1. The British Academy, the national academy for the humanities and social sciences, welcomes the opportunity to respond to the Committee’s inquiry in to the legislative process. The British Academy has a number of Fellows with relevant expertise on legal and constitutional matters and this response draws on that knowledge. This response focuses largely on benchmarks for improving legislation, Brexit and Parliamentary involvement. However, we feel that improvements to the legislative process should not come at the expense of a primary focus on the standards which laws must be required to meet. Additionally, we ask that the committee seeks to ensure that running this inquiry in stages captures any overlap between various aspects of the legislative process.

Creating good law

2. Baroness O’Neill of Bengarve CH, CBE, FBA, HonFRS, FMedSci has helpfully recommended a number of limited and feasible benchmarks in order to improve both the legislative process and the legislation which results. These benchmarks are as follows:
   - Laws are for citizens
   - Laws must be understood by those to whom they apply
   - Laws must be comprehensible
   - It must be feasible to comply with the law

   The European Court of Human Rights has also stressed the importance of the “clarity and intelligibility” of the law (Malone v UK) (see also Lord Bingham FBA, The Rule of Law, p. 37: “The law must be accessible and so far as possible intelligible, clear and predictable”). Additionally, Baroness O’Neill states that laws must be understood in broad terms by the public in terms of what is demanded of them. To Baroness O’Neill, law should be deemed inadequate if those who must comply with it must seek professional advice ‘at every juncture’ in order to do so. It should be borne in mind that “Enacting adequate, feasible laws matters because unknown and unknowable laws do not remedy but create mischiefs. They not only promote institutional inadequacy, but fuel public disengagement and distrust.”

Known law

3. Baroness O’Neill has highlighted shortcomings regarding both the volume and frequency of changes to law. Baroness O’Neill outlines that laws are too frequently made, too complex, and are too often incomprehensible. Laws made too frequently undermine John Locke’s requirement for a society to have ‘known law’ – if law changes too frequently it cannot be known. Whilst the parliamentary process is, in theory, more accessible than ever before, the laws thus resulting may not be, in part due to the sheer amount of law produced and the frequency of its production, not least law produced by delegated legislation and written in terms which cross-refer to other pieces of legislation. Moves away from such frequent legislating would therefore be welcome. The aim should be to make few changes well, rather than a large number of changes.

The importance of the jury

4. It should be noted that intelligibility is of particular importance to English law. This importance is due to the role in the application of law played by non-specialist laypeople as members of a

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jury. When considering the intelligibility of law, it is advisable to consider its application via the jury process.

**Brexit**

Clarity and accommodation

5. It is desirable that legislation is drafted in a way that is clear and intelligible and that it originates in a body that is accountable to the people (or peoples). European Union law which is adopted in the framework of a complex legal process involving multiple states and multiple institutions is not always as clear and intelligible as one might like. This can present difficulties for EU Member States when they seek to implement those parts of EU law which are not directly applicable into national law (e.g. directives). While the decision to leave the EU should mitigate some difficulties faced by national legislatures, within the UK the implementation of EU legislation which lacks clarity or intelligibility could also conceivably increase legislative complexity. This additional complexity would result from the policy preferences and legislative frameworks of the different UK nations as they potentially diverge further in the absence of a 'harmonising' impetus from the EU.

Planning for Brexit

6. Brexit is going to require a considerable volume of legislation in a short space of time. Planning needs to take place now to ensure that sufficient time is properly allocated in order that the improvements to the scrutiny processes outlined in the remainder of this document are properly implemented.

7. Much of the legislation required for Brexit will not take the form of primary legislation. The sheer volume of legislation will make it difficult for the existing procedures for scrutinising delegated legislation to operate. Establishing a series of specialist sub-committees would allow the necessary reporting and scrutiny to be undertaken.

Improving scrutiny

8. Improving the quality of scrutiny can assist in improving the process of legislation. It is in this regard that we wish to draw the committee's attention to the approach of this inquiry. Running the inquiry in stages risks utilising an imperfect approach as various aspects of the legislative process will overlap with others. Impact assessment, for example, is included in stage one yet is also relevant to other stages, especially if draft legislation is amended. The passage of a bill through parliament may result in changes which are not assessed for their impact whilst Select Committees may not have access to impact assessments. Post legislative scrutiny should also be subject to impact assessments and this should be included in the later stage of the inquiry. Applying similar levels of scrutiny to all stages of a bill should have a positive effect on legislation. An example of the need for this is outlined in the next paragraph (9).

9. The Welfare Reform Act 2009 provides an example of the need to improve the process of scrutiny. The Employment, Skills and Enterprise Scheme, introduced in 2011, is an example of a case that covers Stages 1, 2 and 3 of this inquiry process. The Welfare Reform Act 2009 amended the Jobseeker's Act 1995 by inserting a new section 17 with the intention of introducing a scheme which required the unemployed to participate, when instructed, in a specified, work-related scheme. The new section 17 of the 1995 Act authorised the making of regulations, subject to certain conditions, contained in the new section inserted in 2009. As it is not UK practice, the regulations were not available to be debated by Parliament when the legislation was introduced. The regulations, technically made under an Act that dealt with a very different benefit scheme, were not made until 2011. The 2011 Regulations attracted
criticism from the Social Security Advisory Committee on policy grounds and from the House of Lords Select Committee on the Merits of Statutory Instruments.

10. The 2011 Regulations were challenged and the Court of Appeal ruled them to be ultra vires and quashed them in R(Reilly) v Work and Pensions Secretary [2013] EWCA Civ 66, creating a situation in which repayments might be necessitated. The Government responded by introducing retrospective legislation, which was criticised by the House of Lords Constitution Committee and later ruled incompatible with Article 6(1) of the European Convention on Human Rights by the Court of Appeal in Reilly & Anor v Secretary of State for Work and Pensions [2016] EWCA Civ 413.

11. The example of the Welfare Reform Act 2009 is equally relevant to stages 1 and 3 of this inquiry. In stage 1 this example has relevance to how policies are changed and added to existing statutes by amendments. The examples of the 2009 Act and the 2011 regulations are also relevant to stage 3 of this inquiry. In relation to stage 3, this inquiry should adequately consider both the use of delegated legislation to incorporate controversial issues and the way in which delegated legislation is drafted. Only by looking across the inquiry stages in this way can the potential shortcomings in the process be properly understood.

Equalising scrutiny
12. The contrast between scrutiny of draft bills and scrutiny of actual bills is significant, and the legislative process would benefit greatly from a change to this approach. Whereas pre-legislative scrutiny is commonly presented as a valuable addition to the legislative process, the disparity between deliberation of the draft bill and the actual bill can be significant, as can the difference between the content of the bills. An example is the current Wales Bill as (a) it is constitutional legislation which (b) proceeds on a different set of tests for devolved competence to those originally presented in the draft Bill, and yet (c) has been subject to relatively light scrutiny in the House of Commons. It is therefore necessary that the staged approach of the Committee captures all aspects of the legislative process.

13. Delegated legislation is generally subject to less scrutiny and proceeds in a more compressed time frame. Because much of Brexit legislation (both to incorporate and to repeal provisions in EU instruments) will have to be made by delegated legislation, appropriate procedures for scrutiny need to be planned.

Request for clarification
14. Due to the importance of law being accessible, especially to those affected by it, we ask that the committee clarify whether public access to and engagement with the finished law is covered only by Stage Four of the inquiry or throughout the process? Unless the term ‘after Royal Assent’ is interpreted widely to cover impact and implementation – and possibly post-legislative evaluation by Parliament – questions of public access may not be properly addressed.

Conclusion

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4 The Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917
See further HC Research series SN05212 08/09 and 09/09 at http://researchbriefings.files.parliament.uk/documents/RP09-08/RP09-08.pdf
6 Constitution Committee, Jobseekers (Back to Work Schemes) Bill, HL 155 (2013)
15. Legislation and the legislative process can be improved by a greater regard for the benchmarks outlined above, by greater clarity where possible and by improving scrutiny. Ensuring that law is comprehensible to those who are subject to it is an important principle to which to adhere. Improving the quality of the process of scrutiny such as by equalising the scrutiny on draft and actual bills should improve the quality of laws.

*October 2016*