Liberal Democrat Constitutional Affairs Team—Written evidence (LEG0021)

1. Liberal Democrats have long argued for greater parliamentary scrutiny of legislation, and at an earlier stage in policy development. We oversaw, through the Cook-Maclennan agreement prior to the 1997 election, and the subsequent work of the Modernisation Committee of the House of Commons the introduction of a greater degree of pre-legislative scrutiny, and we later continued to champion this practice in the Coalition Government.

2. In addressing the Committee’s call for evidence below, we address the Committee’s questions together in what we hope is a holistic way, setting the outline of a new gold standard legislative process which could amplify the voice of both people and Parliament in law-making. We make new proposals for scrutiny of secondary legislation, which could take on a still further increased role if the primary legislation on Brexit delegates power to Ministers to replace existing EU law with new domestic law. Finally, we advocate a more constructive relationship between the two Houses of Parliament, through a Joint Business Committee, such that the Commons and Lords can act together in a joint endeavour to improve their legislative product.

3. We strongly agree with the Constitution Committee that “the starting point for reviewing how parliament scrutinises the Executive should not be how the Executive can secure its business. The focus should be on how to ensure that the actions of the Executive are scrutinised effectively and that parliamentary approval of delegated legislation – by members of both Houses of Parliament – is not a mere box-ticking exercise.”

4. Indeed, this corrective should surely apply to both primary and secondary legislation. To that end, we believe a new gold standard legislative process should be adopted, and Ministers should be required to make a statement justifying any deviation from the pre-legislative parts of it. One such justification could be where a Bill implements key manifesto commitments, in the first year of the Parliament. Otherwise, our objective is to involve the public to a much greater degree between elections, and at an earlier stage in the legislative process, promoting engagement on the basis of policy choices rather than of simple opposition to one provision or another. We note, and welcome, the Prime Minister’s reported commitment to Green Papers and White Papers2, which we argue should be a routine pre-requisite for Bills coming before Parliament.

5. To improve transparency, we believe that at each stage of the legislative process we set out, Ministers should publish details of any meetings they have held or attended with external organisations, either about the Bill or about its subject matter. This is crucial for the public and media to be able to understand who has been able to influence a Bill. A similar practice should take place alongside publication of draft Statutory Instruments.

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1 House of Lords Select Committee on the Constitution, 9th Report, 2015-16 session
2 A. Thomson and R. Sylvester, ‘May takes tighter grip on No. 10’, in The Times, 1 October 2016
6. Government policy to be implemented by means of primary legislation should routinely go through a process akin to the following:
**Green Paper stage**

I. A Green Paper presented to Parliament by Ministers, with adequate time for the relevant departmental select committee to conduct an inquiry, at that stage, on the policies proposed. Select Committees should seek professional assistance to distil the key issues and dilemmas for public consumption, and produce a standard form survey which Members of Parliament can send electronically to relevant groups in their constituency. The results could be compiled by the Select Committee concerned, which would also take evidence in the usual way, and make recommendations about how the government’s policy priorities should be pursued. This practice would augment departmental consultations, putting more of the power to set terms in the hands of Parliament.

**White Paper and Draft Bill stage**

II. A White Paper should then be presented to Parliament. It should be accompanied by a draft Bill, with explanatory notes sitting side by side each clause, noting how the policy conclusions had been reached, and the implications of the legislation. This method of explanatory notes was demonstrated in *Breaking the Deadlock* cross-party draft Bill on reform of party finance in 2013.3

III. A minimum period of 10 sitting days of the House of Commons should be allowed for Select Committees to identify the policy choices made, and to report on the extent to which their own recommendations at Green Paper stage, and the preferences of the public, had been met.

IV. The draft Bill stage would also allow time for an online “Public Reading” to take place with members of the public able to comment on each clause online.

V. Work on these stages of public involvement should aim for a discursive discussion between Parliament and the public. We suggest that the Constitution Committee, as part of this inquiry, might take evidence from some of the key drivers of public engagement – such as Involve, 38 Degrees and Change.org – in an effort to establish how involving the public at an early stage might encourage those responding to see each policy decision in broad context – for example, of expenditure vs taxation; rights and freedoms vs effective state action – and to balance competing priorities. It is in the interests of both Parliament and those who wish to influence it that citizens are not only invited, late in the day, to oppose a particular government policy by means of an online petition.

**A reformed primary legislative process**

VI. Once the draft Bill process has taken place, the Government should bring forward a Bill for scrutiny in one or other House, via a Second Reading debate. To make this process more readily intelligible by the public, Second Reading should be renamed to indicate that it is the first parliamentary debate. We suggest “First Debate”.

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3 *Funding Democracy: Breaking the Deadlock, a Draft Bill for consultation* -
VII. The parliamentary website should chart each stage of the legislative process as now, including reference to the relevant Green Paper and Draft Bill stages, along with links to relevant Select Committee reports and Departmental consultation documents which were produced during those stages.

VIII. Public Bill Committees of the House of Commons should where possible be composed of members who have been involved in scrutiny of the Bill at Green Paper and Draft Bill stage. Public Bill Committees should continue to be empowered to take evidence, and should particularly focus on doing so around areas of a Bill that have changed since the Green Paper and Draft Bill stage.

IX. No programme motion should be tabled at the time of the First Debate (Second Reading). Instead, the Public Bill Committee to which the Bill is referred should set its own programme, with the Chair reporting to the House on their proposed “out-date” for the Bill to return for Report Stage. In the event a Public Bill Committee had not finished its work by that date, it would be for its Chair to return to the House to seek further time.

X. Once line by line scrutiny of a Bill has taken place in a Public Bill Committee, its clerks – not departmental civil servants – should work with members on a Programme Motion for Report Stage of the Bill, and the Chair of the Public Bill Committee should move that motion on the floor of the House of Commons. This would enable Bill Committees to determine those issues which receive closest attention by the whole House, taking into account public priorities.

XI. A Joint Business Committee of both Houses (see below) should oversee overall scrutiny for each Bill, ensuring that the second house to consider a Bill takes account of the extent of scrutiny in the first, and concentrates on areas which had not been comprehensively resolved. Clauses not considered in the first House should be starred in the version of the Bill as printed for the second House, to make clear that these had been passed without debate.

XII. The Joint Business Committee should be empowered to reconvene the Public Bill Committee in the Commons, or Committee Stage in the Lords, with a fresh opportunity to take evidence, if a Government introduces a wholly new policy proposal at Report Stage.

XIII. The parliamentary website should enable the public, interested parties, and indeed their representatives in Parliament itself, easily to see which clauses of a Bill are being debated in each House at each stage, to understand how amendments are grouped, and to switch between the debate which took place on a particular amendment and the text of that amendment.

XIV. The practice of third reading amendments, to enable Ministerial commitments made at an earlier stage to be tested, should be extended to the House of Commons.

XV. Where there is disagreement over an amendment, Conciliation Committees should be set up as a replacement to Reasons Committees, to enable genuine dialogue
between leading protagonists on a Bill, from each House. These exist in countries as diverse as France, Germany, Switzerland, Romania, Japan, Thailand and the United States, for resolving inter-cameral disputes.

XVI. Where amendments in lieu are proposed by one House to another, there should be at least 24 hours for these to be considered by the receiving House and its members before they are formally debated. All amendments sent from one House to another, whether from government or not, should include an accompanying explanatory note, explaining both the effect and the rationale of the proposed change.

Secondary legislation

7. As the Lords Constitution Committee points out in its recent report, Delegated Legislation and Parliament: a response to the Strathclyde Review, it is not only the volume of delegated legislation which has increased in recent decades, but the scope. Statutory Instruments now often areas of principle and policy rather than points of an administrative or technical nature. Liberal Democrats anticipate that the legislation repealing the European Communities Act 1972 could place yet more delegated power into Ministers’ hands to “switch off” parts of EU law that they do not like, and – more controversially still – to replace it with transitional arrangements determined by the UK executive alone.

8. While we believe Governments should avoid using delegated legislation in this way, we recognise that relying on Ministers to be more restrained is insufficient. The two Houses should therefore merge the existing Joint Committee on Statutory Instruments – which deals only with whether the Instruments are ultra vires – and the Secondary Legislation Scrutiny Committee of the Lords, which looks at their substance.

9. Both Houses – through a new Joint Committee – should be involved in assessing the merits and the vires of SIs together, and should report to the floor of each House before votes are taken. Such a committee could recommend amendments, and invite Ministers to re-table the instrument in the light of those recommendations. If a Minister declined to do so, each House should be able to vote by resolution to accept the recommendations and to insist on the amendment.

10. This Committee should be additionally empowered to recommend, on the advice of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRCC), that either House suspend consideration of a Bill where it delegates powers to Ministers over policy and principle, and the Government has failed to publish draft regulations prior to

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4 According to the House of Lords Delegated Powers and Regulatory Reform Committee, in Delegated Legislation and Parliament: A response to the Strathclyde Review “there were rarely more than 2,500 statutory instruments laid in any calendar year before 1990, since 1992 there have generally been between 3,000 and 3,600 per year”.

Report Stage in the first house. The DPRCC should continue to take lead responsibility in scrutinising the extent of order making powers in legislation before Parliament, recognising the additional capacity of the Lords to this work. The standard Draft Bill stage of the legislative process which we have advocated would make this task considerably more straightforward.

11. Taken together, these changes would have the joint effect of enabling Parliament to take greater control of secondary legislation proposed by Ministers, and of encouraging governments to build the detail of their proposals into Bills at the primary legislative stage rather than go through a committee scrutiny procedure later.

A joint business committee

12. Parliament as a whole should “take back control”, of the cross-House legislative process, by establishing a Joint Business Committee of both Houses (hereafter, JBC). This should liaise closely with, and have access to papers from, the Parliamentary Business and Legislation Committee in Government. It would be the senior committee, taking a decisive role in managing the flow of legislation, and in determining which House a Bill should start in. In doing so, it would seek to avoid the ‘London Bus Syndrome’ where governments keen to secure a Commons mandate for controversial measures start a disproportionate number of Bills there, leaving the Lords without legislative work for a long period, followed later by an intense scrabble for Peers to fit in sufficient scrutiny in when Bills emerge.

13. The JBC could additionally allocate time to Bills in each House, put a brake on the introduction of Bills which leave too much detail to delegated legislation, and agree “carry over” when it is desirable to provide more time for scrutiny at the end of session. Each House as a whole should have the right by resolution to refer a Bill back to the Committee for more time to be allocated.

Conclusions

14. The present legislative process too often confers too great a power on the Executive of the day, while affording privileged access to corporate lobbyists – whose ‘upstream’ influence on government departments can be decisive – and denying the general public a say. That parliamentary practice is to call the first, crucial debate on a Bill the “second reading” amply demonstrates the opacity of the present process.

15. Meanwhile secondary legislation has an important and growing role, not merely in filling in the administrative detail of government policy which has already received ‘in principle’ consent in Parliament but in determining the principles themselves. While parliamentary committees will always criticise governments for according themselves order-making powers, we believe the practices and procedures of Parliament must be reformed such that the governments are actively deterred from doing so rather than merely exhorted not to.

16. The combination of:

- a standard Green Paper and Draft Bill process, incorporating early public involvement;
- a Joint Business Committee, overseeing the quality of legislation which is to be introduced and determining in which House it should start;
- and a powerful Joint Committee on Secondary Legislation working with the Lords’ Delegated Powers and Regulatory Reform Committee

would amplify the voice of the public in the legislative process, and strengthen the hand of both Houses of Parliament in their joint endeavour to hold the Executive to account.

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