The Bingham Centre for the Rule of Law welcomes the House of Lords Constitution Committee’s (HLCC) large-scale inquiry into the legislative process.

The processes by which legislation is created and scrutinised by Parliament, and the need for inclusive, effective and accountable consultation in the course of those processes, raise significant rule of law questions concerning the transparency, clarity, coherence, consistency and accessibility of law.

Our evidence on Stage 1 (Preparing legislation for introduction into parliament) is in two parts:

- **Part one:** general matters
- **Part two:** Brexit matters

We have separated these as the Brexit issues speak to very immediate concerns and, for the convenience of the HLCC the separation may be convenient in addressing matters that also relate to work of other select committees looking at Brexit issues.

This evidence on general matters addresses the issues under the heading of questions posed in the consultation documents. It makes **12 recommendations** in total and proceeds as follows:

- **Introduction** [paras 1-3]
- **Overarching point – rule of law standards and legislative process:** Q 1-3, 8-14 [paras 4-10]
- **Creating good law:** Q 2, Q 3 [paras 11-32]
  - Transparency and timing
  - Draft bills
  - Frontloading documents (eg, impact assessments, draft codes)
  - Effect on devolved jurisdictions
  - Titles of bills and packaging of content
- **Brexit:** Q 4, Q 5 [para 33] - refer to Part 2 of our evidence
- **Technology:** Q 7 [para 34-40]
  - Speaker lists and links to the Lords Whip website
  - Widening the pool of consultees in government pre-legislative consultation
- **Public involvement and engagement:** Q 9, Q 10 [para 41-54]
- Consultation periods of 12 weeks
- Stakeholder training for consultation responses – drafting legislative amendments
- Government consultations – publication of consultee responses improvement to government responses

- Parliamentary involvement: Q 14
  - Models and standards
  - Seeking evidence from government about practice
Introduction

1. The Bingham Centre for the Rule of Law welcomes this opportunity to submit evidence to the HLCC Inquiry into the Legislative Process. Our evidence on Stage 1 (Preparing legislation for introduction into parliament) is in two parts:
   - Part one: Stage 1 – general matters
   - Part two: Stage 1 - Brexit matters

We have separated these as the Brexit cut across a wider set of questions and might inform some of the questions the Committee poses in later stages and, for the convenience of the HLCC, it may be convenient in addressing matters that also relate to work of other select committees looking at Brexit issues.

2. The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high-quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity. The Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago.

3. The lead author of this submission is Dr Lawrence McNamara (Senior Research Fellow and Deputy Director of the Bingham Centre), with input from Professor Dawn Oliver (Faculty of Laws, UCL), Professor Christina Murray (Director, Bingham Centre), Angela Patrick (Barrister, Doughty St Chambers), Swee Leng Harris (Research and Training Coordinator, Bingham Centre, who is the lead author of part 2 of our evidence, relating to Brexit), and Centre research assistants Chris Spiller and Alexia Staker.

Questions 1-3, 8-14: The rule of law and the legislative process
4. The Bingham Centre for the Rule of Law welcomes the Committee’s large-scale inquiry into the legislative process. We particularly welcome the decision to consider the pre-legislative process as a separate and distinct stage worthy of particular attention. We encourage the Committee to include in its consideration of the pre-legislative stage all of the processes of policy formation which precede the tabling of legislation in Parliament for its first reading, from early stakeholder engagement, through formal consultation, including on Green and White Papers to the production of draft Bills for public and Parliamentary scrutiny. Altering Government policy after significant investment of political and practical resources have been made by Ministers and at Cabinet level in the language of a Bill can be difficult. Engagement in the process of legislation at the stage when the policy which will underpin its terms is being formed is often most effective at ensuring the final law is evidence-based, effective and coherent. It is important that both the processes leading to enactment and the substance of laws will be consistent with and promote the rule of law. The articulation of clear standards will assist both goals, and pre-legislative process that shows fidelity to the rule of law will make for better substantive law.

5. The processes by which legislation is created and scrutinised by Parliament, and the need for inclusive, effective and accountable consultation in the course of those processes, raise significant rule of law questions concerning the transparency, clarity, coherence, consistency and accessibility of law. In almost all of the consultation questions, rule of law benchmarking would provide a framework against which the Committee might consider the evidence it receives and which the Committee might consider as valuable standards that warrant embedding in the legislative process.

6. As Tom Bingham observed in his landmark work The Rule of Law, the rule of law is not a vague concept but contains concrete principles that can be identified and applied as standards against which laws are made. The founding Director of the Bingham Centre, Professor Sir Jeffrey Jowell QC, has developed these arguments (eg, J Jowell, ‘The Rule of Law: A Practical and Universal Concept’ in Jowell, Thomas & van Zyl Smit, Rule of Law Symposium 2014). Among the principles is legality: a society under the rule of law lives under a system of rules and principles, and not anarchy.

7. The Bingham Principles have also been adopted by Council of Europe’s European Commission for Democracy Through Law (‘The Venice Commission’) which, this year,
The Venice Commission identifies legality as “a core element” of the rule of law, giving some content to its terminology, describing it as, “legality, including a transparent accountable and democratic process for enacting law” (para 18). The Venice Commission notes that the rule of law requires “the involvement of people in the decision-making process in a society”, “establish[es] accountability of those wielding public power” and promotes access to rights, “which protects minorities against arbitrary majority rules” (para 33, 50).

8. The Rule of Law Checklist has benchmarks for legality include law making procedures (Section II(A)(5)), and the following questions are posed as specific elements of those benchmarks, with the first (in bold, emphasis in original) being an overarching question, and then (i) – (vi) listed as specifics:

**Is the process for enacting law transparent, accountable, inclusive and democratic?**

i. Are there clear constitutional rules on legislative procedure?

ii. Is Parliament supreme in deciding on the content of the law?

iii. Is proposed legislation debated publicly by Parliament and adequately justified (eg, by explanatory reports)?

iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?

v. Where appropriate, are impact assessments made before adopting legislation (eg, on the human rights and budgetary impact of laws)?

vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

9. The Centre welcomes the Committee’s 14 consultation questions, which in many respects aim to elicit views about these matters, but our view is that rule of law standards should also be considered by the HLCC in its Inquiry. There is evidence that the use of standards is effective, especially over time as practice improves.¹ We return in more depth to these standards in answering question 14, below.

¹ See for example the Human Rights Joint Committee, Second Report of Session 2009-10, Work of the Committee in 2008-09, which observes improvement in government practice, at [38]-[42].
10. **Recommendation 1:** The Bingham Centre recommends that the HLCC identify clear rule of law benchmarks for the legislative process which would ensure that the legislative process is consistent with and promotes the rule of law. The Venice Commission’s benchmarks in this regard might be fruitfully adopted or adapted with regard to process and supplemented in a more comprehensive way by the Constitution Unit’s *Code of Constitutional Standards* referred to below in our answer to question 14, and further in part 2 of our evidence (relating to Brexit matters).²

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**Creating good law**

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

11. A legislative process that is consistent with the rule of law will include a parliamentary pre-legislative process that allows for and facilitates genuine and effective interaction between the government, parliament and the wider community, both in government consultations and the scrutiny of draft bills. There is a strong case for the use of standardised or default positions in a number of areas, so that there is predictability about what process will be used (e.g., timing, green paper, white paper) and then any proposed departure from the default should be published and explained.

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**Transparency and timing**

12. It is often difficult for the public and stakeholders to engage with pre-legislative scrutiny due to the lack of transparency and predictability around the timings of draft legislation and consultations, and whether draft bills will be presented at all. For example, legislation for a British Bill of Rights and a Counter-Extremism Bill have been flagged since the start of the current parliament, but it is not clear when (if ever) these will appear, or whether there will be draft bills ahead of the bills. There are no clear commitments about what any consultation periods will be once legislative proposals do emerge.

13. A lack of transparency and predictability around the timing of legislative proposals makes it extremely difficult for the public and interested parties to engage effectively with the pre-legislative process. This is especially the case for those working with disadvantaged and

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² See esp para xii of Part 2 of our evidence.
vulnerable groups, who are often heavily reliant on volunteer contributions, for whom adequate time to engage is crucial. It is not only the amount of time available for responses that is important; the scheduling can affect input where, for example, consultation are published at the very start of a holiday period and it is difficult for small civil society organisations to marshal volunteer or staff contributions to provide the best input possible.

14. We recognise that legislative priorities change and that government and parliament need to be responsive to change during the life of the parliament, and that at times there will need to be departures from predicted schedules and adequate consultation periods. However, the benchmark and starting point should always be clear accessible schedules and adequate consultation periods; departures should be the exception and on every occasion should be justified.\(^3\)

15. **Recommendation 2:** There should be easily-accessible timetables for upcoming legislative proposals that provide interested groups with adequate time to engage with the process. Where an easily accessible timetable is not provided then there should be a published explanation of reasons for departing from that standard.

**Draft bills**

16. Pre-legislative scrutiny of draft legislation is a means of promoting the rule of law standards of transparent, clear, coherent and accessible law. Since 1997 repeated governments have indicated their support for the scrutiny of draft legislation as a means of producing ‘better’ laws.\(^4\) For example in 2006 the House of Commons Communities and Local Government Committee concluded that a draft Equalities Bill, “would enable wider public and greater parliamentary scrutiny”.\(^5\) Consultation on draft legislation must not be a political formality to convey legitimacy upon legislation, but a genuine opportunity for the public and interested parties to engage with the legislative process.

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\(^3\) On fast-tracking of legislation, see for example HL Select Committee on the Constitution, Fast-track legislation: Constitutional implications and safeguards, Vol 1, 15 Session of 2008-09, HL116-1.


\(^5\) HL Select Committee on the Constitution, Pre-Legislative Scrutiny in the 2006–07 Session, HL Paper 43 at [10].
17. The absence of draft bills is especially troubling where legislation will be complex and/or will have constitutional importance or wide-reaching effects. Such proposals should ideally be open to as much scrutiny from civil society and Parliament as the timetable allows, and should ordinarily proceed with draft legislation in the first instance.

18. Examples of legislation where draft bills would have been appropriate were the Fixed-Term Parliaments Bill and the Parliamentary Voting System and Constituencies Bill, which were introduced without first being subject to pre-legislative scrutiny as draft bills. Similarly, the Liaison Committee reported in 2015 that the Treasury Committee had been expecting to scrutinise a draft Bill on National Insurance Contributions in the autumn of 2013, only to be told shortly before the House rose for the summer recess that no draft Bill would be published and that the Bill itself would be introduced in the autumn.

19. By contrast, a Liaison Committee report of 2015 stated that the Political and Constitutional Reform Committee’s pre-legislative scrutiny of the Recall of MPs Bill, and the government’s acceptance of almost every recommendation made by the Committee, resulted in a substantially improved Bill being introduced to Parliament. The publication of clear, thorough explanatory notes accompanying a draft bill should also be encouraged.

20. **Recommendation 3**: The default position should be that all bills are produced in draft unless there is a good reason not to do so, and reasons for not doing so should always be published. Draft bills should be accompanied by clear, thorough explanatory notes.

**Front loading documents (eg, impact assessments, draft codes, etc)**

21. Along with publishing draft bills to allow for greater scrutiny, government departments could front-load other relevant documents (such as impact assessments, drafts of essential delegated legislation or codes of practice) surrounding a new bill. If organisations are able to...

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analyse the impact assessments at the same time as the draft legislation they will be able to make a more informed criticism of the proposed legislation. This would aid Parliament in scrutinising the draft bill. We recognise, of course, that impact assessments require a resource commitment by government. However, where legislation is certain to be introduced in some form (eg, where a matter is a manifesto commitment) then the resource commitment is earlier in the process but is not additional resource commitment.

22. We also suggest, as indicated in our answer to question 14, that a ‘standards impact assessment’ might also be appropriate at this point.

23. **Recommendation 4:** Impact assessments should accompany draft bills.

**Effect on devolved jurisdictions**

24. There should be special consideration of the role of pre-legislative scrutiny when it comes to the impact of legislation on devolved jurisdictions. Even in relatively simple ways, effective scrutiny can enhance the quality of law, and avoid rule of law failings with respect to meeting appropriate standards of clarity and coherence. For instance, *Cunningham v Chief Constable of the Police Service of Northern Ireland* [2016] NIQB 25 (see esp para 22ff) provides a useful example of how pre-legislative scrutiny can affect rule of law issues. It concerns court rules and the Justice and Security Act 2013. Colton J pointed out that lifting an amendment drafted for the jurisdiction of England and Wales without proper consideration of the potential ramifications in other jurisdictions created problems for its application in Northern Ireland. In order to make sense of it, Colton J had to use a heavily purposive reading of the law, as its literal reading gave rise to absurdity. This obviously clashes with the rule of law requirement for laws to be clear and coherent, and that dispute resolution should be effective. As Colton J observed (paras 22-23):

> “One of the difficulties that arises in relation to this matter is the fact that a draft appropriate for the jurisdiction in England and Wales has been directly imported into the Northern Ireland jurisdiction. ... It is perhaps regrettable that the rule was not specifically modified to reflect the architecture in this jurisdiction and that in both jurisdictions it did not expressly indicate that the rule related solely to Section 6 applications which would have avoided any of the issues which have arisen in this case.”
25. **Recommendation 5:** Adequate scrutiny should be given to legislation to ensure that it will not unnecessarily cause difficulties in dispute resolution in devolved jurisdictions. The HLCC may wish to consider whether there is a place for some systematic notification of parliament and review of legislation where flaws have been identified, especially where the courts have considered a matter.

**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?

**Titles of bills and packaging of content**

26. The use of vague, general or non-descriptive titles for proposed Bills, and the inclusion of a wide scope of unrelated content, can hinder the development of good law, detracting from transparent law making and the ultimate accessibility of the law.

27. First, it is unsatisfactory if a Bill’s title does not adequately reflect its content. The problem may occur where several issues are dealt with in one Bill. It is particularly troubling where a draft Bill or Bill proposes laws that make major changes to an area of law or which would have substantial effects on vulnerable people or engage important public interests. Where proposed legislation would have such effects it should always have a clear, descriptive title.

28. For instance, in the Criminal Justice and Courts Act, Part 4 had wide-ranging effects on judicial review, obviously entailing public interest concerns (not least in its effects on interveners) but the title of the Act did not indicate the content.\(^\text{11}\)

29. The risk of a title being not merely vague but misleading should be strictly avoided. For example, in Australia, academics criticised the ‘Criminal Code Amendment (Animal Protection) Bill 2015’ on the grounds that it was in fact designed to insulate the animal agriculture industry from scrutiny and was counter to animals’ interests.\(^\text{12}\)

30. Secondly, and related to the title issue, the production of large Bills covering a multitude of unrelated matters can reduce the effectiveness of public engagement and parliamentary

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scrutiny and the coherence of the final legislation. For example, the Bill that would become the Coroners and Justice Act 2009 was heavily criticised for containing content far wider than the issue of coroners reform, with provisions ranging from data protection to witness anonymity. This occurred despite a large-scale pre-legislative scrutiny exercise on coroners reform, including the production of a draft Bill subject to earlier parliamentary scrutiny. These kinds of “Christmas tree” exercises are perhaps understandable given constraints on parliamentary time. However, they should be discouraged as bad practice. As the Joint Committee on Human Rights explained in its consideration of the Coroners and Justice Bill:

“The breadth and size of the Bill and the legal complexity and diversity of the topics it covers have been the subject of concern during the Bill’s passage through the House of Commons given the limited time provided for scrutiny. .... Large, multi-purpose bills of this sort are almost impossible to scrutinise effectively within the limited timescale provided by the Government. Given the range and significance of the human rights issues raised in this bill, the Government should have introduced two or three separate bills, each of which would have been substantial pieces of legislation in their own right or ensured that there was sufficient time for full pre-legislative and Committee stage scrutiny in the House of Commons.”

31. **Recommendation 6:** The titles of Bills and draft Bills should be clear and properly reflect the content of the proposed legislation, especially where a Bill or draft Bill proposes laws that make major changes to an area of law or which would have substantial effects on vulnerable people or engage important public interests.

32. **Recommendation 7:** The content of Bills and draft Bills should be limited in so far as possible to avoid the creation of “Christmas tree” Bills. Bills should be internally coherent and generally should avoid covering a diversity of unrelated reforms.

**Brexit**

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Questions 4 and 5: Brexit

33. Please see Part 2 of our submission for detailed discussion of Brexit matters.

Technology

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

Speaker lists and links to the Lords Whip site

34. The use of technology to increase government transparency and improve public participation in the pre-legislative process is extremely valuable. Examples of good practice on the parliamentary web site include the Bills pages that provide documents and show the stages of the Bills. The new search engine for the web site has also been a great improvement. However, there are simple changes that could further enhance the development and scrutiny of legislation.

35. Among them, technology could easily be used to provide a better guide in advance to who will be speaking in debates or, at least, who is interested in speaking in debates. This is particularly relevant as it enables the public and civil society, industry bodies or academics or others who are able to inform debate to identify the parliamentarians who may be most interested in the issues.

36. The Lords’ Whip website is an extremely useful tool for determining who is speaking in which debates. This website, however, is not obviously linked from the Parliamentary web site; a search from the parliament.uk home page for lordswhip.org brings up 8 hits, none of which reveal a part of the web site where there is a link that a browsing user would find – six are press notices, one a written answer to a question in 2010, and the other a Commons committee report.

37. There is no House of Commons equivalent. We appreciate the concerns raised in the HC Committee on Procedure in its Fourth Report of session 2002-03 (19 Nov 2003) at paragraph 18, where the Committee notes that a key difference is that not everyone who applies to
speak will be able to speak. However, a list of those who had applied to speak would still be of considerable value for the purposes of public engagement.

38. **Recommendation 8:** The parliament web site should contain an easily located link to the [www.lordswhip.org.uk](http://www.lordswhip.org.uk) site, and indicate that it contains speaker lists, among other information.

39. **Recommendation 9:** There should be an online system that enables the public to see who has applied to speak in Commons debates, and that system should be clearly and easily located via a link on the Parliament web site.

### Widening the pool of consultees in government pre-legislative processes

40. The use of targeted and informal consultation is valuable as it enables expert stakeholder input into policy and legislative development early in the process, especially where time is limited. However, there may be a good case to make use of online platforms to enhance and widen the pool of contributions at this stage. For example, it would be possible to publish immediately the list of organisations that have been invited to offer input and to open, even on short timeframes, input opportunities for others.\(^\text{14}\)

### Public involvement and engagement

**Question 9: What factors inhibit effective engagement?**

#### Consultation periods of 12 weeks

41. There has been a decrease in time available for consultation. Until 2013 the assumed period for consultation was 12 weeks, to be extended where feasible and sensible.\(^\text{15}\) However, in 2013 the Government’s Revised Consultation Principles indicated that the time for consultation “might typically vary between two and 12 weeks.”\(^\text{16}\) Therefore although the

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new government guide to consultations\textsuperscript{17} states that consultations “should last for a proportionate amount of time”, it is clear that this is in actuality a decrease in time compared to previous norms. For the purpose of upholding the rule of law principle of transparency the presumed time for consultation with outside groups should return to 12 weeks. An extended period of consultation may be necessary, for example, when consulting on an issue which impacts on disabled or vulnerable people.\textsuperscript{18}

42. \textbf{Recommendation 10}: There should be a return to the previous assumed period of at least 12 weeks for consultations and the position in the HM Government 2008 Code of Practice on Consultation. These standards should apply to all pre-legislative stages, including green papers and white papers.

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

\textit{Stakeholder training for consultation response – drafting legislative amendments}

43. Stakeholders can make profoundly effective contributions to law and policy, helping to shape legislation in a variety of important ways. An effective way of improving pre-legislative scrutiny, and improving the quality of Bills that parliament considers, would be to build the capacity of specialist organisations and stakeholders in ways that mean their responses to consultations – especially on draft Bills and Bills – will be in a form that is of the most assistance to those who are considering amendments to legislation. For example, where a stakeholder body identifies a problem or shortcoming in a proposal and suggests a valuable change to a draft Bill but either does not produce any proposed changes to the draft provisions, or produces proposed changes that are not effective or suitable, the stakeholder contributions may be less effective and process less efficient (especially as parliamentary or government staff need to spend time transforming proposals).

\textsuperscript{17} Consultation Principles 2016, Principle E

\textsuperscript{18} We note that experience in some instances has clearly been that suitable accommodations have not been made. See, for instance, the Joint Committee on Human Rights, A Life Like Any Other? Human Rights of Adults with Learning Disabilities, Seventh Report of Session 2007-08, Vol 1, at [226].
44. Although guides for Peers and MPs do exist for public bills in the House of Lords and the House of Commons, there does not appear to be an easy to access guide on the creation and style of legislative sections and amendments for the public or interested stakeholders.

45. The provision of specialist training may provide useful capacity building for stakeholders. This would be beneficial both to Parliament and to the public as it would simultaneously improve non-Parliamentary organisations’ understanding of the legislative process as well as the quality and usefulness of submissions to consultations.

46. Recommendation 11: There should be specialist, advanced legislative process and drafting training available for organisations that engage regularly with legislative change.

**Government consultations – publication of consultee responses and improvements to government responses**

47. While government consultations on law and policy are always welcome, for these consultations to be effective it is imperative that the government makes public and pays adequate attention to submissions it receives. As a senior parliamentary official has noted, “Government replies tend to be fulsome in their praise of a report and discreet about the recommendations that have not been accepted”. If there is no effective transparency of the submissions that have been made to government or in the response by government then civil society groups and the public can lose faith in the process and there is a risk that good points which affect matters such as clarity and legal certainty are ignored with the result that the Act in due course is defective. The rule of law principles that the legislative process (and the law itself) should be clear and transparent are also damaged in the process.

48. To avoid this, the government should take two steps as a matter of course. First, consultation responses should be published, just as they are by parliamentary consultations. There have been consultations where this has occurred. For example, the Cabinet Office published the responses it received to its Justice and Security Green Paper. It should be seen as good practice and the norm, and any departure should be stated and justified.

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21 See archived responses:
49. Secondly, government should respond to consultations in ways that fully address the points raised in submissions. As the Cabinet Office’s ‘Consultation Principles’ states, consultations should “Explain the responses that have been received from consultees and how these have informed the policy.” The response to consultation, to be effective, should be able to demonstrate the practical outcome of consultation on policy. This is particularly important when proposed policy is going against the weight of submissions; in this case the attention paid to this issue should be proportionate and the reasons for disagreement should be addressed. For example, in the recent consultation on proposed changes to immigration fees 142 of 147 responses said that fees should not be raised, and “the majority argued that the large fee increases proposed would deny access to justice for vulnerable people wishing to challenge a decision of the Home Office.” The government response states the principle behind the change (user-pays) and then sets out measures it states will provide protection to vulnerable people. However, without the government response having set out in any way the substance of arguments in the majority of responses, it is difficult to evaluate the adequacy of the government response as against the consultee responses. This is troubling when the weight of consultee views was so overwhelmingly negative. An appropriately detailed picture of the consultee responses should be provided and an appropriately detailed response from the government should be provided – one which directly addresses the substance of consultee concerns – as this would both enhance the quality of scrutiny at this point and would subsequently provide better basis for productive and informed debate in Parliament. While it clearly must be open to Government to disagree with the substantive responses to a consultation, dismissing serious concerns without explanation undermines not only the consultation exercise but the credibility of subsequent legislation.

50. This point is particularly important when it comes to questions about the evidence base for proposed reforms. As the National Audit Office has highlighted in a recent report, the Ministry of Justice did not properly examine how Legal Aid, Sentencing and Punishing of Offenders Act would affect the wider system before the act was put in place. Sir Amyas

22 Consultation Principles 2016, Principle I
23 Ministry of Justice, Tribunal Fees: The Government response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber). September 2016, at [7]
24 National Audit Office, Report by the Comptroller and Auditor-General, Implementing reforms to civil legal aid, HC 784, Session
Morse KCB, the Comptroller and Auditor-General and head of the Office, noted, “Without this understanding, the Ministry’s implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for taxpayer.” This information could have been gathered through more effective and engaged use of pre-legislative consultation. Similarly, if the evidence base for government policy seems to clash with expert or public opinion, the consultation response should explain this discrepancy.

51. The specific questions posed in consultation are also extremely important as the questions may limit the range of matters on which a consultation seeks answers and with which the public engages. Where a significant number of respondents raise an issue outside of the parameters of the questions, or challenge the premises of questions, the response to consultation should address those points.

52. The publication of responses received to a consultation and the adequacy of the government response go directly to rule of law standards: they are essential for transparency and accountability, and they and will inevitably enhance the clarity and coherence of the substantive law that follows.

53. **Recommendation 12**: The default position should be that responses made to government consultations are published. Where there is a departure from that position it should be justified.

54. **Recommendation 13**: There should be guidelines for good practice on for government responses to consultations which specifically address the need for the government to explain adequately the basis for any departure from the weight of submissions and evidence.

**Parliamentary involvement**

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


55. The Committee could consider what provisions there are within government to ensure that proposed legislation is compatible with the rule of law and other constitutional principles at the pre-legislative stage. It would be useful if the Committee could ask for evidence from government as to how in practice constitutional matters are considered in the legislative process, by whom, and at what stage.

56. There is a strong case for the adoption of parliamentary-endorsed benchmarks and standards that can be applied at all stages of the legislative process. This includes application in the pre-legislative stages of formulation of law and policy within government and in parliamentary pre-legislative scrutiny. We have in mind two examples in particular. First, and directly applicable to – and derived from – the UK parliament, the Constitution Unit at University College London has created a Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee. Second, the legislature in New Zealand provides an example of how standards might be applied, with legislature having set up a Legislation Design and Advisory Committee that has created a set of constitutional guidelines against which proposed laws may be tested. This is an impressive step forward which deserves consideration by the UK Parliament.

57. The Code of Constitutional Standards or a development if it could be applied voluntarily by HC and HL Committees and would not require government acceptance or endorsement. If the government knows that committees such as the HLCC and possibly others may raise Code issues in the course of scrutiny of raft bills or bills then the government ought to take them into account when formulating policy and getting bills drafted. This should be done clearly and in ways beyond those currently required by the Cabinet Office Guide to Making Legislation. The preferred position is that government should produce a ‘standards impact statement’ with draft bill or bill.

58. In a related manner, when legislation is being developed by departmental lawyers there should be mechanisms in place to ensure they take account not only of a code of standards but also of reports of the House of Lords Constitution Committee, the Joint Committee on Human Rights and the Lords Delegated and Regulatory Reform Committee. This would ensure a greater, if indirect, involvement of parliamentarians in the legislative process.

26 https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/159.
59. **Recommendation 14**: The Committee should consider models and standards such as those above, and in particular the *Code of Constitutional Standards Based on the Reports of the House of Lords Constitution Committee* and should ask for evidence from government as to how in practice constitutional matters are considered in the legislative process, by whom, and at what stage. We note here the recommendations in Part 2 of our evidence – on the Brexit matters, esp at para [xiii] – and in section 5 of that where we specifically refer to the *Code of Constitutional Standards* in recommendations regarding legislation for Brexit.

16 October 2016