



THE CONSTITUTIONAL  
STANDARDS OF THE HOUSE  
OF CONSDS OF

# **The Constitutional Standards of the House of Lords Select Committee on the Constitution**

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Appendix: List of the Reports of the House of Lords Select Committee on the Constitution	24
1. 2001-2002	24
2. 2002-2003	25
3. 2003-2004	26
4. 2004-2005	28
5. 2005-2006	29
6. 2006-2007	32
7. 2007-2008	33
8. 2008-2009	35
9. 2009-2010	39
10. 2010-2012	41
11. 2012-2013	45

# Genesis of this project

Dawn Oliver advocated the development of legislative standards in her article 'Improving the Scrutiny of Bills: the Case for Standards and Checklists' in Public Law in 2006. Robert Hazell provided supporting arguments in two other articles in Public Law, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' (2004), and 'Time for a new Convention: Parliamentary Scrutiny of Constitutional Bills' (2006).

In 2013 these ideas were revived at a panel session on 'Parliament and fundamental values' at the Study of Parliament Group's annual conference. The panel was organised by Murray Hunt, Legal Adviser to the parliamentary Joint Committee on Human Rights. After the panel Robert Hazell suggested to Dawn Oliver that it was time to demonstrate that a set of legislative standards could be developed, and this project was born. Jack Simson Caird has done the hard work of going through all the reports of the House of Lords Constitution Committee, extracting their standards and assembling them into coherent form.

The study was kindly funded by Nat Le Roux, Director of the Constitution Society. We are very grateful for his financial support, without which this project would not have been possible.

- 1 D Oliver, 'Improving the Scrutiny of Bills: the Case for Standards and Checklists' (2006) Public Law 219-246.
- 2 D Oliver, 'Improving the Scrutiny of Bills: the Case for Standards and Checklists' (2006) Public Law 219-246 219.
- 3 Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 5.22.
- 4 House of Lords Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001–02, 11) para 1.
- 5 See J Simson Caird, 'Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the

In its first report, the Committee explained that it defined the constitution as being made up of five main tenets:

- Sovereignty of the Crown in Parliament
- The Rule of Law, encompassing the rights of the individual
- Union State
- Representative Government
- Membership of the Commonwealth, the European Union, and other international organisations.<sup>6</sup>

The Committee also explained that scrutiny would focus on those aspects of bills that raised 'significant constitutional issues'.<sup>7</sup> They defined a constitutionally significant issue to be 'one that is a principal part of the constitutional framework and one that raises an important question of principle'.<sup>8</sup> This provided a useful starting point. What is of particular interest is how, in practice, the Committee interprets the constitution. The code of standards below reveals how the five tenets and definition of 'significant constitutional issues' have been applied in the context of the legislative process and to the content of legislation. While it is important to recognise that the majority of the standards contained in the code were extracted from the Committee's reports on particular bills, the fact that many of the standards can be identified in multiple reports shows that the Committee has adopted a number of clear and consistent positions on the meaning of certain constitutional norms in the legislative context. By expounding the meaning of the constitution in this way the Committee has performed a vital service to constitutionalism in the United Kingdom: it has demonstrated the relevance of the normative content of the constitution to the lawmaking process. It is hoped that this code highlights this contribution.

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6 House of Lords Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001–02, 11) para 21.

7 House of Lords Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001–02, 11) para 23.

8 House of Lords Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001–02, 11) para 23.

9 The work of the Constitution Committee (32.12), the Joint Committee on Human Rights (11.31) and the work of the House of Lords Delegated Powers and Regulatory Reform Committee (15) are covered by the Guide: Cabinet Office, *The Guide to Making Legislation* (London: 2013) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/210917/Guide\\_to\\_Making\\_Legislation\\_July\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210917/Guide_to_Making_Legislation_July_2013.pdf).



participants in the legislative process. The standards within this code cannot resolve the key political questions that arise during the legislative process, but they can serve to provide a normative framework for some of those questions. The point of a soft-law code of standards is that, while a breach or departure from a standard is not necessarily undesirable, it should be acknowledged and justified by those responsible.

## Methodology

Extracting the constitutional standards from the Constitution Committee's reports is not a precise science. There is an unavoidable degree of subjectivity to the exercise. The basic methodology was to record every reference to a norm that related to either the content of legislation or the legislative process itself. The first sift involved reading through reports and recording every norm within each report. The result of this sift is included in the Appendix.

To produce the code, we categorised the norms catalogued in the initial sift under headings and then amalgamated some of the standards so as to avoid repetition. When two or more standards overlapped to a significant degree they were collapsed into one standard and the relevant footnote contains all the references to the separate standards.

The main problem is that it is not always crystal clear when the Constitution Committee

has tried to be as faithful as possible to the text of the report. 55 (Annex A, mentioned in ) TJ

There is little doubt that for the Committee to produce its own code based on its reports, it

The important thing to bear in mind is that the Committee is a very categorical institution. It is not for it to say legislation should not exist or legislation should exist. However 55 (, the Committee ) TJ

# A Code of Constitutional Standards based on the reports of the House of Lords Select Committee on the Constitution

## 1) The rule of law

### *1.1 Retrospective legislation*

1.1.1 Enacting legislation with retrospective effect should be avoided.<sup>14</sup>

1.1.2

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14 Reports 7 and 56.  
15 Report 77.  
16 Report 147.  
17 Report 7.  
18 Report 7.  
19 Report 7.  
20 Report 77.  
21 Report 85.

## **1.2 Legal certainty**

1.2.1 The rule of law requires laws to be reasonably certain and accessible.<sup>22</sup>

1.2.2 General warrants should be avoided.<sup>23</sup>

1.2.3 Laws that include a variable monetary penalty should include an upper limit.<sup>24</sup>

## **2) Delegated powers, delegated legislation and Henry VIII clauses**

### **2.1 Defining the power**

2.1.1

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22 Reports 64, 113 and 123.

23 Report 44.

24 Report 64.

25 Reports 12, 30 and 49.

26 Reports 41 and 145.

27 Reports 51, 77, 93 and 130.

28 Reports 116 and 137.

29 Report 51.

30 Report 51.

31 Report 64.

- 2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a Bill then they should be included.<sup>32</sup>
- 2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.<sup>33</sup>
- 2.2.4 Henry VIII powers that relate to a constitutionally sensitive subject-matter should use a super-affirmative parliamentary procedure.<sup>34</sup>
- 2.2.5 Ministers should not be able to suspend legal powers by giving directions; instead orders, which are subject to parliamentary oversight, should be used.<sup>35</sup>
- 2.2.6 Provision should be made for Parliament to be informed promptly of all ministerial exercises of legislative power.<sup>36</sup>

### **2.3 Appropriate uses of delegated powers**

- 2.3.1 Henry VIII clauses should be limited so that they cannot be used to alter constitutional arrangements.<sup>37</sup>
- 2.3.2 Laws should not permit the sub-delegation of legislative powers.<sup>38</sup>
- 2.3.3 Delegating order-making powers to Ministers to change the statute book should be avoided when there are other more constitutionally appropriate alternatives available.<sup>39</sup>

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32 Report 51.  
33 Reports 51, 77, 116, 137.  
34 Report 138.  
35 Report 64.  
36 Report 25.  
37 Reports 25, 39 and 51.  
38 Report 51.  
39 Report 86.  
40 Report 90.  
41 Report 93.  
42 Report 93.

## 2.3.7

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43	Reports 24 and 53.
44	Reports 137 and 144.
45	Report 49.
46	Report 27.
47	Reports 25, 27, 77, 137.
48	Reports 51, 93, 130, 145.
49	Report 27.
50	Reports 51, 77.
51	Report 56.
52	Report 73.

- 3.1.2 Judges' security of tenure should be preserved.<sup>53</sup>
- 3.1.3 The politicisation of the judicial appointments process should be avoided.<sup>54</sup>
- 3.1.4 Ouster clauses should be avoided.<sup>55</sup>
- 3.1.5 The exercise of powers to combat terrorism should be subject to adequate judicial control.<sup>56</sup>
- 3.1.6 The roles of Parliament and the judiciary should not be confated.<sup>57</sup>
- 3.1.7 If a government minister is to be made responsible for judiciary-related matters, then that minister should be the Lord Chancellor.<sup>58</sup>
- 3.1.8 Coercive powers that restrict a constitutional right should be exercised by the judiciary rather than the executive.<sup>59</sup>
- 3.1.9 The nature of the judicial oversight of a ministerial power should be clear on the face of the bill.<sup>60</sup>
- 3.1.10 Laws should avoid creating the possibility of conflict between Parliament and the courts.<sup>61</sup>
- 3.1.11 A Minister's legal accountability to the courts should not be fragmented.<sup>62</sup>
- 3.1.12 Interference with the courts' ability to decide on the appropriate balance between the competing public interests of national security and the proper administration of justice should be avoided.<sup>63</sup>
- 3.1.13 Laws should not grant powers to the Secretary of State that unduly risk the fair administration of justice.<sup>64</sup>
- 3.1.14 Case management issues should be decided by the courts and not by Government ministers.<sup>65</sup>

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53 Report 21.

54 Report 137.

55 Report 60.

56 Report 73.

57 Report 73.

58 Reports 73 and 80.

59 Report 83.

60 Reports 84 and 129.

61 Report 91.

62 Reports 128 and 132.

63 Report 138.

64 Report 138.

65 Report 138.



3.2.12 Laws should not risk or impair the principle of individual ministerial responsibility to Parliament.<sup>77</sup>

3.2.13 Laws should respect the principle that the revenue affairs of individuals should be kept at arm's length from ministers.<sup>78</sup>

### **3.3 Parliament**

3.3.1 Laws should not impede effective parliamentary scrutiny.<sup>79</sup>

3.3.2 Laws should not add unnecessary complexity to the law-making process.<sup>80</sup>

3.3.3 The Government should not unduly restrict parliamentary deliberation.<sup>81</sup>

3.3.4 Omnibus Bills hinder legislative scrutiny and should be avoided.<sup>82</sup>

3.3.5 The principle of parliamentary privilege should be respected.<sup>83</sup>

3.3.6 It is not appropriate for Parliament to act unilaterally to reinterpret an international treaty to which the UK has become a party.<sup>84</sup>

3.3.7 Laws should not interfere with the principle that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament save where this is specifically authorized by Act of Parliament.<sup>85</sup>

3.3.8 Legislation should respect the fundamental constitutional principle that no Parliament may bind its successors.<sup>86</sup>

## **4) Individual rights**

### **4.1 General principles**

4.1.1 The restriction of individual rights should be proportionate.<sup>87</sup>

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77 Reports 128 and 132.

78 Report 79.

79 Report 116.

80 Report 48.

81 Report 36.

82 Reports 37 and 84.

83 Report 91.

84 Report 49.

85 Report 51.

86 Report 123.

87 Reports 36, 61, 73, 109 and 131.

- 4.1.2 Provisions that restrict the liberty of the individual should be drafted as narrowly as possible.<sup>88</sup>
- 4.1.3 Provisions that restrict the liberty of the individual should be accompanied by sufficient limits and protections.<sup>89</sup>
- 4.1.4 Severe restrictions on the liberty of the subject should only be the result of a criminal conviction.<sup>90</sup>
- 4.1.5 Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights.<sup>91</sup>

## **4.2 Access to justice**

- 4.2.1 Laws should respect the constitutional right of access to justice.<sup>92</sup>
- 4.2.2 A statutory power granted to a public body to deprive an individual of a significant right should be subject to a reference by the public body to a court.<sup>93</sup>
- 4.2.3 Laws should respect the constitutional principle that individual liberty is to be protected by the courts.<sup>94</sup>

## **4.3 Due process and procedural fairness**

- 4.3.1 Laws that create a power to make administrative decisions that affect individuals should meet the minimum standards of procedural fairness.<sup>95</sup>
- 4.3.2 The common law principle of natural justice: *audi alteram partem* (hear both sides before making a decision) should be respected.<sup>96</sup>
- 4.3.3 The right to a fair trial should be respected.<sup>97</sup>

4.3.4

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88 Report 58.  
89 Reports 58 and 129.  
90 Report 58.  
91 Report 61.  
92 Reports 2, 57 and 131.  
93 Report 66.  
94 Report 73.  
95 Report 64.  
96 Report 64.  
97 Report 72.  
98 Report 83.

4.3.5 Laws that create a public decision-making process should ensure that affected citizens have recourse to an effective appeal system.<sup>99</sup>

4.3.6

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99 Report 75.  
100 Report 90.  
101 Report 131.  
102 Reports 4 and 31  
103 Report 97.  
104 Report 31.  
105 Report 31.  
106 Report 31.  
107 Report 31.  
108 Reports 67, 71 and 104.

- 5.1.8 Publication of draft Bills should be spread across the parliamentary year.<sup>109</sup>
- 5.1.9 The Government should issue a formal response to a committee report on a draft Bill.<sup>110</sup>
- 5.1.10 The Government should provide a written statement to the House when measures contained in a draft Bill are not pursued or where the provisions in a draft Bill are substantially amended or combined with other proposals in subsequent legislation.<sup>111</sup>
- 5.1.11 When a Government response to a committee report on draft legislation is delayed beyond two months, the Government should write to the Committee concerned to explain the delay.<sup>112</sup>
- 5.1.12 If a draft Bill announced as part of the Government's legislative programme is not subsequently brought forward, the Government should, by the end of the session, make a written statement to the House explaining the delay.<sup>113</sup>

## **5.2 Explanatory Notes**

- 5.2.1 The Explanatory Notes to each Bill should include, in the introductory section, a clear and developed explanation of the purpose of the Bill, incorporating or accompanied by the criteria by which the Bill, once enacted, can be judged to have met its purpose.<sup>114</sup>
- 5.2.2 Where a Bill amends an earlier Act, the effects of the Bill on the Act should be shown in an informal print of the amended Act and should be included in the Explanatory Notes to the Bill.<sup>115</sup>
- 5.2.3 The Explanatory Notes to all Bills introduced to give effect to EU obligations should carry a section detailing the scrutiny history of the measure.<sup>116</sup>
- 5.2.4 Explanatory notes to a Bill should draw attention to significant departures from the Draft Bill.<sup>117</sup>

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109 Report 82.

110 Report 82.

111 Report 104.

112 Report 104.

113 Report 104.

114 Report 31.

115 Reports 31, 38 and 49.

116 Report 31.

117 Report 97.



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- 123 Reports 80, 91, 107, 140 and 146.
  - 124 Report 107.
  - 125 Report 107.
  - 126 Report 123.
  - 127 Report 146.
  - 128 Report 143.
  - 12909-B 59 Tmt 146.

(b) What is the justification for fast-tracking each element of the Bill?

(c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?

(d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

(e) Does the Bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?

(f) Are mechanisms for effective post-legislative scrutiny and review in place? If not, why do the Government judge that their inclusion is not appropriate?

(g) Has an assessment been made as to whether existing legislation is sufficient to deal with any or all of the issues in question?

(h) Have relevant parliamentary committees been given the opportunity to scrutinise the legislation?<sup>132</sup>

5.4.7 When a Bill is fast-tracked there should be a presumption in favour of the inclusion of a sunset clause.<sup>133</sup>

5.4.8 When a Bill is fast-tracked it should be subject to post-legislative review within a maximum of two years post-enactment.<sup>134</sup>

5.4.9 Fast-track legislation should not be used to retrospectively overturn a court judgment where there is no compelling operational requirement to amend the law retrospectively.<sup>135</sup>

## **5.5 Responding to a committee's report**

5.5.1 If the Constitution Committee reports on a Bill before second reading, the Government should respond before the commencement of the committee stage.<sup>136</sup>

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132 Reports 89, 126, 143, 146.

133 Report 89.

134 Report 89.

135 Report 147.

136 Reports 97 and 125.

## **5.6 Amendments**

5.6.1 The late tabling of amendments should be minimised.<sup>137</sup>

## **5.7 Post-legislative scrutiny**

5.7.1 The Government should explain their position on post-legislative scrutiny of the Bill prior to its enactment.<sup>138</sup>

5.7.2 Constitutional legislation should be subject to comprehensive post-legislative scrutiny.<sup>139</sup>

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137 Report 89.

138 Report 124.

139 Report 138.

# Appendix: List of the Reports of the House of Lords Select Committee on the Constitution 2001-02 to 2012-13

## 1. 2001-2002

1. *First Report: Reviewing the Constitution: Terms of Reference and Method of Working* (First Report) (HL Paper 11)  
None.
2. *Anti-Terrorism, Crime and Security Bill* (Second Report) (HL Paper 41)  
Provision should be made for prompt access to a court or tribunal for the resolution of disputes between individuals and the state and disputes between individuals (Appendix).
3. *Sex Discrimination (Election Candidates) Bill* (Third Report) (HL Paper 41)  
None.
4. *Changing the Constitution: The Process of Constitutional Change* (Fourth Report) (HL Paper 69)  
Government bills should be published in draft (para 40).
5. *Justice (Northern Ireland) Bill* (Fifth Report) (HL Paper 42)  
None.
6. *Nationality, Immigration and Asylum Bill* (Sixth Report) (HL Paper 95)  
None.
7. *Nationality, Immigration and Asylum Bill Further Report* (Seventh Report) (HL Paper 129)  
Laws should not have retrospective effect (paras 6- 8).

Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake (para 7).

Legislation should respect the principle of legal certainty (para 9).

Laws

Laws should not prevent a court deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced (para 11).

## 2. 2002-2003

8. *Crime (International Co-operation) Bill [HL]* (First Report) (HL Paper 27)  
None.
9. *Devolution: Inter-Institutional Relations in the United Kingdom* (Second Report) (HL Paper 28)  
None.
10. *Courts Bill [HL]* (Third Report) (HL Paper 38)  
None
11. *Regional Assemblies (Preparations) Bill* (Fourth Report) (HL Paper 56)  
None.
12. *European Parliament (Representation) Bill* (Fifth Report) (HL Paper 65)  
Powers to make subordinate legislation should be drawn as narrowly as practicable (para 4).
13. *Extradition Bill* (Sixth Report) (HL Paper 82)  
None.
14. *Criminal Justice Bill* (Seventh Report) (HL Paper 129)  
None.
15. *Health and Social Care (Community Health and Standards) Bill* (Eighth Report) (HL Paper 156)  
None.
16. *The Draft Constitutional Treaty for the European Union* (Ninth Report) (HL Paper 168)  
None.
17. *Meeting with the Lord Chancellor* (Tenth Report) (HL Paper 180)  
None.

### 3. 2003-2004

18. *European Parliamentary and Local Elections (Pilots) Bill* (First Report) (HL Paper 16)  
None.
19. *Annual Report (2002-2003)* (Second Report) (HL Paper 19)  
None.
20. *Planning and Compulsory Purchase Bill* (Third Report) (HL Paper 27)  
None.
21. *Justice (Northern Ireland) Bill* (Fourth Report) (HL Paper 40)  
Judges' security of tenure should be preserved (Appendix 1).
22. *Companies (Audit, Investigation and Community Enterprise) Bill* (Fifth Report) (HL Paper 53)  
None.
23. *The Regulatory State: Ensuring its Accountability* (Sixth Report) (HL Paper 68)  
None.
24. *Gangmasters (Licensing) Bill* (Seventh Report) (HL Paper 108)  
The main objectives of a legislative scheme should be apparent from the face of a Bill and should not be left to secondary legislation (paras 4-8).
25. *Civil Contingencies Bill* (Eight Report) (HL paper 114)  
Henry VIII clauses must be clearly justified (para 7).

Provision should be made for Parliament to be informed promptly of all ministerial exercises of legislative power (para 12)

Henry VIII clauses should be drafted so that they cannot be used to amend constitutional enactments (paras 13-15).

26. *Children Bill* (Ninth Report) (HL Paper 123)  
None.
27. *Age-Related Payments Bill* (Tenth Report) (HL Paper 124)  
Delegations of legislative authority should be justified (para 10).

Delegations of legislative authority should be narrowly defined (para 10).

Delegations of legislative authority should fit within the overall scheme of a Bill (para 9).

- 28. *Constitutional Reform Bill* (Eleventh Report) (HL paper 142)  
None.
- 29. *The Regulatory State: Ensuring its Accountability* (Twelfth Report) (HL Paper 150)  
None.
- 30. *Age-Related Payments Act* (Thirteenth Report) (HL Paper 172)  
Widely-drawn delegations of legislative authority cannot be exclusively justified by the need for speed (para 6).
- 31. *Parliament and the Legislative Process* (Fourteenth Report) (HL Paper 178)  
Government bills should be published in draft (para 34).

When a Government bill is not published in draft, the explanatory notes should set out the reasons to explain the reasons behind the decision (para 34).

The Government should ensure that the full text of draft Bills is available to pre-legislative scrutiny committees in good time before they are asked to report (para 63).

Joint Committees should be set up at least two sitting weeks before a draft bill is published and not be required to report until at least one month after the end of the 63).EHFDQQRWEHEHRIEHFJDWLRQVMXWLGHEHEHEHFDQQRWEH



42. *Second Progress Report 2005-06 (Second Report) (HL Paper 47)*  
None.
43. *Identity Cards Bill (Third Report) (HL Paper 44)*  
Significant changes to the relationship between the State and the individual should not be brought about by secondary legislation (para 9).
44. *Terrorism Bill (Fourth Report) (HL Paper 82)*  
General warrants should be avoided (para 4).
- Legislative provisions that are only needed for a limited time should include sunset clauses the provision for regular post-legislative scrutiny (para 5).
- The restriction of individual rights should be proportionate (para 6).
45. *Constitutional Reform Act 2005 (Fifth Report) (HL Paper 83)*  
None.
46. *Meeting with the Lord Chancellor (Sixth Report) (HL Paper 84)*  
None.
47. *Constitutional aspects of the challenge to the Hunting Act 2004 (Seventh Report) (HL Paper 141)*  
None.
48. *Government of Wales Bill (Eighth Report) (HL Paper 142)*  
para 7.1.1 (para 4).

50. *Government Response to a report on the Government of Wales Bill* (Tenth Report) (HL Paper 168)  
None.

51. *Legislative and Regulatory Reform Bill* (Eleventh Report) (HL Paper 194)  
Bills of constitutional significance should be published in draft (para 1).

Ministerial powers to make secondary legislation should be restricted by effective legal boundaries (para 8).

The committee stage of Bills of first class constitutional importance should be taken on the floor of the House of Commons (para 19).

The government should provide Parliament with its justification for the constitutional implications of legislation when it introduces a Bill (para 21).

Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of a Bill (para 23).

Laws should not interfere with the principle that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament (para 32).

Henry VIII powers should be accompanied by adequate procedural and legal safeguards (para 35).

The justification for a Henry VIII clause should refer to the specific purpose that it is designed to serve (para 35).

The purpose of a Henry VIII clause should be defined in the Bill as narrowly as possible (para 36).

If constitutional safeguards can be added without undermining the policy goals of a Bill then they should be included (para 45).

Henry VIII clauses should be limited so that they cannot be used to alter constitutional arrangements (para 52).

Ministerial powers should be defined objectively (para 60).

Laws should not permit the sub-delegation of legislative powers (para 61).

Order making powers should be restricted so that they do not allow the amendment of primary legislation that is less than two years old (para 62).

52. *Police and Justice Bill* (Twelfth Report) (HL Paper 195)  
None.

53. *Armed Forces Bill* (Thirteenth Report) (HL Paper 200)  
The most important aspects of a policy should be included in the face of a Bill and not left to be decided through delegated legislation (para 5).
54. *Meeting with the Lord Chief Justice* (Fourteenth Report) (HL Paper 213)  
None.
55. *Waging war: Parliament's role and responsibility* (Fifteenth Report) (HL Paper 236)  
None.
56. *Final Progress Report 2005–06* (Sixteenth Report) (HL Paper 255)  
Laws should not have retrospective effect (para 4).

Where an “incidental and consequential” Henry VIII power is likely to be used in relation to constitutional legislation, there is a need for a clear and detailed account of how and why the Government intends to exercise that power (Appendix 5).

## **6. 2006-2007**

57. *Tribunals, Courts and Enforcement Bill* (First Report) (HL Paper 13)  
Public authorities established by Act of Parliament ought to derive their principal powers from express legal provisions (para 12).

Laws should not interfere with the constitutional principle of access to justice (paras 14-16).

58. *Serious Crime Bill* (Second Report) (HL Paper 41)  
Provisions that restrict the liberty of the individual should be drafted as narrowly as possible (para 12).

Provisions that restrict the liberty of the individual should be accompanied by sufficient

61. *Freedom of Information (Amendment) Bill* (Fifth Report) (HL Paper 127)  
The process of enacting Bills of constitutional importance should meet the requirements of caution and proportionality (para 4).

Voluntary assurances should not be regarded as a satisfactory substitute for legally enforceable rights (para 8).

Restrictions on the right to access information should be narrowly drawn and proportionate (paras 12-14).

62. *Relations between the executive, the judiciary and Parliament* (Sixth Report) (HL Paper 151)  
None.
63. *The Governance of Britain* (Seventh Report) (HL Paper 158)  
None.

## **7. 2007-2008**

64. *Regulatory Enforcement and Sanctions Bill* (First Report) (HL Paper 16)  
Laws should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety (para 2).

Laws should be reasonably certain and accessible (para 6).

Ministers should not be able to suspend legal powers by giving directions; instead orders, which are subject to parliamentary oversight, should be used (para 6).

Laws that creates a power to make administrative decisions should meet the minimum standards of procedural fairness (para 11).

The common law principle of natural justice: *audi alteram partem* (hear both sides before making a decision) should be respected (para 11).

Laws that creates a variable monetary penalty should include an upper limit (para 12).

65. *Scrutiny of Welsh Legislative Competence Orders* (Second Report) (HL Paper 17)  
None.
66. *Child Maintenance and Other Payments Bill* (Third Report) (HL Paper 27)  
A statutory power granted to a public body to deprive an individual of a significant right should be subject to a reference by the public body to a court (para 10).

67. *Pre-Legislative Scrutiny in the 2006–07 Session* (Fourth Report) (HL Paper 43)  
Draft bills should be published in good time, and should allow at least twelve weeks for scrutiny at a minimum (para 21).
68. *Annual Report 2006-07* (Fifth Report) (HL Paper 44)  
None.
69. *European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution* None.
- 69.

Sunset clauses should be included when provisions are introduced for reasons of expediency in one Session ahead of a bill on the same subject that is forthcoming (para 49).

Powers to dismiss judicial officers should be conferred on the Lord Chancellor rather than upon a Secretary of State (para 57).

74. *Relations between the executive, the judiciary and Parliament: Follow-up Report* (Eleventh Report) (HL Paper 177)  
None.

## 8. 2008-2009

75. *Marine and Coastal Access Bill* (First Report) (HL Paper 13)  
Laws that create a public decision-making process should ensure that citizens have recourse to an effective appeal system (para 13).
76. *Surveillance: Citizens and the State* (Second Report) (HL Paper 18)  
None.
77. *Banking Bill* (Third Report) (HL Paper 19)  
Henry VIII powers should only be enacted when there is a compelling justification (para 3).

The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure (para 3).

Henry VIII powers should be subject to parliamentary control (para 3).

Henry VIII powers cannot be justified simply by reference to a desire to make the legislative regime in question 'effective', instead they should be justified by reference to the particular context of the Bill in question (para 5).

Retrospective legislation should only be used when there is compelling reason to do so (para 7).

Provisions that have retrospective effect should be drafted as narrowly as possible (para 7).

78. *Annual Report 2007-08* (Fourth Report) (HL Paper 20)  
None.

79. *Part 1 of the Borders, Citizenship and Immigration Bill* (Fifth Report) (HL Paper 41)  
Laws should respect the principle that the revenue affairs of individuals should be kept at arm's length from ministers (para 2).

80. *Northern Ireland Bill* (Sixth Report) (HL Paper 50)  
Bills that deal with issues of constitutional significance should be published in draft and subject to pre-legislative scrutiny (para 3).

Bills that deal with issues of constitutional significance should not be put on a fast-track legislative process in the House of Commons and the House of Lords (para 9).

If a government minister is to be made responsible for judiciary-related matters, then that minister should be the Lord Chancellor (para 14).

81. *Part 3 of the Borders, Citizenship and Immigration Bill* (Seventh Report) (HL Paper 54)  
Bills with constitutional implications should be preceded by effective consultation (para 16).

Government should not be granted legal authority in excess of the powers properly needed to implement a proposed policy (para 20).

82. *Pre-Legislative Scrutiny in the 2007-08 Session* (Eighth Report) (HL paper 66)  
Publication of draft bills should be spread across the parliamentary year (para 23).

The Government should issue a formal response to a committee report on a draft bill (para 31-32).

83. *Welfare Reform Bill* (Ninth Report) (HL Paper 79)  
Laws that confers upon the executive powers coercive sanction powers should include measures to establish safeguards for ensuring that fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight (para 9).

Coercive powers that restrict a constitutional right should be exercised by the judiciary rather than the executive (para 10).

Ministerial assurances as to the use of administrative sanction powers are not a substitute for legal safeguards on the face of a Bill (para 11).

Legislative sanction powers should not be administered by a private sector business (para 12).

84. *Coroners and Justice Bill* (Tenth Report) (HL Paper 96)  
Omnibus Bills hinder legislative scrutiny and should be avoided (para 2).

The nature of the judicial oversight of a ministerial power should be clear on the face of the bill (para 9).

85. *Banking Act 2009: Supplementary report on retrospective legislation* (Eleventh Report) (HL Paper 97)

A legislative power to make a provision which has retrospective effect should only be invoked on the basis of 'necessity' and not of 'desirability' (para 10).

86. *Law Commission Bill* (Twelfth Report) (HL Paper 103)

Delegating order-making powers to Ministers to change the statute book should be avoided when there are other more constitutionally appropriate alternatives available (para 2).

87. *The National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)* (Thirteenth Report) (HL Paper 105)

None.

88. *Analysis of the Government's response to Surveillance: Citizens and the State* (Fourteenth Report) (HL Paper 114)

None.

89. *Fast-track Legislation: Constitutional Implications and Safeguards* (Fifteenth Report) (HL Paper 116)

The late tabling of amendments should be minimised (para 106).

The Minister responsible for a fast-tracked bill should be required to make an oral statement to the House of Lords outlining the case for fast-tracking (para 184).

The Minister responsible for a fast-tracked bill should be required to issue a written memorandum which addresses the following points:

(a) Why is fast-tracking necessary?

(b) What is the justification for fast-tracking each element of the bill?

(c) What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?

(d) To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

(e) Does the bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why do the Government judge that their inclusion is not appropriate?



Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of a Bill (para 12).

Delegated legislation should not be used to create new criminal offences (para 14).

102.

significant Bill if there is not enough time to adequately scrutinise them in

117. *Public Bodies Bill* (Sixth Report) (HL Paper 51)

Henry VIII powers must be clearly limited, exercisable only for specific purposes, and subject to adequate parliamentary oversight (para 5).

Laws should not impede effective parliamentary scrutiny (para 6).

Legislation should only depart from constitutional principles where a full and clear explanation and justification is provided by government to Parliament (para 6).

118. *Parliamentary Voting System and Constituencies Bill* (Seventh Report) (HL Paper 58)

Bills that propose major constitutional reform should be subject to prior public consultation and pre-legislative scrutiny (para 12).

Referendums should only be used to decided fundamental constitutional issues (para 16).

119. *Fixed-term Parliaments Bill* (Eighth Report) (HL Paper 69)

The Government should explain in clear terms how constitutional reform proposals within a Bill relate to constitutional principles (para 167).

Save where there are justifiable reasons for acting more quickly, the proper way to introduce a constitutional reform proposal is to publish a green or white paper or a draft bill, and to take the comments and concerns raised in the process of consultation and pre-legislative scrutiny into account in the legislation that follows (para 179).

120. *Meeting with the Lord Chief Justice and the Lord Chancellor* (Ninth Report) (HL Paper 97)

None.

121. *Money Bills and Commons Financial Privilege* (Tenth Report) (HL Paper 97)

None.

122. *Meeting with Lord Jay of Ewelme, Chairman* (Eleventh Report) (HL Paper 104)

None.

123. *The Cabinet Manual* (Twelfth Report) (HL Paper 107)

None.

124. *European Union Bill* (Thirteenth Report) (HL Paper 121)

Laws should aim to avoid complexity that will hinder transparency and accessibility in the law (para 27).

Referendums should only be used to decide fundamental constitutional issues (para 38).

Laws should respect the fundamental constitutional principle that no Parliament may bind its successors (para 44).

125. *Part 1 of the Police Reform and Social Responsibility Bill* (Fourteenth Report) (HL Paper 143)

Laws should not jeopardise the operational independence of the police (para 4).

The Government should explain their position on post-legislative scrutiny of the Bill prior to its enactment (para 19).

126. *The Process of Constitutional Change* (Fifteenth Report) (HL Paper 177)

When the Government introduces a Bill it should provide a written ministerial statement which indicates whether, in each minister's view, the bill provides for significant constitutional change and, if so:

- what is the impact of the proposals upon the existing constitutional arrangements;
- whether and, if so, how the government engaged with the public in the initial development of the policy proposals and what was the outcome of that public engagement;
- in what way were the detailed policies contained in the bill subjected to rigorous scrutiny in the Cabinet committee system;
- whether a green paper was published, what consultation took place on the proposals, including with the devolved institutions, and the extent to which the government agree or disagree with the responses given;
- whether a white paper was published and whether pre-legislative scrutiny was undertaken and the extent to which the government agree or disagree with the outcome of that process;
- what is the justification for any referendum held, or to be held, on the proposals;
- and when and how the legislation, if passed, will be subject to post-legislative scrutiny (para 71-72).

Significant constitutional legislation should be subject to pre-legislative scrutiny (para 95)

The parliamentary scrutiny of constitutional bills should not be rushed unless there are justifiable reasons for fast-tracking them (para 99).

Constitutional legislation should not be passed during the wash-up (para 99).

Constitutional legislation should be subject to comprehensive post-legislative scrutiny (para 104).

If the Constitution Committee reports on a bill before second reading, the Government should respond before the commencement of the committee stage (para 114).

127. *Police (Detention and Bail) Bill* (Sixteenth Report) (HL Paper 178)

The explanatory notes to a fast-tracked Bill should explain the reasons the departing from the normal parliamentary procedure (para 5).

Parliament should be given adequate time to consider a Bill that raises questions of constitutional principle (para 7).

128. *Scotland Bill* (Seventeenth Report) (HL Paper 184)

None.

129. *The Health and Social Care Bill* (Eighteenth Report) (HL Paper 197)

Laws should not risk or impair the principle of individual ministerial responsibility to Parliament (para 18).

A minister's legal accountability to the courts should not be fragmented (para 18).

130. *Terrorism Prevention and Investigation Measures Bill* (Nineteenth Report) (HL Paper 198)

Laws which increases the power of the executive over the liberty of the individual should be subject to adequate safeguards (para 13).

The explanatory notes are not the appropriate location for constitutionally significant directions to the courts, such matters should be clear from the face of the Bill (para 17).

131. *Protection of Freedoms Bill* (Twentieth Report) (HL Paper 215)

Henry VIII clauses should be drafted as narrowly as possible (para 8).

Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of a Bill (para 10).

132. *Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill* (Twenty-First Report) (HL Report 222)

Laws should not interfere with the constitutional right of access to justice (para 5).

Restrictions upon the constitutional right of access to justice should be proportionate (para 6).

Laws should not interfere with the right of an individual detained in a police station to free legal advice (paras 18-19).

133. *Health and Social Care Bill: Follow-up* (Twenty-Second Report) (HL Paper 240)  
Laws should not risk or impair the principle of individual ministerial responsibility to Parliament (para 1).

A minister's legal accountability to the courts should not be fragmented (para 1).

134. *Voting at the Close of Poll* (Twenty-Third Report) (HL Paper 245)  
None.

135. *Referendum on Scottish Independence* (Twenty-Third Report) (HL Paper 263)  
None.

136. *Judicial Appointments* (Twenty-Fourth Report) (HL Paper 272)  
None.

## **11. 2012-2013**

137. *Sessional Report* (First Report) (HL Paper 16)  
None.

138. *Crime and Courts Bill* (Second Report) (HL Paper 17)  
The use of Henry VIII powers should only be contemplated where a full and clear explanation and justification is provided (para 6).

The use of Henry VIII powers should only be permitted if specific purposes are



145. *Defamation Bill* (Ninth Report) (HL Paper 86)

A Bill which contains provisions of constitutional significance should be preceded by draft legislation, which was subject to public consultation and to pre-legislative scrutiny by a joint committee (para 6).

149. *The pre-emption of Parliament* (Thirteenth Report) (HL Paper 165)

None.

