal government processes precede and directly impact upon subsequent legislative processes. As a basic minimum, the Cabinet Manual should set out for ministers and civil servants the requirements relating to both those internal processes and the process for significant constitutional change which we recommend in this report. (Para 34)
120. The desire to act quickly as a new government is no justification for bypassing a proper constitutional process. (Para 40)
121. Consultation is important, both as a means to improve proposals for change but also to ensure that all those affected by a proposed change are given the opportunity to respond and influence the outcome. It is not a part of the process which should be overlooked or treated as a box-ticking exercise. There should be a significant period of public debate which informs the process by which the United Kingdom moves from one constitutional arrangement to another. (Para 46)
122. There are a number of weaknesses inherent in the current practice of legislating for constitutional change: lack of constraints on the government, failure to have regard to the wider constitutional settlement, lack of coherence within government, lack of consistency in the application of different processes, changes being rushed and lack of consultation. These weaknesses arise out of the fact that the United Kingdom has no agreed process for significant constitutional change. (Para 51)
123. We believe that a clear and consistent process for constitutional change is essential to achieving a realisation of the Government's aims as set out above. (Para 55)

### **Our recommended process for constitutional change**

124. We believe that the best way to proceed at the present time is to seek to strengthen the role that both Houses of Parliament and the existing parliamentary committees can play in relation to the process of constitutional change. This can best be done by ensuring that the government abide by what is currently accepted as best practice. We do not, however, accept that the government should continue to pick and choose which processes to apply to which proposals. We therefore recommend that a clear and consistent process be set down in a manner which retains flexibility whilst also holding the government to account for their decisions. (Para 67)
125. We recommend that when a government bill is introduced into either House of Parliament, the minister responsible for the bill in that House make a written ministerial statement. The minister responsible for the bill when introduced into the second House should also make a written ministerial statement. For ease of reference, a copy of each statement should be included in the relevant explanatory notes. (Para 71)
126. Both statements should set out whether, in each minister's view, the bill provides for significant constitutional change and, if so:
  - what is the impact of the proposals upon the existing constitutional arrangements;
  - whether and, if so, how the government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;
  - in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;
  - whether a green paper was published, what consultation took place on the proposals, including with the devolved institutions, and the extent to which the government agree or disagree with the responses given;
  - whether a white paper was published and whether pre-legislative scrutiny was undertaken and the extent to which the government agree or disagree with the outcome of that process;
  - what is the justification for any referendum held, or to be held, on the proposals; and
  - when and how the legislation, if passed, will be subject to post-legislative scrutiny. (Para 72)
127. We stress that this is intended to be a comprehensive package from which the government should depart only in exceptional circumstances and where there are clearly justifiable reasons for so doing. Where the government have not undertaken one or more specific parts of the recommended process, each minister should set out the reasons in their written statement. (Para 73)
128. We reserve our right to disagree with the government's assessment, both as to whether a bill provides for significant constitutional change and as to whether the bill has been subjected to the proper process. (Para 74)
129. We agree that public engagement during the policy-making process is a desirable element of the constitutional change process but that there is no one model which should be adopted for all proposed changes. Nor is public engagement at this stage of the process always a necessary requirement.

However, if not undertaken, the government should be able to justify their decision not to conduct a public engagement exercise. If a public engagement exercise has been conducted, whether by the government or otherwise, each minister should set out in their written statement what account the government have taken of the results of that exercise in formulating their policies. (Para 80)

130. We reaffirm our belief both in the importance of Cabinet government and in the essential role that the Cabinet committee system plays as part of the system of collective ministerial responsibility. These mechanisms are particularly important in relation to proposals for significant constitutional change. The government should ensure that proposals for significant constitutional change continue to be subject to rigorous internal government scrutiny in the Cabinet and its committees. (Para 85)
131. The nature of a significant constitutional change is that its impact will outlast whichever government initiated it. Whilst internal government processes are clearly important, the process of significant constitutional change is too important to be left solely to the government. Thus, in relation to any proposal for significant constitutional change, the government should initially set out their proposals in a green paper. The government should in each relevant case consult the devolved institutions. Ministers should consider the responses received and either change their proposals accordingly or explain in the written ministerial statement why they have chosen not to do so. (Para 90)
132. We agree with the Leader's Group and continue to believe that significant constitutional legislation should be subject to pre-legislative scrutiny. This requirement should be departed from only in exceptional circumstances; if the government do not publish a bill in draft, each minister should formally explain and justify that approach to Parliament in their written statement. (Para 95)
133. We concluded earlier in this report that it is not possible to provide a watertight definition of significant constitutional legislation. We stress the importance of proper parliamentary scrutiny of all bills, but we do not recommend that any new parliamentary procedures such as super-majorities should apply to significant constitutional bills. However, parliamentary scrutiny of such bills should not be rushed unless there are justifiable reasons for fast-tracking them, and, in particular, the government should not seek to pass significant constitutional legislation during the wash-up. (Para 99)
134. We consider that comprehensive post-legislative scrutiny should be a requirement for all significant constitutional legislation. Each minister should set out the government's plans for such scrutiny in their written statement. (Para 104)
135. We believe that abiding by the processes outlined above will do much to remedy many of the weaknesses that exist in the current practice of constitutional change in the United Kingdom. The need to set out within a written ministerial statement the processes to which a bill has been subjected and the outcomes of those processes should, we believe, focus the minds of ministers and help to bring about a cultural change in Whitehall regarding constitutional legislation. The requirement to justify and explain any decision not to subject a bill to a particular process will help to underline the importance of each of the above processes. (Para 105)

### **The role of the Constitution Committee**

136. We recommend that the government, when introducing a bill providing for significant constitutional change into the House of Lords, allow a minimum of three weekends between first and second reading. We believe there will rarely be a sound justification for rushing a significant constitutional bill through Parliament and that an extension of one week would not unduly impact on the government's legislative timetable. (Para 109)
137. Our bill scrutiny reports, unlike many committee reports which may follow a long and in-depth inquiry, will not raise issues which the government could not be expected to have previously considered. We therefore regard the two-month time limit for responses to general committee reports to be longer than that which should be available to departments for responses to bill scrutiny reports. In the majority of cases, where we have published a bill scrutiny report before second reading, we would expect the government to respond to the report before the commencement of committee stage. (Para 114)

## **APPENDIX 1: SELECT COMMITTEE ON THE CONSTITUTION**

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The Members of the Committee that conducted this inquiry were:

Lord Crickhowell  
Lord Goldsmith  
Lord Hart of Chilton  
Lord Irvine of Lairg  
Baroness Jay of Paddington (Chairman)  
Lord Norton of Louth  
Lord Pannick  
Lord Powell of Bayswater  
Lord Rennard  
Lord Renton of Mount Harry  
Lord Rodgers of Quarry Bank  
Lord Shaw of Northstead

Professor Richard Rawlings and Professor Adam Tomkins acted as Specialist Advisers for this inquiry.

### **Declaration of Interests**

No relevant interests were declared in relation to this inquiry.

A full list of Members' interests can be found in the Register of Lords' Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

## APPENDIX 2: LIST OF WITNESSES

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### Written Evidence

Evidence is published online at [www.parliament.uk/hlconstitution](http://www.parliament.uk/hlconstitution) and available for inspection at the Parliamentary Archives (020 7219 5341).

Evidence received by the Committee is listed below in order of receipt and in alphabetical order. Witnesses without a \* gave written evidence only. Witnesses marked with \* gave both oral and written evidence. Witnesses marked with \*\* gave oral evidence and did not submit any written evidence.

### Oral evidence in chronological order

- |    |              |  |
|----|--------------|--|
| *  | (QQ 1–47)    | Richard Gordon QC & Professor Sir John Baker       |
| *  | (QQ 48–78)   | Professor Jeffrey Jowell & Professor David Feldman |
| *  | (QQ 79–106)  | Professor Tony Wright & David Howarth              |
| *  | (QQ 107–132) | Dr Alexandra Kelso & Professor Matthew Flinders    |
| ** | (QQ 133–175) | Professor Graham Smith & Professor Stephen Coleman |
| ** | (QQ 176–250) | Rt Hon Nick Clegg MP, Deputy Prime Minister        |

### Written Evidence in order of receipt

- |   |          |   |
|---|----------|---|
| * | (CRP 1)  | Professor Matthew Flinders  |
| * | (CRP 2)  | Professor Jeffrey Jowell  |
| * | (CRP 3)  | David Howarth   |
|   | (CRP 4)  | Mark Ryan   |
|   | (CRP 5)  | Professor Hugh Bochel; Catherine Bochel; Andrew Defty; Jane Kirkpatrick |
|   | (CRP 6)  | Professor Rodney Brazier  |
|   | (CRP 7)  | Democratic Audit  |
| * | (CRP 8)  | Dr Alexandra Kelso  |
|   | (CRP 9)  | Law Society of Scotland   |
| * | (CRP 10) | Professor David Feldman   |
|   | (CRP 11) | Constitution Society  |
|   | (CRP 12) | Hansard Society   |
|   | (CRP 13) | Unlock Democracy  |
| * | (CRP 14) | Professor Sir John Baker  |
| * | (CRP 15) | Richard Gordon QC   |
|   | (CRP 16) | Professor Robert Hazell   |
|   | (CRP 17) | Law Society of England & Wales  |

**Alphabetical Order**

- \* Professor Sir John Baker (CRP 14)  
Catherine Bochel (CRP 5)  
Professor Hugh Bochel (CRP 5)  
Professor Rodney Brazier (CRP 6)
- \*\* Rt Hon Nick Clegg MP
- \*\* Professor Stephen Coleman  
Constitution Society (CRP 11)  
Andrew Defty (CRP 5)  
Democratic Audit (CRP 7)
- \* Professor David Feldman (CRP 10)
- \* Professor Matthew Flinders (CRP 1)
- \* Richard Gordon QC (CRP 15)  
Hansard Society (CRP 12)  
Professor Robert Hazell (CRP 16)
- \* David Howarth (CRP 3)
- \* Professor Jeffrey Jowell (CRP 2)  
Jane Kirkpatrick (CRP 5)
- \* Dr Alexandra Kelso (CRP 8)
- \*\* Professor Graham Smith  
Law Society of England & Wales (CRP 17)  
Law Society of Scotland (CRP 9)  
Mark Ryan (CRP 4)  
Unlock Democracy (CRP 13)
- \*\* Professor Tony Wright

### APPENDIX 3: CALL FOR EVIDENCE

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The Constitution Committee was appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.

The Committee has decided to conduct an inquiry into the constitutional reform process.

In 2002 the Constitution Committee produced a report on *Changing the Constitution: The Process of Constitutional Change*. The report was compiled in the light of significant recent constitutional reforms such as the establishment of the devolved institutions and the passage of the Human Rights Act 1998 and the Freedom of Information Act 2000.

In the years since that report was published, constitutional reform has continued apace. Under the last Government the role of the Lord Chancellor was reformed, the Supreme Court was established and the Civil Service was placed on a statutory footing for the first time. This Government has brought forward legislation to introduce fixed-term Parliaments, to reduce the number of MPs and redraw parliamentary constituency boundaries, and to hold a referendum on the electoral system, whilst proposals to reform the House of Lords are expected soon. Meanwhile the devolution settlement has continued to evolve, through the Scotland Bill currently before Parliament, the 3 March referendum on further Welsh devolution, and the devolution of policing and justice powers in Northern Ireland.

Throughout this period (and under successive governments) the process by which constitutional reform takes place has often proved controversial. This Committee has consistently expressed concern about rushed proposals, lack of consultation and pre-legislative scrutiny and a failure to appreciate the knock-on constitutional consequences of any given reform. In the light of this, the Committee has decided that it is time to revisit the issue and consider the process of constitutional reform and how it can be improved.

The Committee invites interested organisations and individuals to submit written evidence as part of its inquiry, reflecting the guidance given below. Written evidence should reach the Committee as soon as possible and **no later than 31 March 2011**.

#### *Scope of the Committee's inquiry*

Witnesses are invited to bear in mind that this inquiry is not intended to focus on the merits or otherwise of any specific constitutional reform proposals, but instead seeks to focus on the process by which they have been introduced. In particular, the Committee invites evidence on the following themes:

#### *Overview*

Should constitutional laws be considered to have a special character such that constitutional law-making is given special treatment? Should the Government apply particular procedures to constitutional policy-making? If so, what should these be?

How would you characterise the constitutional reform process in the UK? What are its strengths and weaknesses? Has the process changed in recent years?

How would you assess the varying processes by which successive governments have conceived and developed proposals for constitutional reform? What case studies would you cite as examples of good and bad practice?

How can the constitutional reform process be improved? What “good practice” principles could the Committee recommend in terms of the development of constitutional reform policy?

How is constitutional reform undertaken in other countries? What can be learned from practice elsewhere in terms of good and bad practice?

*The development of constitutional reform proposals*

Should the onus for proposing constitutional reform rest (solely) with the Government? What role should Parliament and/or outside bodies and individuals have in initiating proposals for change?

In what circumstances should constitutional proposals be set out in green or white papers?

In what circumstances should constitutional proposals be subject to public consultation, such as via Citizens’ Assemblies? What principles should apply and what form should such consultation take?

Should the Government consult other parties when developing constitutional reform proposals? What importance should be attached to achieving cross-party consensus?

*The role of Parliament*

What role should Parliament play in the scrutiny of constitutional reform proposals?

Can constitutional legislation be defined? Should its consideration differ from that pertaining to other legislation?

Should constitutional reform proposals be subject to parliamentary pre-legislative scrutiny?

*Post-legislative scrutiny*

Is the post-legislative scrutiny model set out by the then Government in March 2008 a sufficiently robust process for both the Government and Parliament to scrutinise constitutional reform legislation effectively?

Those responding to this call for evidence are not necessarily expected to address all these points but instead to focus on those issues on which they have special expertise or about which they are particularly concerned. Respondents should not feel constrained by the above list from drawing attention to any other points about the process of constitutional reform thought to be of significance to the United Kingdom constitution.

#### **APPENDIX 4: NOTE OF SEMINAR HELD ON 16 MARCH 2011**

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The following is a note of the issues raised by a seminar on the process of constitutional change which took place on Wednesday 16 March. The seminar was held under the Chatham House Rule.

##### **Members present:**

Lord Crickhowell  
 Lord Hart of Chilton  
 Lord Irvine of Lairg  
 Baroness Jay of Paddington (Chairman)  
 Lord Norton of Louth  
 Lord Pannick  
 Lord Rennard  
 Lord Renton of Mount Harry  
 Lord Rodgers of Quarry Bank  
 Lord Shaw of Northstead

##### **Participants:**

Professor Anthony Bradley, Emeritus Professor of Constitutional Law, University of Edinburgh

Professor Sir David Butler, Emeritus Professor, Nuffield College, University of Oxford

Dr Ruth Fox, Director, Parliament and Government Programme, Hansard Society

Professor Robert Hazell, Director, Constitution Unit, UCL

Dr Meg Russell, Reader in British and Comparative Politics and Deputy Director, Constitution Unit, UCL

##### **Was it possible to define a constitutional reform proposal or constitutional legislation?**

It was difficult to provide a definition of constitutional legislation: some bills were clearly constitutional (such as the European Communities Act 1972 and the Human Rights Act 1998), but there were also bills which contained clauses with an indirect effect on the constitution (such as the Civil Contingencies Act 2004 and the Public Bodies Bill 2010–2012). The fundamental problem was that the UK had no written constitution against which such bills could be measured, therefore it was necessary to look for other means of identification; but a cast-iron definition for the future was impossible to achieve.

##### **Was it helpful to compare constitutional reform in other countries?**

Most other countries had a written constitution which imposed rigid requirements for constitutional reform (to a greater or lesser degree). The principles which applied in those countries for constitutional reform did not therefore apply in the UK. However, written constitutions included only some of the issues which would be regarded as constitutional in the UK. For example, the Parliamentary Voting System and Constituencies Act reduced the number of MPs from 650 to 600—this was the sort of provision which would be included in most written constitutions—but also required a referendum to be held on the voting system—many written constitutions did not specify the voting system.

It was necessary to bear in mind that constitutional rules in the UK included conventions as well as legislation—this further distinguished the UK system.

Trying to define a constitutional measure in the UK was more difficult than elsewhere, but the UK system could be described as superior in allowing for a wider definition, greater flexibility and greater opportunity to add different elements to the constitutional settlement. The supposedly simple solution of codification was not an answer to the problem of definition.

### **Should government have some machinery for identifying constitutional matters?**

Political parties had a tendency to bring forward proposals which had not been fully considered. In particular, new governments had a tendency to wish to be seen to be acting quickly and this created its own momentum.

One important aspect of process was the way in which a bill was handled in the Cabinet's Legislation Committee. It was necessary that that Committee understood the role of the House of Lords and developed a sound Lords handling strategy. However, it was stressed by some participants that, in the end, Number 10 would determine which bills were introduced so the machinery for consideration of bills within Number 10 was key.

### **Should Parliament have some machinery for identifying constitutional matters?**

Suggestions for parliamentary control made by participants included the use of a Speaker's certificate and a Legislative Standards Committee to examine bills prior to, or just following, their introduction.

The idea of using a Speaker's certificate was not widely welcomed by the participants since it would involve difficult and highly political decisions—there would be no straightforward definition to apply as there was with the certification of money bills.

A Legislative Standards Committee would ideally be set up on a bicameral basis to examine the legislative preparation of all bills. It would not focus only on constitutional issues, but the Committee could identify objective criteria by which constitutional bills would be identified. Bills which did not meet certain standards could have their second readings delayed to allow for improvements in either the content of the bill or the process relating to it (e.g. the need for more consultation). The threat of delay could also strengthen the hand of the Cabinet's Legislation Committee since that Committee would have a sound argument for ensuring that legislation was properly prepared.

Parliamentary scrutiny was not intended to prevent all bills progressing. For example, if a Legislative Standards Committee was unhappy with the preparation of a bill and was minded to recommend its deferral, the Committee alone would not make the decision: its recommendation and explanation would be put to the relevant House for a decision. That would leave it to members to decide what to do; the bill might go through but at least members would have made the decision rather than the executive imposing the bill on Parliament to be scrutinised in a form and at a time of its choosing.

However, it was necessary to take into consideration the fact that the opposition parties might have an interest in defining a bill as constitutional if this would delay

it or use up government time (e.g. by requiring the bill to be taken on the floor of the House of Commons).

### **What was the most appropriate relationship between Parliament and the executive in relation to constitutional reform?**

The question of the extent to which Parliament should simply accept legislative proposals from the government was an important one. It was not satisfactory for the government to decide changes to the constitution on their own.

The reality was that the government had the power to do a great deal because they had a majority in the Commons. This tended to be a particular problem at the beginning of an incoming government's term which was when process issues were more likely to be overlooked. Parliament might scrutinise bills, but the government could ignore Parliament if they chose to do so. Whatever the constraints on government, ultimately the government would get their own way. Furthermore, governments were likely to be most insistent when the political stakes were highest which might well be the case when constitutional propriety was being tested.

It was, however, also argued that the constitution belonged to the people and not to any political party—this highlighted the need for consensus.

There was a problem with the level of ignorance within governments (particularly new governments) and the senior Civil Service of the way in which Parliament worked. For example the draft Cabinet Manual had not mentioned the work of a number of parliamentary committees, nor had it referred to the implications for parliamentary scrutiny of the use of Henry VIII clauses.

A few participants noted that MPs and Peers continued to vote with the Government following the formation of the coalition in 2010 in order to ensure the Government's survival. Furthermore, the point was made that MPs and Peers who were actually opposed to legislation (or some key aspects of it) nonetheless voted for it—thus exhibiting the power of the whips / party ties / tribalism etc., even when there were serious concerns about the legislation in question. This need to support the government created a difficulty for the process of parliamentary scrutiny. Was this a greater problem when governments were proposing to reform the constitution? Objective criteria to determine what constituted a constitutional matter could make it easier for Members to vote against the government if the government were trying to reform the constitution without having followed a proper process.

### **What should be the role of the House of Lords?**

The participants stressed the importance of the role of the House. Business managers in the House of Commons decided whether a bill was of first class constitutional importance and their decisions were influenced by the desire to not have too many bills taken on the floor of the House. The House of Lords had a separate role to the House of Commons as a result of its composition, its expertise and the lack of a government majority. The House of Lords was of fundamental importance as a constitutional longstop.

How far could the Lords actually go? It was argued that the Lords might ask for change, but that it was not for the Lords to throw a bill out. Whilst the House of Lords remained unelected, the Commons had to get its way in the end. Participants noted the reluctance of some Peers to vote directly against the Parliamentary Voting System and Constituencies Bill (along with other recent

constitutional bills), even though voting against bills was potentially the most effective sanction against constitutional impropriety.

### **What should be the role of the Constitution Committee?**

The participants stressed the importance of the role of the Committee. The Committee was an important player in deciding whether a bill was constitutional and was therefore able to signal whether it should be subjected to a particular process. However, the Committee could not operate on a bicameral basis and was not therefore a substitute for a bicameral Legislative Standards Committee.

### **What was the most appropriate role for the judiciary in the process (if any)?**

Some participants were sceptical about the judiciary having a role in the process of constitutional reform. Set rules which would require constitutional legislation to be treated differently would increase their role and the risk of judicial review of the reform process needed to be borne in mind.

### **How best might, or should, the public be involved in the process?**

Was there a problem of a democratic deficit with regard to constitutional reform?

The participants were generally agreed that referendums were not appropriate for every aspect of constitutional reform. It was noted that polling on the then forthcoming AV referendum demonstrated a low level of knowledge and understanding of the issues.

One participant noted that public consultations with which he had been involved had demonstrated a lack of public understanding of, or any real interest in, many constitutional issues. The public tended to be uninterested in the process: their interest lay in the outcome (and individuals cared more about proposals which directly affected them).

It was noted that the ideas of the Power Commission on citizens' juries had not been enthusiastically received. It was further argued that, whilst the former Prime Minister Gordon Brown had been interested in citizens' juries and largely persuaded by the arguments of the Power Commission, both Power and Brown had underestimated the fact that citizens' juries came in different shapes and sizes and that there was no quality threshold in terms of time spent on an issue etc.

The Danish Board of Technology was cited as a good case study of public engagement. This had used a range of consultative measures and Danish parliamentary committees had employed them to undertake consultation on technical issues such as genetically modified food. They had spent three or four days with between 60 and 200 people, and a more informed series of papers and findings had emerged. It was argued that this was more effective as a public consultation tool.

### **What was the appropriate role for experts in the process?**

“Public” involvement could take place at an elite level—this was typically seen in the limited but expert responses to most government consultations, many of which came from the “usual suspects”. Experts provided an intermediate level of public involvement between Parliament/government and the general public. The public might be represented by bodies such as trade unions and campaign groups.

A good example of expert involvement was the Scottish Constitutional Convention which had been initiated by the Campaign for a Scottish Parliament and which had involved political parties, local authorities, trade unions and civil society. This had led to sound proposals for a Scottish Parliament. It was argued that Wales had suffered from the lack of an equivalent convention.

The importance of thinktanks was also stressed—such bodies had increased significantly over the last 30 years. There were now far more people in thinktanks doing serious work on constitutional issues than had been the case previously and they now had much more influence.

How had the constitutional reform process worked in practice in recent years?

The discussion brought out four different periods of constitutional reform with different characteristics: 1997–99 was characterised by radical change accompanied by consultation and due process; 1999–2007 by rushed and ill-thought out changes; 2007–2010 by endless consultation with not much to show for it; and the period from May 2010 by radical reform with insufficient consultation.

The post-1997 reforms had been preceded by the Cook-Maclennan Agreement. This process had produced some excellent constitutional reforms, such as on devolution and human rights. Sections of this agreement had been a great success because the negotiations had combined two parties with academic expertise. However, it was not always possible for a government programme to be prepared in advance in this way.

The Constitution Unit had fed into that process, producing detailed reports on devolution, human rights etc—this had all helped the process.

Finally, most of the post-1997 reforms had been accompanied by green and/or white papers and, in the case of devolution, referendums, all of which had helped to build a consensus in favour of reform.

In relation to each of the post-1997 reform strands—human rights, devolution, Lords reform, freedom of information etc—a Cabinet committee of senior ministers had examined all the issues thoroughly. For example, in the case of devolution for Scotland there had been 14 two-hour committee meetings examining the detail. This committee system had fallen into abeyance following this initial period and business had started to be transacted by correspondence.

It was agreed that the 1997–1999 period had been relatively successful. A number of the constitutional reforms brought about during that period would now be difficult to reverse: the package of reform had been largely accepted.

In contrast, it was agreed that the process of reform post-1999 had been poor, though it was not clear whether this was because the process had broken down *per se* or whether it was simply a case of politics getting in the way.

Since May 2010 the reform process had been greatly affected by the Coalition agreement which appeared to be regarded within Government as binding, thus reducing opportunities for parliamentary scrutiny and legislative amendment. The agreement had been produced in just five days (considered by some participants to be too short a time to finalise constitutional proposals) and no outside expertise had been brought in. There had been no preparation in 2010, but the reforms proposed in the agreement had become incredibly important to the internal dynamics of the Coalition.

Lords reform was cited as an example of ongoing consultation and discussion which had so far not led to very much (beyond the House of Lords Act 1999). The process at the time of the seminar, involving discussions in a cross-party committee and the expected publication of a draft bill subject to pre-legislative scrutiny, was comprehensive but there remained uncertainty as to what would come of it.

## **APPENDIX 5: CONSTITUTION COMMITTEE REPORTS ON PROCESS**

### **Reports concerning process issues in general**

- 1st Report (2001–02), *Reviewing the Constitution: Terms of Reference and Method of Working*;
- 4th Report (2001–02), *Changing the Constitution: the Process of Constitutional Change*;
- 14th Report (2003–04), *Parliament and the Legislative Process*;
- 15th Report (2008–09), *Fast-track Legislation: Constitutional Implications and Safeguards*;
- 12th Report (2009–10), *Referendums in the United Kingdom*.

(See also the Committee's annual reports and reports on pre-legislative scrutiny in each previous session.)

### **Bill scrutiny reports drawing attention to specific process concerns**

#### *The need for awareness of the knock-on effects of any proposal*

- 1th Report (2005–06), *Legislative and Regulatory Reform Bill*;
- 17th Report (2008–09), *Parliamentary Standards Bill*;
- 7th Report (2010–11), *Parliamentary Voting System and Constituencies Bill*;
- 8th Report (2010–11), *Fixed-term Parliaments Bill*.

#### *The value of public consultation and engagement*

- 11th Report (2005–06), *Legislative and Regulatory Reform Bill*;
- 17th Report (2008–09), *Parliamentary Standards Bill*;
- 7th Report (2010–11), *Parliamentary Voting System and Constituencies Bill*;
- 8th Report (2010–11), *Fixed-term Parliaments Bill*.

#### *The need for consultation with affected groups*

- 16th Report (2008–09), *Policing and Crime Bill*;
- 7th Report (2010–11), *Parliamentary Voting System and Constituencies Bill*.

#### *The role of referendums in the constitutional reform process*

- 8th Report (2005–06), *Government of Wales Bill*;
- 13th Report (2010–11), *European Union Bill*.

#### *The importance of draft bills and pre-legislative scrutiny*

- 11th Report (2005–06), *Legislative and Regulatory Reform Bill*;

- 6th Report (2008–09), Northern Ireland Bill;
- 7th Report (2009–10), Clause 12 of the Bribery Bill: Further Report;
- 7th Report (2010–11), Parliamentary Voting System and Constituencies Bill;
- 8th Report (2010–11), Fixed-term Parliaments Bill.

*The undesirability of omnibus bills*

- 2nd Report (2001–02), Anti-terrorism, Crime and Security Bill;
- 3rd Report (2004–05), Serious Organised Crime and Policing Bill;
- 9th Report (2008–09), Welfare Reform Bill;
- 13th Report (2008–09), The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers);
- 7th Report (2010–11), Parliamentary Voting System and Constituencies Bill.

*The importance of effective parliamentary scrutiny*

- 10th Report (2003–04), Age-Related Payments Bill;
- 11th Report (2005–06), Legislative and Regulatory Reform Bill;
- 6th Report (2007–08), European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution;
- 3rd Report (2008–09), Banking Bill;
- 17th Report (2008–09), Parliamentary Standards Bill;
- 11th Report (2009–10), Constitutional Reform and Governance Bill;
- 6th Report (2010–11), Public Bodies Bill [HL].

*Problems with government responses to Committee reports*

- 7th Report (2009–10), Clause 12 of the Bribery Bill: Further Report.