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Dear Ann

28th October 2019

GOVERNMENT RESPONSE TO HOUSE OF LORDS CONSTITUTION COMMITTEE: THE LEGISLATIVE PROCESS: THE PASSAGE OF BILLS THROUGH PARLIAMENT

First, we unreservedly apologise for the lateness of the Government's response to your Committee's report '*The Legislative Process: The Passage of Bills Through Parliament*', which was published on 8 July 2019. Your report raised a number of important issues, which we wished to give due consideration.

We welcome the Committee's report, which recognises the complementary scrutiny role of both Houses. These differences reflect the UK's constitutional settlement and respects the primacy of the House of Commons and the role of the House of Lords as a revising Chamber. The complementary roles played by both Houses ensures the effective scrutiny of the passage of legislation.

We accept a number of the report's recommendations, particularly those which focus on improving Parliament's website. Fundamental to facilitating effective scrutiny in both Houses is the ability of members and the public to access information relating to bills in a user-friendly and intuitive manner.

We note a number of recommendations, which provide an opportunity to adapt the procedures in the House of Lords to improve scrutiny. We will consider re-committing bills or splitting committee stage between the Chamber and Grand Committee if the relevant circumstances arise on a case-by-case basis.

But, for the reasons set out below, we do not support recommendations which would entail more significant changes to the legislative process. We believe that a Legislative Standards Committee is unnecessary. The Government already follows a stringent process ahead of a bill's introduction, whereby bills need to be cleared by the Parliamentary Business and

Legislation Cabinet Committee. The evidence provided in the report also fails to make the case that such a Committee is needed in order to help to determine the scheduling of bills in the House of Lords. We do not support the introduction of Keeling Schedules as a matter of course, nor do we support public evidence taking during Committee stage in the House of Lords.

We understand the Committee's concerns about the fast-tracking of Northern Ireland legislation. In the absence of a Northern Ireland Executive, we have had to balance the introduction of essential legislation to ensure good governance and the continued delivery of vital public services in Northern Ireland against the need to support ongoing talks to restore an Executive. We are grateful to Parliament for its support in expediting the passage of this essential legislation. We will endeavour, as far as possible, to avoid fast-tracking Northern Ireland legislation in the future.

Once again, we apologise for the delay in responding to your Committee's report.

Yours
Sawb.

Yours
Natalie

ANNEX: Government response to individual conclusions and recommendations

Scrutiny in each House

1. While the two Houses operate superficially similar procedures for bill scrutiny, they have different, complementary roles, which contribute to the overall effectiveness of the legislative process. (Paragraph 21)

The Government agrees that each House has its own role to play in scrutinising bills in Parliament. These complementary roles reflect the different composition and functions of each House. Elected MPs rightly take supremacy in the process, with the House of Lords fulfilling the role of the revising Chamber, drawing on the expertise of its members. Changes to the ways in which either House scrutinises legislation must seek to strengthen, rather than undermine, the existing balance.

Time available for scrutiny

Timetabling in the Commons and its consequences for the Lords

3. We recommend that the Procedure Committee considers asking the House of Lords Library, in their briefings on bills brought from the Commons, to highlight the clauses and schedules that were not debated due to lack of time at committee and report stages. We suggest this should be trialled for a number of bills in a single session and an evaluation should be conducted of the value it provides to members. (Paragraph 28)

This recommendation is a matter for the House of Lords' Procedure Committee, and the House of Lords Library. The House of Lords Library already produces comprehensive briefings for all bills. Adapting and publicising these notes would address the recommendation.

Self-regulation in the House of Lords

4. The system of self-regulation in the House of Lords largely works well in its consideration of bills. We welcome the efforts of the usual channels to arrange business to assist the whole House. (Paragraph 32)

We welcome the Committee's recognition that in relation scrutiny of legislation, the system of self-regulation in the House of Lords works well. Self-regulation relies on self-restraint, and we are grateful to members of the usual channels for working constructively with the Government on the arrangement of business.

Intervals between stages of a bill

5. Minimum intervals provide a measure of predictability between stages of a bill, allowing the Government to take forward legislation in a timely fashion as well as provide sufficient opportunity for Members of Parliament to prepare for each stage of scrutiny. We accept that there may be occasions where the time between stages needs to be reduced, but this should happen only in exceptional circumstances and with the agreement of the usual channels. (Paragraph 37)

6. We welcome the fact that the Cabinet Office's Guide to Making Legislation now requires the justification for fast-tracking to be included in a bill's explanatory notes. We note that the Government has observed it in respect of most recent bills that have been fast-tracked. (Paragraph 38)

The Government has always acted in accordance with the principle that breaching the recommended minimum intervals between bill stages in the House of Lords should only occur in exceptional circumstances and/or with the agreement of the usual channels. In the 2017-19 session, the only Government bills which breached minimum intervals, excluding Northern Ireland Acts, were the third readings of the Parliamentary Buildings (Restoration and Renewal) Act and the Kew Gardens Act. The scheduling of both bills was agreed with the usual channels.

7. We regret that legislation relating to Northern Ireland has regularly been fast-tracked. This has become common not just for bills which might be required to address urgent or unforeseen problems, but for routine and predictable matters such as budgetary measures. The political stalemate in Northern Ireland has led to an absence of a functioning Executive and a democratic deficit. Fast-tracking bills relating to Northern Ireland reduces further the scrutiny these measures should receive. Routinely fast-tracking in this way is unacceptable, unsustainable and should only be used for urgent matters. (Paragraph 39)

We acknowledge that there has been more fast-track legislation in relation to Northern Ireland than Parliament and Government would like. The fast-tracking of Northern Ireland legislation reflects the exceptional circumstances currently existing in Northern Ireland. The Government has always been clear that in the absence of a locally elected power sharing Government, we will ensure good governance and the continued delivery of public services. As part of this commitment we have legislated on vital measures to facilitate the continued delivery of public services, including simple legislation to put the budget announced early in each financial year on a statutory footing. We are grateful for the contribution of your Committee to scrutinising this important legislation, particularly publishing reports at short notice.

Northern Ireland needs a restored Executive and the political leadership of its elected local representatives. The Government is clear that our priority is supporting the ongoing talks process to achieve this. We have consistently applied a high bar on necessary legislation

and it is right that we minimise the instances where we seek to legislate on devolved matters. The Government of course supports ensuring Parliament has time to scrutinise legislation and works with the usual channels accordingly. The time available to pass legislation needs to be balanced with the priority of restoring the Executive and giving the process the necessary space to maximise the chance of success, enabling legislation to be passed in the Northern Ireland Assembly rather than at Westminster.

The Government will continue to work closely with parliamentarians and provide regular updates on progress in the Northern Ireland talks. Given the routine nature of many of the bills, we are grateful to Parliament for its support to pass them at pace where absolutely necessary. This will not apply in every case however, as demonstrated by the Historic Institutional Abuse Bill introduced earlier this week. The Government committed to introducing this legislation at the request of the NI parties and civil service, given the time that had passed since the inquiry in Northern Ireland reported. It is right however that time is given for Parliament to consider this detailed piece of legislation whilst also keeping open the option for the Assembly to pass the legislation in Northern Ireland if the Executive was restored in the immediate term.

Business management

8. Our first report on this inquiry, *Preparing Legislation for Parliament*, recommended the establishment of a Legislative Standards Committee to ensure that all bills are sufficiently prepared prior to being presented to Parliament. We reiterate this recommendation as the Parliamentary Business and Legislation (PBL) Cabinet Committee, which is responsible for carrying out this task in Government, has not always rigorously ensured that bills are fit for purpose before introduction. Such a committee would be well placed to assess the amount of time a bill might need for scrutiny and it would constitute a mechanism by which backbenchers could provide their view on the time required to the usual channels. While the recommendations of a Legislative Standards Committee on bill timetabling would not be binding, the usual channels would be cognisant of the political risks of departing from the recommendations of a cross-party committee. The existence of a Legislative Standards Committee would also encourage the Government to ensure that bills are thoroughly prepared before introduction to Parliament to avoid the risk of critical reports and potential delays. (Paragraph 46)

As set out in our response to your first report, *Preparing Legislation for Parliament*, we do not believe the creation of a Legislative Standards Committee is necessary. The Government already follows a stringent process ahead of a Bill's introduction which is scrutinised by the Parliamentary Business and Legislation Committee. The Business Managers in each House take their responsibilities as members of this Committee very seriously and departments are often required to undertake further work ahead of introduction before their bills are cleared.

Moreover, a Legislative Standards Committee is not needed to assess the time needed to scrutinise a bill in either House. As the Committee knows, the allocation of time for a bill's

passage through either House is discussed by the usual channels. For most bills in the House of Commons, the House has an opportunity to agree a programme motion after Second Reading and therefore the House itself is agreeing to the time that will be available for scrutiny. The report does not provide any evidence or specific examples of occasions when the time allocated to debate any bill in the House of Lords was insufficient (by and large proceedings in committee and on report get more time when they need it: the Government has no way to force proceedings to a conclusion). Any such Committee, as described in the evidence, is likely to turn into a rubber stamping exercise.

Finally, it is important that any process that considers legislation ahead of introduction retains sufficiently flexibility, for example to respond quickly to live events (the collapse of Northern Rock, Article 50 etc). Adding another stage to the process - outside of the government's control - may cause unnecessary (and potentially damaging) delay. The government should retain the unfettered ability to introduce legislation to parliament.

Amendments

9. Where the House of Commons only sees substantial new policy material for the first time during consideration of Lords amendments, it may wish to consider how to ensure there is sufficient time to scrutinise those provisions. (Paragraph 54)

10. We recommend that, where the Government adds substantial new policy material to a bill late in its passage, the bill—or at least the new provisions— should be re-committed to allow for additional debate and scrutiny. (Paragraph 55)

Changes to bills through the passage of Parliament are to be expected. It is for the House of Commons to determine whether, and if so, how to alter its scrutiny of Lords amendments which include substantial new policy material. The House of Commons already has the opportunity to agree a programme motion at the outset of consideration of Lords amendments and thereby has the chance to agree the time available to consider any late changes to a bill.

We agree that tabling Government amendments with substantial new policy material, which is not in response to amendments or discussions with members, in the second House is undesirable and guidance issued by the secretariat to the Parliamentary Business and Legislation Committee makes clear that “government amendments to bills after introduction must...be kept to a minimum and will only be agreed by PBL Committee if they are considered essential”¹. However, there are numerous reasons why the Government may need to do this. For example, amendments may be needed to respond to unforeseen events or to ensure that the drafting of the bill best meets reflects the intention of members or the Government. In the House of Lords, re-committing a bill may or may not be the best way to ensure the House is able to scrutinise the new policy material, particularly if doing so would shorten other bill stages or affect when the provisions can come into force. If the circumstances demanded it, we would consider re-commitment in conjunction with members

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf

and the usual channels. In 2015, the Government re-committed the Energy Bill from Report to Grand Committee in respect of technical and detailed Government amendments which were tabled after Committee Stage had finished.

Split committal

11. As part of a flexible and tailored approach to scrutiny, the Government and the other participants in the usual channels should consider the benefits of using split committals more frequently. We note that it is open to individual members of the House of Lords to propose alternative arrangements for commitment through amendments to a commitment motion. (Paragraph 59)

We support the use of split committal in cases where it would enable the House of Lords to more efficiently and effectively scrutinise bills. In 2012, through the usual channels, the House agreed to a split committal for the Protection of Freedoms Bill. In this case, it allowed debate of the largely technical clauses in Grand Committee, while granting more time for other bills to be debated on the floor of the House. The Government needs to consider the number of Members that may table amendments and participate in a Committee stage which may not make it appropriate to either split the committal or take stages in the Grand Committee.

Ping-pong and Reasons Committees

12. Reasons Committees serve no practical purpose and should be abolished. (Paragraph 64)

The abolition of Reasons Committees are a matter for both Houses, to be considered by their respective Procedure Committees. Any changes to Reasons Committees would need to be agreed by both Houses, acting jointly and implemented simultaneously. Although the report sets out the shortcomings of Reasons Committees, it does not recommend an alternative procedure to be followed or whether a different mechanism is necessary. We agree that any change would need to account for the use of Reasons Committees to indicate matters of Commons Financial Privilege. However, we note that matters of Financial Privilege could be indicated through the use of italic notes on amendments sent from the Commons to the Lords.

13. Select committees' strength comes from their ability to use their subject matter expertise in a non-partisan manner, and this gives authority to their reports. Formal involvement in the legislative process would risk undermining their ability to do this, by inviting adversarial debate and division, as the Government would seek to ensure its members on select committees voted to get its legislation through and opposition members would correspondingly seek to oppose it. The benefit select committees can bring to the legislative process is in scrutinising draft bills and, where they consider it appropriate, reporting to the House during a bill's passage. (Paragraph 69)

We agree with the Committee's conclusion. We note that a number of Lords Select Committees, such as the Delegated Powers and Regulatory Reform Committee, and the

Constitution Committee, already scrutinise bills before Parliament and report to the House during a bill's passage. We are also grateful to those House of Commons departmental select committees and those joint committees which have considered Government Bills in draft and made valuable recommendations ahead of introduction.

Chapter 3: Information accompanying bills

Explanatory materials

14. Explanatory notes are to assist understanding of the legislation, but they have no legal effect and are not to be relied on for legal interpretation. During the passage of the Trade Bill 2017–19, the Government suggested initially in correspondence with this Committee that the courts could rely on the content of explanatory notes when interpreting the meaning of the Bill. Following further exchanges, the Government accepted and confirmed that this was not the case. (Paragraph 73)

15. If, as we suggest, a Legislative Standards Committee is established, it would examine the explanatory materials that accompany a bill. Such a committee might develop a checklist to assess explanatory materials for quality and consistency, as is the case for the Secondary Legislation Scrutiny Committee's scrutiny of secondary legislation. If explanatory materials were inadequate, defective or absent, a Legislative Standards Committee could press the Government for improvements. (Paragraph 82)

As we have set out above, we do not support the creation of a Legislative Standards Committee.

The Parliamentary Business and Legislation (PBL) Committee already plays a key role in ensuring that bills and its supporting documents are thoroughly scrutinised ahead of introduction. The PBL secretariat works closely with departments and bill teams to offer formal and informal training, including guidance on best practice. The PBL secretariat is also responsible for ensuring lessons are disseminated across Government. This includes ensuring that they are factored into guidance, including the Guide to Making Legislation.

Keeling schedules

16. Bills that substantially amend prior Acts can be difficult to follow and for parliamentarians to scrutinise. Keeling schedules, or their equivalent in explanatory materials, can make a significant difference to the accessibility of a bill by setting out clearly the effects of a bill on a preceding statute. (Paragraph 86)

17. We are disappointed that, 15 years after our earlier report, the Government does not routinely produce Keeling schedules (or their equivalent in explanatory materials). Technological improvements in the intervening period should make the production of such schedules comparatively straightforward. We recommend that the Government

produces such schedules or explanatory materials for all bills that substantially amend previous legislation. (Paragraph 87)

We do not think it is necessary to routinely provide Keeling Schedules to bills. As the report notes, they are not accessible to non-lawyers. Explanatory notes are more accessible and set out a Bill's policy background and any relevant existing legislation which is being amended. Including Keeling Schedules as a matter of course would use up valuable Government resources which could be better utilised to improve the quality of a Bill's drafting or the explanatory materials. It would of course be open to Parliament to produce them after a bill has been introduced.

Explanatory statements on amendments

18. We welcome the use of explanatory statements on amendments to clarify the issues and improve the accessibility of proceedings for members of the House of Lords and the public. (Paragraph 90)

We are pleased that this innovation in the House's procedures have improved the accessibility of proceedings on bills.

Use of technology

19. There is an opportunity to improve the accessibility and comprehensibility of the legislative process by linking up the information about bills online and presenting it more effectively. (Paragraph 94)

20. Parliament's processes and platforms need to adapt to improve the operation and presentation of the legislative process for members and the public alike. We recommend that the necessary investment is made to deliver improvements to the integration and presentation of parliamentary data. (Paragraph 95)

We agree that Parliament should adapt its presentation and communication of bill proceedings. We are aware that Parliament is investing in significant changes in its website and presentation of bill documents, and urge that the changes are implemented without delay.

Chapter 4: Public understanding and engagement

21. It is essential for Parliament to communicate its scrutiny of legislation effectively to improve understanding of, and engagement with, the legislative process. A bill's passage through Parliament will inevitably have many technical aspects, but there are opportunities to inform and engage the public with the policy content of legislation. (Paragraph 102)

22. We recommend that the House of Lords takes a more proactive approach to promoting its work on legislative scrutiny. The most newsworthy issues—and

therefore the issues that would benefit from a balanced and factual explanation—are likely to be those involving some controversy. We recognise that the House’s communications staff may feel constrained in what they feel able to do in such circumstances. We suggest that establishing a more explicit line of accountability for the communications staff would assist them when engaging on controversial issues. We are aware that the Lords Liaison Committee has appointed a working group to explore how the House communicates its committee work; we look forward to its conclusions. (Paragraph 104)

This is a matter for the House of Lords, but we agree that it would be beneficial to be more proactive in its approach to promoting its scrutiny of legislation. Although it is right that the House wishes to maintain impartiality when it uses social media, this does not prohibit it from informing members of the public about significant proceedings on bills. A good example of the House being proactive in this area was tweeting about when votes were taking place on the EU (Withdrawal) Act 2018, while explaining in clear succinct language what the issues were that members were voting on.

Public engagement mechanisms

23. The existing engagement mechanisms provide opportunities for the public and external organisations to give parliamentarians their views on legislation. These opportunities are more likely to be used by professional organisations, as they tend to have greater knowledge of the law and the legislative process, more resources and more awareness of the opportunities to influence legislation. Parliament’s engagement and outreach work has grown and improved significantly in recent years, and this is expected to continue to enable a more diverse range of voices to be heard. (Paragraph 110)

Again, this is a matter for Parliament and its engagement and outreach team. However, we support the Committee’s conclusion that the good work in this area being carried out by both Houses needs to continue and increase the diversity of the views heard in Parliament.

24. We reiterate our recommendation that pre-legislative scrutiny should be the norm rather than the exception and that it offers the most effective opportunity for the public and interested groups to influence bills. (Paragraph 111)

The Government is of the view that, whilst pre-legislative scrutiny can add significant value, it is best to consider whether to take forward pre-legislative scrutiny on a bill-by-bill basis, taking into account the appetite in each House to conduct such scrutiny. This should in part be based on communication with select committees in each House and the Liaison Committees of each House where a joint committee is under consideration.

In the last session, we published nine bills in draft, seven of which have been scrutinised by either a Joint Committee or the relevant Select Committee in the House of Commons (the ninth is the draft Finance Bill). This includes the Draft Environment (Principles and

Governance) Bill, the Parliamentary Buildings (Restoration and Renewal) Bill, the Registration of Overseas Entities Bill and the Domestic Abuse Bill.

25. We emphasise that in the UK's representative democracy it will be Members of Parliament who determine the final content of any bill, and so any public engagement opportunities must set realistic expectations about potential influence. That said, we encourage greater public engagement in the legislative process and welcome consideration of ideas for new engagement mechanisms. (Paragraph 112)

We agree with the Committee's conclusion that the UK's representative democracy entails that members of Parliament should determine the final content of any bill.

Evidence-taking on bills

26. Evidence-taking on bills has strengthened Parliament's scrutiny of bills. It has increased the knowledge of MPs serving on public bill committees and provided an opportunity for the public and external organisations to contribute directly to the legislative process. (Paragraph 120)

27. It is an oddity that for bills starting in the House of Lords there is no evidence-taking in either House. This should be addressed. We recommend that there should be a presumption that evidence is taken at the beginning of committee stage on bills starting in the Lords. There will be exceptions to the presumption of evidence-taking. For example, it might be dispensed with for short, technical bills, or bills which have been subject to pre-legislative scrutiny by a committee of one or both Houses. Procedures already exist in the Lords to allow for evidence-taking, however the Procedure Committee may wish to review them to ensure they are suited to more frequent use. (Paragraph 121)

28. If a Legislative Standards Committee is established, as we recommend, it would be well-placed to assess the value of evidence-taking on each bill starting in the Lords. (Paragraph 122)

We do not agree that there should be a presumption that all bills starting in the House of Lords should be subject to public evidence-taking at the start of their committee stage. The key strength of the House of Lords is that it comprises members with external experience, often of a world class standard, on a wide range of subjects. Without constituency responsibilities, peers also have a greater capacity to become familiar with the policy surrounding a bill. In contrast, in the House of Commons, evidence sessions are a useful tool in helping MPs, who may not be experts in the particular policy area, to quickly become familiar with bills and the policy landscape and to hear from stakeholders on their areas of expertise.

The de facto introduction of evidence taking select committees for Lords starting bills would be a significant departure from the House's procedures. The procedures and sittings of the

House are currently designed to support members continuing to work in their fields of interest and to contribute their knowledge to the House. All committee proceedings are accessible to all members and all amendments tabled can be debated. If Select Committees were to be appointed to take evidence on bills, this might necessitate other changes to Committee procedures. Such a change would also undermine the complementary nature of scrutiny in both Houses.

The House of Lords already benefits from a number of select committees who report on bills to the House. It is open to those Committees to consider taking public evidence.