

THE CONSTITUTIONAL STANDARDS OF THE HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION

SECOND EDITION

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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

- ! Union State
- ! Representative Government
- ! Membership of the Commonwealth, the European Union, and other international organisations.⁷

The Committee also explained that scrutiny would focus on those aspects of bills that raised 'significant

application, even in

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 to the legislative

- 1.1.1 Enacting legislation with retrospective effect should be avoided.¹⁷
- 1.1.2 Provisions that have retrospective effect should be drafted as narrowly as possible.¹⁸
- 1.1.3 Individuals should not be punished or penalised for contravening what was at the time a valid legal requirement.¹⁹
- 1.1.4 Laws should not retrospectively interfere with obligations when the liberty or criminal liability of the citizen is at stake.²⁰
- 1.1.5 Laws should not deprive someone of the benefit of a judgment already obtained.²¹
- 1.1.6 Laws should not prevent a court from deciding pending litigation according to its merits on the basis of the law in force at the time when the proceedings were commenced.²²
- 1.1.7 Retrospective legislation should only be used when there is a compelling reason to do so.²³
- 1.1.8 A legislative power to make a provision which has retrospective effect should be justified on the basis of 'necessity', and not of 'desirability'.²⁴

- 1.2.1 The rule of law requires laws to be reasonably certain and accessible.²⁵
- 1.2.2 General warrants should be avoided.²⁶
- 1.2.3 Laws that include a variable monetary penalty should include an upper limit.²⁷

¹⁷ Reports 7 and 56.

¹⁸ Report 77.

¹⁹ Report 148.

²⁰ Report 7.

²¹ Report 7.

²² Report 7.

²³ Report 77.

²⁴ Report 85.

²⁵ Reports 64, 113 and 124.

²⁶ Report 44.

- 2.1.1 Delegations of legislative power should be framed as narrowly as possible.²⁸
- 2.1.2 The policy aims of a ministerial power should be included in the bill itself.²⁹
- 2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.³⁰
- 2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the bill.³¹
- 2.1.5 Ministerial powers should be defined objectively.³²
- 2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.³³

2.3.12 Delegations of legislative authority should fit within the overall scheme of the bill.⁵¹

2.4.1 Ministers should provide Parliament with their justifications for proposing the delegation of legislative powers.⁵²

2.4.2 Ministerial assurances as to the purpose of order

- 3.2.5 An independent system of regulation should be underpinned by laws that make provision to ensure its political neutrality.⁷⁵
- 3.2.6 The decision-making powers of a public authority should be subject to the possibility of appeal to a different body.⁷⁶
- 3.2.7 Laws should not jeopardise the operational independence of the police.⁷⁷
- 3.2.8 The executive should not be allowed to have the dual role in civil proceedings of being a party to the litigation and at the same time being the sole “gatekeeper”, controlling access to the possibility that the litigation be conducted in a certain manner.⁷⁸
- 3.2.9 Legislation that creates statutory defences to criminal offences specific to the executive should be subject to an authorisation procedure.⁷⁹
- 3.2.10 Legislative sanction powers should not be administered by a private sector business.⁸⁰
- 3.2.11 Government should provide detailed justification for provisions which repeal statutory duties to engage in consultation.⁸¹
- 3.2.12 Ministerial assurances as to the use of administrative sanction powers are not a substitute for legal safeguards on the face of a bill.⁸²
- 3.2.13 Ministerial assurances are no substitute for a statutory sunset clause.⁸³
- 3.2.14 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.⁸⁴
- 3.2.15 Laws should not risk or impair the principle of individual ministerial responsibility to Parliament.⁸⁵
- 3.2.16 Laws should respect the principle that the revenue affairs of individuals should be kept at arm’s length from ministers.⁸⁶

⁷⁵ Report 92.

⁷⁶ Report 92.

⁷⁷ Report 125.

⁷⁸ Report 139.

⁷⁹ Report 103.

⁸⁰ Report 83.

⁸¹ Report 161.

⁸² Report 83.

⁸³ Report 72.

⁸⁴ Reports 72 and 73.

⁸⁵ Reports 129 and 133.

⁸⁶ Report 79.

- 3.2.17 Statutory duties imposed on regulators should not inhibit a regulator's independence of action and their ability to protect the public interest.⁸⁷
- 3.3.1 Laws should not impede effective parliamentary scrutiny.⁸⁸
- 3.3.2 Laws should not add unnecessary complexity to the law-making process.⁸⁹
- 3.3.3 The Government should not unduly restrict parliamentary deliberation.⁹⁰
- 3.3.4 Omnibus bills hinder legislative scrutiny and should be avoided.⁹¹
- 3.3.5 The principle of parliamentary privilege should be respected.⁹²
- 3.3.6 When a Bill is thought to affect parliamentary privilege, Article 9 of the Bill of Rights does not need to be re-legislated, as it already has the force of law.⁹³
- 3.3.7 It is not appropriate for Parliament to act unilaterally to reinterpret an international treaty to which the UK has become a party.⁹⁴
- 3.3.8 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 an Act of Parliament.⁹⁵
- 3.3.9 Legislation should respect the fundamental constitutional principle that no Parliament may bind its successors.⁹⁶
- 4.1.1 The restriction of individual rights should be proportionate.⁹⁷
- 4.1.2 Provisions that restrict the liberty of the individual should be drafted as narrowly as possible.⁹⁸
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4.1.3 Provisions that restrict the liberty of the individual should be accompanied by sufficient limits and protections.⁹⁹

4.1.4

- 4.3.3 The right to a fair trial should be respected.¹¹⁰
- 4.3.4 Laws that confer upon the executive coercive sanction powers should include safeguards for ensuring that fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight.¹¹¹
- 4.3.5 Laws that create a public decision-making process should ensure that affected citizens have recourse to an effective appeal system.¹¹²
- 4.3.6 Laws which impose restriction on the freedom of individuals backed by sanctions should include basic due process safeguards.¹¹³
- 4.3.7 Laws should respect the right of an individual detained in a police station to free legal advice.¹¹⁴
- 5.1.1 Government bills should be published in draft.¹¹⁵
- 5.1.2 Draft bills should represent a properly rounded set of proposals.¹¹⁶
- 5.1.3 When a Government bill is not published in draft, the explanatory notes should set out the reasons.¹¹⁷
- 5.1.4 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.¹¹⁸
- 5.1.5 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 consultation period. In the absence of a formal consultation exercise on the part of the Government, the minimum should be four months from publication of draft bills.¹¹⁹
- 5.1.6 A committee considering a draft bill should be supplied with the findings of a consultation exercise, and the Government's response to those findings should be made available to it.¹²⁰

¹¹⁰ Report 72.

¹¹¹ Report 83.

¹¹² Report 75.

¹¹³ Report 90.

¹¹⁴ Report 132.

¹¹⁵ Reports 4 and 31.

¹¹⁶ Report 97.

¹¹⁷ Report 31.

¹¹⁸ Report 31.

¹¹⁹ Report 31.

¹²⁰ Report 31.

5.1.7

- 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.¹³¹

5.3.2 The Government should provide Parliament with its justification for the constitutional implications of legislation when it introduces a bill.¹³²

5.3.3. When the Government puts forward changes to the devolution settlement in one nation of the Union, it should outline how these changes will affect the Union as a whole.¹³³

5.3.4 The committee stage of bills of first class constitutional importance should be taken on the floor of the House of Commons.¹³⁴

5.3.5

(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?¹⁴⁸

5.4.8 The Government should explain and give justifications for every element of a Bill which it proposes to fast-track.¹⁴⁹

5.4.9 When a bill is fast-tracked there should be a presumption in favour of the inclusion of a sunset clause.¹⁵⁰

5.4.10 When a bill is fast-

5.6.1 The late tabling of amendments should be minimised.¹⁵⁴

1. *First Report: Reviewing the Constitution: Terms of Reference and Method of Working* (First Report) (HL Paper 11)

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.
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)

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 consultation period. In the absence of a formal consultation exercise on the part of the Government, the minimum should be 4 months from publication of draft bills (para 69).

A committee considering a draft bill should be supplied with the findings of a consultation exercise, and the Government's response to those findings should be made available to it (para 71).

The Explanatory Notes to each bill should include, in the introductory section, a clear and

49. *Third Progress Report* (Ninth Report) (HL Paper 151)

When legislation makes extensive amendments to previous legislation the Government should take steps, such as publishing a Keeling version of the bill, to make the legislation easier to comprehend (para 4).

Rights of appeal should be set out in primary and not secondary legislation (para 9-10).

There needs to be a strong justification for legislation that proposes to restrict an individual's rights of appeal (Appendix 3 – para 4).

It is not appropriate for Parliament to act unilaterally to reinterpret an international treaty to which the UK has become a party (Appendix 3 – para 8).

Parliamentary debate and legislative authorisation should precede, not follow, the establishment of a public body (Appendix 4).

Delegations of legislative power should be framed as narrowly as possible (Appendix 5 – para 3).

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

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).

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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 limits and protections (para 14).

Severe restrictions on the liberty of the subject should be the result of a criminal conviction (para 17).

59. *Waging war: Parliament's role and responsibility Follow-up (Third Report) (HL Paper 51)*
None.

60. *Justice and Security (Northern*

Laws that create 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 create 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* (Sixth Report) (HL Paper 84)

proportionately (para 5).

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.

(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)

safeguards on the face of a bill (para 12).

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

Henry VIII clauses should be drafted as narrowly as is practicable (para 20)

Bills should identify which provisions in other enactments which require amendment rather than using Henry VIII powers to leave the power to make amendments to the subsequent discretion

103. *Clause 12 of the Bribery Bill: Further Report (Seventh Report) (HL Paper 49)*
Legislation that creates statutory defences to criminal offences specific to the executive should be subject to an authorisation procedure (para 11).

Draft bills should represent a properly rounded set of proposals (para 12).

108

(HL Paper 99)

109

(Paper 107)
for private life should be proportionate (para

110

Bill: Government Responses to the Committee's 7th and
(HL Paper 109)

111

tments Commission (Fifteenth Report) (HL

112

and the Centre of Government (First Report) (HL

113

(Paper 25)
(10).

principle of legal certainty should be carefully

114

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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

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 G

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).

137. *Sessional Report (First Report)* (HL Paper 16)
None.
138. *Crime and Courts Bill (Second Report)* (HL Paper 17)

and pre-legislative scrutiny (para 4).

Legislative powers that permit the Secretary of State to affect a constitutionally important right should be subject to effective parliamentary scrutiny (para 13).

142. *The Agreement on a referendum on independence for Scotland* (Sixth Report) (HL Paper 62)
None.
143. *The accountability of civil servants* (Seventh Report) (HL Paper 61)
None.
144. *Police (Complaints and Conduct) Bill* (Eighth Report) (HL Paper 80)
When introducing a bill that is to be fast-

The fast-tracking of normal parliamentary procedure should only occur when strictly necessary (para 16).

Bills containing constitutionally significant matters should not be subject to a fast-tracked parliamentary procedure (para 20).

148.

163. *The office of Lord Chancellor (Sixth Report) (HL Paper 75)*
None.
164. *Recall of MPs Bills (Seventh Report) (HL Paper 80)*
Electoral law offences should ordinarily be created by primary rather than

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