The Government Response to the House of Lords Constitution Committee Report 'The Process of Constitutional Change'

Presented to Parliament
by the Deputy Prime Minister
by Command of Her Majesty

September 2011

Cm 8181 £6.00

This publication is available for download at www.official-documents.gov.uk

ISBN: 9780101818124

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P002454493 09/11

Printed on paper containing 75% recycled fibre content minimum.

Introduction

1. **This Command Paper provides the Government's response to the House of Lords Constitution Committee's report of their inquiry into 'The Process of Constitutional Change'. The Government is grateful to the Committee for its report, which raises a number of important issues. This response deals with the Committee's recommendations under the four sections set out in the report itself:**

    - **Introduction;**
    - **The current practice of constitutional change;**
    - **The Committee's recommended process for constitutional change; and**
    - **The role of the Constitution Committee.**

2. The Committee recommends that '**a clear and consistent process should apply to all significant constitutional change**'. The Government agrees that it is important that the process leading to constitutional change should be clear, and consistent with what is appropriate practice for all bills. It is important that such change should be thought through and its impact on the existing arrangements analysed, as the Committee recommends in paragraph 29. However, in this respect, constitutional change is no different from any other public policy. All policy development, whether or not leading to legislation, should go through a process of rigorous analysis. The Government notes that the Committee does not offer a definition of 'constitutional'. The Government sees this as a significant problem in introducing a special process for 'constitutional' legislation. There is a further difficulty in that the origins of 'constitutional' legislation may vary greatly.

3. For example, a proposal may have been included as a direct manifesto commitment on which a new Government was elected. By contrast, something like the response to the parliamentary expenses scandal needed to be done quickly. There would have been no public understanding if the then Government had suggested that it needed to do two years research and public consultation before deciding what to do about the MPs' expenses regime. Not all constitutional change is discretionary; some is driven, as in all policy areas, by events.

The current practice of constitutional change

4. The Committee suggests that although Governments should continue to have the right to initiate constitutional change, this needs to be **tempered by a realisation that constitutional legislation is qualitatively different from other legislation** (paragraph 26). The Government does not accept this. Constitutional legislation, like all legislation, varies in its importance, complexity and impact. It is recognised practice for government bills of '**first-class'** constitutional importance to be committed to a Committee of the Whole House in the House of Commons.[1] Not all Bills that might be deemed constitutional go through that Committee process. In terms of scale of social impact and effect on daily lives, other policy changes can be as significant as constitutional change, sometimes more so, and will be of more significant concern to the general public.

5. The Committee recommends in paragraph 34 that the Cabinet Manual should include the requirements for dealing with constitutional change. The Government will separately respond to the three Select Committee reports on the draft Cabinet Manual. Here it is appropriate to make two points. First, the manual is intended to record the existing position rather than to effect change – if a clearly defined process for constitutional reform is agreed it would be

[1] *Erskine May (24th edition) p. 555*

included in the manual, but it should not set out new requirements in the absence of a consensus. Secondly, the draft manual does already include a number of points that are relevant to the Committee's report, including general guidance on the importance of well-prepared legislation and the fact that issues of a constitutional nature would normally be considered by Cabinet.

6. Paragraph 40 of the Committee's report suggests that 'the desire to act quickly as a new Government is no justification for **bypassing a proper constitutional process**'. The Government agrees. But the proper constitutional process is the legislative process. Anything else which may precede or follow the enactment of the legislation may be desirable, but its absence cannot be taken as a failure to follow a proper process. In both the pieces of constitutional legislation introduced by the Government early in the first session, there was a genuine need for early action. A referendum on the voting system had to be held in time to allow for a new electoral system to be introduced for the next elections in 2015, if the public had voted for it. And if you are going to move to fixed-term parliaments, the time to do so is at the beginning of the Parliament so that the discipline applies to the Parliament and the Government which introduce the change.

7. The Committee recommends that there should be a **significant period of public debate** to inform the process by which the UK moves from one constitutional arrangement to another. The Government accepts that it is desirable, where at all possible, to provide for pre-legislative scrutiny and has a good record this session in the number of bills published for such scrutiny. But, as noted before, it does not see this as unique to constitutional change. It also notes that it can be challenging to generate public interest in constitutional change. Change to the NHS, or to pensions, or to the wider benefit system, will be of far more interest to the majority of people because it will directly affect them. The Government also notes that at paragraph 80, the Committee says that although public engagement during the policy-making process is a desirable element of the constitutional change process **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. The Government agrees with this assessment.

The Committee's recommended process for constitutional change

8. Paragraph 67 of the report suggests 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'.** It is a matter for Parliament to consider how it conducts scrutiny of proposed constitutional change. The Government, for its part, considers that the scrutiny of all proposed legislation is important.

9. The core of the Committee's recommendation is set out in paragraph 72, where they recommend that any constitutional Bill should be accompanied, **on introduction into each House**, by a statement setting out:

    a. **whether, in each minister's view, the bill provides for significant constitutional change and, if so:**
    b. **what is the impact of the proposals upon the existing constitutional arrangements;**
    c. **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;**
    d. **in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;**
    e. **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;

f. **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;**
g. **what is the justification for any referendum held, or to be held, on the proposals; and**
h. **when and how the legislation, if passed, will be subject to post-legislative scrutiny.**

10. The Government will consider whether to accept the principle of this recommendation together with the similar recommendation made by the Leader of the House of Lords' Group on working practices and wider proposals for further reform of working practices in the House of Commons. The Committee has recommended that the statement should be included in the Explanatory Notes to the Bill. Much of this information, and that suggested for inclusion by the Leader's Group, is in fact already available in the Explanatory Notes which accompany each Bill. For example, it is standard practice for the Explanatory Notes to refer to any consultation documents which the Government has issued. It is also standard practice for the Government to publish the response to any consultation, whether in a White Paper accompanying a Bill or as a separate document, and to make reference in the Explanatory Notes to where that response can be found. Explanatory Notes also routinely explain what the impact of the proposed legislation on existing arrangements will be, and where it is possible to access a wider assessment of the economic impact, the impact on the third sector and business, and the disability and equality impact assessments.

11. There are a number of aspects which the Government believes would require further consideration or where the Government does not agree with the Committee's approach.

12. First, the Government does not agree that it is necessary to limit this approach simply to constitutional Bills. If a written statement setting out the process of consultation and scrutiny has value, then it could be produced for any legislation when it is introduced.

13. Secondly, the Government does not think it is appropriate for any such statement to go into details about the internal Government deliberations, including the Cabinet Committee processes, which have led to the development of the Bill. The Government notes that paragraph 2.3 of the Ministerial Code states that the internal process through which a decision is made or the level of committee by which it was taken should not be disclosed. A Bill when it is published is the collectively agreed view of the whole Government on how it wishes to proceed. The process by which it has arrived at that view is a matter for the Government, not for Parliament.

14. Thirdly, and conversely, the Government does not believe it would be appropriate for it to set out how it expects post-legislative scrutiny to be carried out, as recommended in paragraph 104. Post-legislative scrutiny is a matter for Parliament. The Government already publishes a Memorandum for submission to the relevant Commons departmental select committee on the impact of all legislation within three to five years of it being enacted. It is for those Committees to decide whether to pursue scrutiny of each Act. It is also open to the House of Lords to arrange for post-legislative scrutiny of particular Acts.

15. The Committee has recommended that the statement should be made in each House at the time of its introduction. As noted above, much of the material suggested for inclusion in the statement is already included in the Explanatory Notes to the Bill which are updated when the Bill moves to the second House.

16. The Government notes, and agrees with, the recommendation in paragraph 80 that there is no one model which should be adopted for all proposed changes. The Committee makes this comment particularly in relation to public

engagement at the policy development stage. The Government believes it is equally valid at the other proposed stages of the process. It does not accept, therefore, that there will always be a need for both a Green and a White Paper to be published. As noted above, where the Government has undertaken any consultation about a policy proposal, it is already standard practice to publish the results of the consultation and to indicate where it has had an impact on the final policy proposals.

17. On the question of internal government deliberation, which the Committee addresses in its recommendation in paragraph 85, we agree that the role of the Cabinet committee system is important in ensuring collective ministerial responsibility for proposed constitutional reform. This applies across all government proposals and not only for those seeking constitutional change. As noted above, the process by which such agreements are reached is a matter for the Government, not for Parliament.

18. The Committee recommends in paragraph 90 that **the Government should in all cases publish a Green Paper about any significant constitutional proposals**. As noted above, the Government does not accept this recommendation. It also notes that it seems somewhat at odds with the recommendation in paragraph 80 that there is no one model which would fit all circumstances. The Government also does not agree with the Committee that it is peculiar to constitutional change **that its impact will outlast whichever government initiated it.** As noted above, the same could be said about many other changes. In fact, all Governments will hope that their policy initiatives will outlast them. The Government however does agree about the importance of consulting all those who will be directly affected by proposed changes. This may include, as the Committee suggests, the devolved institutions, but the government notes that the constitution is a reserved matter in all three settlements. The list of those affected by a proposal may also include a large range of other bodies, such as local authorities, the Law Commission, and the

judiciary, as well as the business sector, the voluntary sector and the general public.

19. The Committee recommends that significant constitutional legislation should be subject to pre-legislative scrutiny and **if the government does not publish a bill in draft, each minister should formally explain and justify that approach to Parliament in their written statement**. The Government has made clear its intention to publish more bills in draft for pre-legislative scrutiny, as it considers this improves the process of scrutiny and leads to better drafted legislation. The Government's commitment to increase pre-legislative scrutiny goes beyond constitutional bills to other types of government legislation. The fact that a bill could be considered constitutional in nature does not of itself mean it should be a priority for pre-legislative scrutiny. In the current session, the Government has published the draft House of Lords Reform Bill for pre-legislative scrutiny and also its proposals on individual electoral registration. These examples show that there are instances where sufficient opportunity for pre-legislative scrutiny can be built into the timetable for implementing reform. There will on occasion be justifiable reasons why other constitutional bills need to reach the statute book sooner than the undertaking of full pre-legislative scrutiny would allow; for example the need to implement boundary changes in advance of 2015.

20. The Government agrees with the Committee in their comment in paragraph 99 that it is **impossible to provide a watertight definition of significant constitutional legislation.** It is one of the reasons why the Government is reluctant to see special processes for handling such legislation. The Government therefore supports the Committee's recommendation that **there should be no new parliamentary procedures such as super-majorities** to apply to constitutional Bills.

21. The Government notes the Committee's recommendation in paragraph 99 that **the government should not seek to pass significant constitutional legislation during the wash-up.** If the Government's Fixed-term Parliaments Bill is enacted, the nature of the end of a Parliament will change. It is too early to say with certainty what the new dynamic will be, but it may be possible to avoid the wash-up inevitable when an unexpected General Election is called. The Government otherwise suggests that procedure for the wash-up should remain informal and subject to negotiation between the principal political parties and votes in the two Houses.

22. The Committee proposes that **comprehensive post-legislative scrutiny should be a requirement for all significant constitutional legislation**. As noted above, the Government does not believe it would be appropriate for it to set out how it expects post-legislative scrutiny to be carried out. Post-legislative scrutiny is a matter for the two Houses and the Government has agreed to publish a Memorandum for submission to the relevant Commons departmental select committee on the impact of all legislation within three to five years of it being enacted. It is for Parliament to decide what it wishes to do with that information and whether it proposes to conduct post-legislative scrutiny of constitutional legislation.

The role of the Constitution Committee

23. The Government notes the Committee's recommendation in paragraph 109 that **when introducing a bill providing for significant constitutional change into the House of Lords there should be a minimum of three weekends between first and second reading**. The recommended "minimum intervals" between stages is a matter for the House. The Government disagrees with the Committee that the constitutional nature of a bill should be the factor which determines the pace and nature of scrutiny. Scrutiny needs to be proportionate to the complexity of the measure proposed. The Government

considers that the existing recommended minimum intervals are appropriate to all bills.

24. The Committee recommends, in paragraph 114, that **the response time for Government responses to bill scrutiny reports should be shortened from the present two months, so that a response to a report published before second reading is available by the beginning of Committee stage.** The Government does not agree that there should be any formal change to the present arrangements, although it accepts the importance of its response being available to the House before it has concluded its deliberations on the Bill. But although, as the Committee says, many of the points which the Committee has made may be issues which the Government has considered in preparing its own proposals, this does not obviate the need for proper, collective, consideration of the recommendations, particularly if there is any question of proposing changes to the policy as a result. The Committee has itself drawn attention to the importance of proper Cabinet consideration of constitutional proposals. The Government's view is that this applies as much to the consideration of responses to select committee reports as to other aspects of the policy development.

Conclusion

25. The Government is grateful to the Committee for its report. It agrees with the Committee on the importance of preparing constitutional legislation properly, including where appropriate having public consultation and pre-legislative scrutiny. But as the Deputy Prime Minister said in evidence to the Committee, and as quoted in paragraph 54, the Government believes that there should be an emphasis in <u>everything</u> it is doing 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'.

26. The Deputy Prime Minister also said, as quoted in paragraph 64, 'We...know what works best when dealing with any area of public policy that is controversial, fundamental and an issue of considerable public concern....The building blocks of that are proper, deliberative, collective discussion, first within government, public engagement and consultation where appropriate and possible, proper pre-legislative scrutiny in [Parliament], and proper legislative scrutiny of the bills that come forward.'

27. It is intrinsic in the United Kingdom's constitutional arrangements that we do not have special procedures for dealing with constitutional reform. Comparing processes in the United Kingdom with those in other countries which do have written constitutions and special procedures for reform of those constitutions is therefore of limited value. The first stumbling point, as the Committee has itself noted, is the problem of the definition of what should be subject to special treatment. It is for this reason that the Government continues to believe that special procedures are inappropriate. Best practice in developing policy, legislating for change and evaluating the impact of that change should of course apply to constitutional proposals. But it should apply to other proposals as well, particularly those which will have a significant impact on the lives of individuals for generations to come. The Government accepts the spirit of the Committee's core recommendation that it can do more to explain to MPs and Lords the process, including its consideration of public views, by which it has arrived at its conclusions when presenting constitutional legislation. But it does not wish to limit itself to providing information of how its conclusions were reached for constitutional issues only.

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Parliamentary Bookshop
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

TSO@Blackwell and other Accredited Agents

ISBN 978-0-10-181812-4