

# Speaker's Commission on Digital Democracy



## Response to calls for evidence

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### About CfPS

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The Centre for Public Scrutiny is a charity whose principal focus is on scrutiny, accountability and good governance, both in the public sector and amongst those people and organisations who deliver publicly-funded services.

We believe that accountability, transparency and involvement should be the foundations of planning and delivering public services.

Effective scrutiny and accountability can hold services to account and create opportunities for communities and decision-makers to improve the quality of services by producing solutions to problems together.

The Centre supports individuals, organisations and communities by sharing research and analysis of current and developing best practice through publications, consultancy and events. We also create and support networks and on-line forums. The bulk of our work focuses on local government and the wider localism agenda, but we also work extensively with and for health and social care bodies, and others such as police, park and fire authorities, housing associations and other housing management organisations, universities, regulators, Parliament and select committees and government departments.

The Centre for Public Scrutiny is an independent charity (charity number 1136243) and company limited by guarantee (company number 5133443), governed by a Board of Trustees and supported by an Advisory Board. There are three Trustees from our founder members (LGA, CIPFA and LGiU) and six independent Trustees, including the Chair, the Rt Hon Nick Raynsford MP.

We have not sought to answer every question posed by the Commission in our response.

### Making laws

**Could technology improve the access to and usability of both legislation and the law-making process for citizen, representatives and professionals?**

Access to and usability of legislation

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Legislation can currently be accessed online through [legislation.gov.uk](http://legislation.gov.uk). However, that website makes little use of hyperlinks, and amendments to historic legislation by more recent statute are not consistently recorded. Similarly, links between primary and secondary legislation are often not noted – a particular issue of concern, considering the broad regulatory powers granted to Secretaries of State in recent legislation (for example, in the Localism Act). A better use of hyperlinking, to identify the connections between historic and current legislation, and primary and secondary statute (along with statutory guidance) would help.

### The law-making process

Law-making is a process which begins with the development of policy ideas by the executive, and ends with their implementation. Parliament's role in the development of policy is therefore a critical one, but not the only part of the story. Arguably, there should be more innovation in and consistency in the way that Government consults on Green and White Papers, more use by Government of Command Papers to set out and develop policy options, and more effective pre-scrutiny by Parliament of policy ideas before they are formally introduced as Bills. Technology provides a means to carry out that scrutiny more effectively – possibly integrated with the Public Reading Stage (see below). While we would not go so far as to suggest that legislation should be crowd-sourced, there are opportunities arising from new technology which could lead to a form of co-production being used. For example, moving away from the traditional consultation model for Green Papers, Government could set out the terms, and key issues, on which it planned to legislate, inviting comments and ideas which would then be gradually refined – based on further public dialogue – as the time to introduce a Bill in Parliament approached.

### **Should you need to be a lawyer to understand and use an Act?**

Inherent in Acts of Parliament is the concept of legal certainty. Certain words must be clearly defined and sometimes these definitions may not be wholly shared with the “ordinary” definitions of such words – for example, the meaning of the word “reasonable” has been subject to significant litigation in public law which has resulted in its definition arguably being different to that which it might have in ordinary speech. This does produce difficulties for the casual reader, but is critical for the lawyer and for the sake of legal certainty. A way around this might be to make more effective use of the explanatory notes that accompany all legislation. If presented alongside the legislation (rather than as an appendix or endnote) it would serve two positive purposes – firstly, to make more obvious and public Government's legislative intent, and thus making that intent better subject to Parliamentary scrutiny, and in making it clearer to non-professionals what particular parts of legislation “do”. We have found that some explanatory notes – particularly those relating to secondary legislation – can be of poor quality.

We do not consider that further use of explanatory notes will harm the primacy of the words used on the face of the Act. Usually those words will be sufficiently legally distinct to avoid confusion and in any case, case law since Pepper v Hart provides a framework (albeit a

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narrow one) to adduce evidence in court of Parliamentary intention where doubt exists, a principle that could be seen to extending to explanatory notes.

**Could technology be used to integrate citizens' views better into the legislative process? At what stage of the legislative process would this work best? How could the Public Reading Stage be improved?**

In a sense, by the time a Bill is introduced on the floor of either House it is too late to make fundamental amendments.

Such amendments tend to be the result of political compromise, by which strongly-held public opinion may often be fed through political representatives, but which is not often caused by widespread public opposition. In recent years, there are a handful of examples of this having happened – the introduction of Police and Crime Panels to hold Police and Crime Commissioners to account during the Lords stages of the Police Reform and Social Responsibility Bill, and the withdrawal of the Health and Social Care Bill prior to its reintroduction later in the 2010-12 Parliamentary session being two of the more notable examples.

Research has shown that it is unusual for amendments to be made to Bills as the result of a division.

As such we would suggest a bolstering of the process by which Government policy is developed into Bill form – either through Parliamentary oversight of the Green and White Paper process, and/or seeking to involve citizens earlier.

Green and White Papers

Parliamentary oversight of the Green and White Paper process would lead to a number of positive outcomes:

- Consistency in the level of detail provided in those papers, and in the expectations of the public of how any public responses to those papers will be dealt with, possibly through Parliament agreeing a set format or protocol for these papers in future. This could be defined by the Speaker's Committee, by the Liaison Committee or through some other means;
- A clear understanding / undertaking that responses received further to a Green or White Paper will be themselves responded to transparently, and reflected in subsequent Government publications presented as Command Papers;
- A mechanism by which Parliament can hold Government to account in Parliament, on the extent to which the Bill, once presented, gives effect to the aspirations set out in the initial

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Green and White Paper. This is currently possible but tends not to be the focus of Parliamentary debate, which inevitably focuses on the face of the Bill.

Green and White Papers' status as Command Papers, formally presented to Parliament, affords the opportunity for Parliament to seek to advise Government on the format and style to which it expects those papers to conform.

### Involving citizens earlier

The Public Reading Stage has been piloted with both Government and Parliamentary control; a Scrutiny Unit study concluded that the pilot had been successful. However, success does depend on the nature of the Bill and the extent to which effective pre-legislative scrutiny has been carried out on it (for example, see the Children and Families Bill, where there was no substantive change to the Bill notwithstanding the submission of a sizeable number of public comments). It seems likely that the earlier in the process the public's views are solicited, the more likely that change will result. See below for our views on how to enhance pre-legislative scrutiny.

## **Digital scrutiny**

### **The role of technology in helping Parliament and other agencies to scrutinise the work of Government**

We have carried out research on transparency ("Your right to know" (2013), [http://www.cfps.org.uk/domains/cfps.org.uk/local/media/downloads/L13\\_72\\_CfPS\\_your\\_right\\_to\\_know\\_v4.pdf](http://www.cfps.org.uk/domains/cfps.org.uk/local/media/downloads/L13_72_CfPS_your_right_to_know_v4.pdf)), and how openness can contribute to better accountability ("Accountability works" (2010), <http://www.cfps.org.uk/publications?item=91&offset=75>). The most important point to note is that transparency does not, in and of itself, mean that decision-makers are more accountable. Where Government publishes more information about its work, there still need to be formal processes and systems to allow the public to use that information to hold Government to account.

In the UK we have generally maintained a traditional approach to the publication of official information and its use to hold services to account. In the main, Government publishes official information, through Command Papers and other publications, which do not make it easy for Parliament or other agencies to look behind those publications to the raw data underpinning them. Where raw data is provided it is often done so reactively, in response to Freedom of Information requests or answers to Parliamentary questions.

Technology could help to avoid the inherent cost and organisational implications of a more proactive approach to the publication of official information. Government could commit to making internal management information from Departments available to MPs to access as a matter of course, for example, negating the need for the periodic and unco-ordinated release of such information on an occasional basis as the result of Parliamentary questions. Real-time

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access to such information – already available to Ministers and senior civil servants – would help Parliament hold Government to account. There is naturally a sense of operational and political risk associated with this move, but where this information exists, and technology has made it easy to be made available to a wide range of policy-makers practically in real time, it is increasingly untenable to deny access to Parliament for the purpose of scrutiny. Whether it should be opened up to the wider public for the business of scrutiny is another point. There does need to be a “safe space” for policy formulation – there are some discussions that need to remain sacrosanct in the interest of the full and frank exchange of views. But there may also be a middle ground where certain more sensitive information can be made available to MPs, and Parliamentary staff, without being published more widely. However, while there is a precedent for this – for example, in how information from the security services is presented to MPs – its wider use around more general policy formulation would require careful thought.

We think that the process of pre-legislative scrutiny is one which could benefit from a stronger role for “digital scrutiny.” This could take place during the process of Parliamentary oversight of Green and White Papers which we have proposed above or through scrutiny of draft Bills, as has begun to happen in Parliament already to a limited degree. We believe that as a matter of course unless there is some overwhelming reason or urgency which make it impossible, all public Bills should be subject to pre-scrutiny, and there should be much stronger links between this process of scrutiny and the formal scrutiny of the actual Bill once presented to Parliament. As our Chair, Nick Raynsford MP, has long argued (see in particular the 2008 CfPS Annual Lecture, <http://cfps.org.uk/publications?item=194&offset=200>), there is too often a disconnect between the informed debate and gathering of evidence which is carried out by the committee considering a draft Bill and the more rigid, whipped and guillotined debates around formal amendments which take place on the actual published Bill during its formal Committee stage.

Technology – used for example to crowd-source evidence, to facilitate public contributions and evidence, to host on-line debates which could supplement debates in Committee, to make public the evidence being presented and seek further comments on its value and importance – could further enhance the process of pre-legislative scrutiny and open it up to more views and perspectives. There then need to be changes to the formal process of scrutiny by Public Bill Committees to ensure they are genuinely scrutinizing the substance of the Bill and considering if and to what extent it reflects the evidence gathered during the pre-scrutiny stage. Again, technology could make this more transparent to the public, enabling different versions of documents to be compared and changes to be tracked. The composition of Public Bill Committees may also need to be looked at, for example whether it is appropriate for the Minister responsible to be a member of the committee rather than appearing as a ‘witness’ to present the Bill and give evidence on its provisions, but this probably goes beyond the remit of this Commission.

Recent research by Democratic Audit (see <http://www.democraticaudit.com/?p=2278>) found that while select committees had greatly enhanced their capacity to scrutinize the executive over recent times, one area where they were falling down was in the major gender bias in their choice of witnesses – over 80% of ‘independent expert’ witnesses giving evidence to their inquiries were men, for example. It is vital for good policy-making that a wide variety of views and perspectives are heard as this leads to better decisions. This is sometimes described as cognitive diversity – being able to draw on views, perspectives, approaches, ways of thinking

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from people who come from a wide variety of backgrounds and approach problems in different ways, meaning you are more likely to come up collectively with the solution. Hélène Landemore, a political scientist from Yale University, argues in her book [Democratic Reason](http://press.princeton.edu/titles/9907.html) that a democracy will usually reason its way towards good decisions, not despite, but because of the fact that its citizens have very different levels of education and information. In her view, democracy is not just fairer than other systems of governance, but smarter, because it harnesses the power of cognitive diversity to scale. Digital democracy and digital scrutiny has the power to take this cognitive diversity to the next level and to ensure our parliamentary representatives – who are not themselves fully representative of our nation – are drawing on a much wider set of ideas and views in shaping, challenging and scrutinising public policy decisions.

### **The role of technology in helping citizens to scrutinise the Government and the work of Parliament**

Various projects undertaken by mySociety (see below) and other interested groups have sought to directly help citizens to scrutinise both Government and Parliament. Twitter and other social media have arguably led to a more immediate connection between vocal and articulate citizens, Government and Parliament. The public nature of such tools often means that substantive responses to concerns, complaints and queries are quicker to come by, but Government departments do still tend to use Twitter and other social media principally as a broadcast mechanism, rather than as a means for two-way communication, and as such its use for meaningful scrutiny is limited.

Government, and Parliament, could help citizens to engage in scrutiny of their work more effectively by linking data together (for example, Government responses to select committee recommendations could be less discursive and provide links to departmental action plans which the public, and Parliament, could use to hold Government to account). Similarly, the presence of such action plans, and hyperlinks within them to evidence of action having been undertaken, would enable the public to effectively scrutinise Parliament for its own effectiveness.

Use of keywords and hyperlinks could also make Hansard more easily searchable. For example, for certain debates, the House of Commons Library could provide links to background information relevant to Parliamentary debates, to allow citizens to engage with the policy background being discussed by Members. There would of course be a resource implication in doing this.

These are, we admit, incremental changes to existing systems, designed to co-opt technological solutions to augment the accessibility of traditional processes such as the drafting of Hansard and the preparation of select committee recommendations. However, we consider that such incremental change offers the best way to embed new approaches within our existing constitutional framework.

## **Representation**

### **What will democracy look like in 15-20 years time?**

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This is a difficult question to answer. It is easy to fall into the trap of assuming that the use of technology will result in a fundamental shift in the relationship between citizen and state, leading to a radical reshaping of Government institutions. However, there is no real sign that this might happen. What seems most likely is that the changing way in which public services are provided may serve to make democratic structures seem less important.

An increase in the tendency for the relationship between citizen and state to be seen as a relationship between consumer and provider will mean that accountability will increasingly be exerted through market, rather than democratic, structures. At a local level, services are increasingly being commissioned from external providers (some, but not all, of whom are private bodies) and it seems likely that this trend will continue, and accelerate. The development and proliferation of personal budgets for services such as social care and possibly health may lead to a crisis of governance, as a multiplicity of local providers are involved in delivery of public services, with little to no direct accountability to politicians, and onwards to the electorate. The levers available to national politicians to influence services on the ground will become less effective. The effects that this will have on traditional concepts such as ministerial responsibility and the concept of representative democracy remain to be seen, but it is increasingly recognised as a potential risk to these traditional mechanisms for securing public accountability – see for example the recent NAO report on assurance to Parliament for local funding (<http://www.nao.org.uk/report/local-government-funding-assurance-to-parliament/>)

This challenge has provoked us to consider how – at a local level – democracy might be bolstered through the development of local Public Accounts Committees (<http://www.cfps.org.uk/publications?item=11575&offset=0>), which might link up to the Commons PAC at national level in developing a forensic approach to bringing locally elected politicians front and centre in an otherwise atomised local democratic landscape – as long as this is carried out alongside significant local devolution. This approach would also give national politicians the assurance necessary that wholesale local devolution would be a process which would still secure value for the taxpayer. If the process of continuing fragmentation in public service delivery described above continues, we believe that a strengthening of local democratic institutions and processes will be vital to secure public trust in democracy as a way of ensuring public accountability. Otherwise there is a real risk of democracy becoming less relevant in the future to decision-making and resource allocation processes.

### **Will the digital era lead to pressure for more direct democracy, such as crowd-sourcing, referendums and citizens initiatives?**

It is possible that the digital era will lead to more pressure for innovative, technological advances in how democracy is conceived, but whether these will be realised is a moot point. Crowd-sourcing would present an exciting and different method for policy formation – but its success rests on the assumption that it is self-policing and that it would not be manipulated by narrow sectional interests – or by lobbyists on behalf of their clients. It could also be argued that such methods would be of advantage principally to those who are already engaged and literate in democratic processes – well-educated, predominantly middle class and white people, who would be articulate enough to use a crowd-sourcing process to argue their point of view cogently and persuasively. It would not necessarily enhance engagement from already

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marginalised groups. The same caveats apply to other more general citizens' initiatives (such as the use of petitions).

Ultimately, the decision about legislating must remain with elected representatives, which makes crowd-sourcing in a meaningful sense less practical. It could, however, form a part of the initial process that Governments undertake as part of the Green and White Paper process.

There are well-rehearsed arguments against the increased use of referendums, which refer back to the UK's tradition of representative, Parliamentary democracy. If referendums are, however, to be seen as a legitimate means of securing change in the context of representative democracy, we would suggest that Parliament seek to establish for the future the circumstances in which a referendum will be appropriate. The recent report of the Political and Constitutional Reform Committee suggests a range of circumstances in which referendums might be held in the context of a more codified constitution for the UK. Without such a further codification, we consider that any discussion about an increased use of referendums will founder on disagreement about under which circumstances one ought to be triggered. We would, for example, not be keen to see referendums being brought forward for political purposes.

We note the existence of the Referendums Act 2000 but also note that it covers purely the procedural aspects of staging a referendum, rather than the circumstances in which such referendums should be held.

### **How can MPs make better use of the internet and social media to represent their constituents?**

"Representation", in the Westminster context, has been a slippery issue since Burke's speech to the electors of Bristol; it is perhaps better to talk about the use of the internet and social media by MPs to engage with, listen to and communicate with their constituents.

In local democracy, there has been significant success by ward councillors in using social media and the internet to engage with and represent constituents. The small size of wards and electoral divisions covered by local councillors, compared with the comparatively large size of Westminster constituencies, naturally helps with this. It also helps that local councillors are a permanent presence in the local community, rather than MPs, who when Parliament are in session will be in London from at least Monday to Wednesday inclusive.

Public-i's "Networked councillor" report and campaign (<http://www.public-i.info/wp-content/uploads/2014/02/The-Networked-Councillor-report-FINAL-November-2013.pdf>) highlights the opportunities arising from better engagement in networked tools for local councillors. Importantly, the report and campaign highlights the fact that this kind of networking is not solely about a social media presence. It is about responsiveness, community power, and building relationships. Inevitably, scaling this up to Westminster constituency level is challenging. Local relationships may be difficult to build and maintain, especially where an MP may have a national profile and may comment frequently on issues of national importance, engaging with other national politicians, journalists and opinion-formers as they do so. Some MPs have made a success of both national and local roles, but this is clearly challenging.

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mySociety's "They Work for You" (and connected tools, such as "What Do They Know", provide a mechanism for citizens to use technology to hold their MPs to account. MPs could engage more actively with these initiatives, particularly in relation to explaining their voting record, their contributions on the floor of the House and in committee, and demonstrating how this links back to their representative role.

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