



**Bar Council response to the House of Lords Constitution Committee Inquiry:
The Legislative Process Call for Evidence
(Stage 1: Preparing legislation for introduction in Parliament)**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Constitution Committee Inquiry: The Legislative Process Call for Evidence.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council considers that in the case of government led bills there are opportunities for improving the legislative process's ability to produce "good law", particularly by encouraging or enabling the Government to bring forward legislation that restates the law without re-opening existing components of it. It also believes that there is room to improve public participation at the early stages of the legislative process, particularly by seeking direct online comments on legislation and by increasing the use of Joint Committees and Public Bill Committees for pre-legislative scrutiny.

¹ Constitution Committee Inquiry: [The Legislative Process Call for Evidence](#) 2016

Creating good law

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

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

5. There is a great deal of variation in whether good law is delivered by current practices and it is not possible to generalise. Even where amending legislation makes the law more effective, it might at the same time make the law less coherent or less accessible.

Question 2 – Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

6. Many aspects of the political process militate against the consistent creation of good law. These include: the need to prioritise the scarce use of Parliamentary time, a desire to be responsive to trends and public opinion and the deterrent effects of the risks in legislating, such as negative comment on proposals or pressure to accept unwelcome amendments. Against this political backdrop it is inevitable that some legislation will fail to meet one or more of the Office for Parliamentary Counsel’s description of good law.

Question 3 – Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

7. On the whole, legislation introduced into Parliament is well drafted. It is more open to question whether the policies described in the legislation are sound, and the Bar Council would encourage the consistent and widespread use of pre-introduction consultation and pre-legislative scrutiny to allow full scrutiny of the policies and legislation when a Bill is formally introduced, particularly where this reaches expert users of the legislation. Pre-legislative scrutiny is particularly effective where it is undertaken by Joint Committees, which leads to greater consistency of scrutiny during the passage of a Bill.

8. The Bar Council is aware that a particular barrier to the creation of good law is that the parliamentary processes encourage government departments to amend or supplement existing bodies of law, often making those bodies of law ever more complex and less clear and accessible. The Bar Council understands that this is because departments are unwilling to risk restating areas of law for fear that old battles will be reopened at a cost to certainty for people and businesses. If a parliamentary mechanism could be designed which would allow a greater use of restatement without those risks, better law might result. One approach to this might be

a system where some aspects of a Bill which represent existing law are not open to amendment, which might encourage departments to be bolder in proposing coherent restatements of the law.

Brexit

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

Question 4 – What impact will the UK's withdrawal from the EU have on the volume and type of legislation and how will that affect this stage of the legislative process?

9. The impact of the UK's withdrawal from the EU on the volume of legislation will be heavily dependent on the speed with which the Government acts to change the law. Following the announcement that most of the law emanating from the EU will be preserved, at least initially, it is difficult to provide any estimates of the volume or type of legislation that might come forward.

Question 5 – Will there be changes required to how the Government and Parliament deal with legislation following Brexit?

10. At present, while some Directives are implemented by means of primary legislation enacted following the usual full Parliamentary procedure, the majority are implemented by means of subordinate legislation made under section 2(2) of the European Communities Act (ECA) 1972. Such legislation may amend or repeal primary legislation. The generous scope of that power was affirmed by the Divisional Court in the "metric martyrs" case, *Thoburn v. Sunderland City Council* [2002] QB 151 <http://www.bailii.org/ew/cases/EWHC/Admin/2002/195.html>. Even where the affirmative resolution procedure is adopted for an ECA instrument, the opportunity for meaningful public and Parliamentary debate on the terms of each instrument is extremely restricted.

11. However, the abbreviated process derives its legitimacy from the fact that each Directive will itself have been the subject of the elaborate legislative process at EU level. That process invariably involves two or more rounds of public consultation by the Commission before a proposal is formally put to the bipartite EU legislature (the Council and Parliament); detailed scrutiny and amendment by the Parliament (acting through its appropriate Committee and in plenary session); and, more often than not, a degree of scrutiny by national legislatures (in this respect the work of the Lords EU Select Committee and its Sub-Committees set a high standard among the Member States). At each stage, stakeholder and public involvement helps shape the legislation as it makes its journey towards adoption.

12. It would be a matter of great constitutional concern if the “Great Repeal Bill” mooted by the Government were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s. 2(2) instruments. Such a process would bring about a significant democratic deficit which would undermine the legitimacy of resulting legislation. It is one thing to use a subordinate instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees. Indeed our own Supreme Court has already affirmed that the ECA 1972 power is confined to transposing into the content of EU legislation into domestic law. Government may not lawfully use it to “piggy back” different or additional content of its own (sometimes known as “gold plating”) onto the implementation exercise: see *United States of America v. Nolan* [2015] UKSC 63, [2016] AC 463 <http://www.bailii.org/uk/cases/UKSC/2015/63.html>.

13. We would invite the Committee to draw to the attention of the Government the importance, following Brexit, of a legislative process involving sufficient public and Parliamentary scrutiny of any future proposal to alter the content of law deriving from an EU instrument otherwise than through full primary legislation.

Technology

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

Question 6 – How effectively do Parliament and the Government make use of technology at this stage of the legislative process?

14. Very little use is made of technology other than to publish the legislation and the accompanying paperwork. Further comment is provided in response to question 10.

Question 7 – How could new or existing technologies be used to support the development and scrutiny of legislation?

15. See the response to question 10.

Public involvement and engagement

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

Question 8 – To what extent, and how effectively, are the public and stakeholders involved in this stage of the legislative process?

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

Question 9 – What factors inhibit effective engagement?

17. At the moment it is often only effective to express views on legislation by using traditional political lobbying techniques, which is labour intensive and requires strong networks. Most experts, end users and others interested in new legislation are effectively excluded from the legislative process.

Question 10 – What mechanisms could be used to increase or improve engagement with the public and stakeholders?

18. Considerable progress has been made in making information about Bill procedures and Bill papers available to the public. The Bill pages on Parliament website provide reliable access to the paperwork but could be improved. The new form of Explanatory Notes has improved the accessibility of Bills, although performance by government departments remains patchy.

19. Nevertheless, there is room for further improvements in participation by interested parties and the public in the process, many of which are enabled by the internet.

20. At the moment it is often only possible to express views on legislation by using traditional political lobbying techniques, which is labour intensive and requires strong networks. Most experts, end users and others interested in new legislation are effectively excluded from the legislative process. It would be possible for one or other House of Parliament to host an internet-based form for collecting a wider range of comments on the provisions. This need not disrupt the timing of procedures because the comment window could be limited to the period between Introduction and Second Reading of the Bill. A modern system could simply be accessed by MPs or Peers, or committees, interested in seeing the comments for use during the scrutiny process.

21. Although the OPSI has made progress with its consolidation work on UK legislation available through the legislation.gov.uk site, legislators and future users of legislation would

probably find it helpful if OPSI or Parliament could extend this work by routinely publishing consolidated papers showing how the provisions of Bills would affect the body of UK law by publishing copies of the law as it would be after the changes proposed in the Bill come into force.

22. We believe that consideration should be given by the House authorities to making increased use of Public Bill Committees (previously known as Standing Committees) to allow the gathering of evidence from interested parties. This has the advantage of both informing parliamentarians and engaging the public and stakeholders.

Information provision

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

Question 11 – How effectively is information about potential legislation disseminated at this stage in the process?

23. Please see our comments on the Parliament website in response to question 10.

Question 12 – How useful is the information that is disseminated and how could it be improved?

24. No comment

Parliamentary involvement

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

Question 13 – To what extent is Parliament, or are parliamentarians, involved in the development of legislation before it is introduced into Parliament?

25. Parliamentarians will be involved in debates on public policy issues that may lead to legislation.

Question 14 – Is there scope for Parliament or parliamentarians to be more involved at this stage of the legislation process?

26. No comment

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