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"Better Regulation"

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Answers to questionnaire: United Kingdom

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ACA Europe Questionnaire: Better Regulation

1. This note provides some responses to the *ACA Europe Questionnaire: Better Regulation* in advance of May's conference. Given the unique common law heritage of the United Kingdom, alongside the longstanding doctrine of parliamentary sovereignty, it provides an overview of the mechanisms of both pre- and post-legislative scrutiny, addressing where relevant the issues included in the questionnaire.

2. The focus will not be on the internal legislative scrutiny of a bill (e.g. the formal parliamentary stages, debates in the House of Commons or House of Lords, etc.), but rather on the role of external actors in scrutiny, such as courts and advisory bodies (including where those bodies may have a formal involvement in the parliamentary process through committee evidence).

3. Scrutiny of legislation in the United Kingdom (both in advance of and after its enactment) is one part of what is chiefly a *parliamentary* process, albeit one to which a range of actors contribute. Even where non-legislative bodies play a part in the process of scrutiny (courts, advisory bodies, etc.), the part they mainly play is to assist Parliament. As such, this note is most usefully structured not exactly around the order of questions as presented in the questionnaire, but instead takes its direction from the *process* by which the scrutiny exercise is carried out. It therefore begins with the means of scrutiny at the stages before a policy becomes statutory law, before moving onto post-enactment scrutiny.

Pre-legislative scrutiny

Deciding to legislate

4. For each parliamentary session the government (which almost always also enjoys a majority in the House of Commons, the lower house of the legislature) will have a legislative programme. Other bills may be passed during each parliamentary session (e.g. emergency bills and private members' bills), but most key legislation will originate in the government's programme.

5. For a bill to be included within the government's legislative programme, the sponsoring department must submit a bid to the Parliamentary Business and Legislation ("**PBL**") Committee of the Cabinet. The PBL Committee considers all the relevant bids and makes recommendations to the Cabinet as to which bills should be included in the legislative programme for a parliamentary session. It will take into account whether legislation is needed for the bill's desired outcomes; how it relates to the political priorities of the government; and whether the bill has been published in draft for consultation. Those bills which make into the legislative programme will be announced in the Queen's Speech at the state opening of Parliament.

6. Some advisory bodies (such as the Bingham Centre for the Rule of Law) have observed that it is difficult to alter government policy once a significant investment of political and practical resources has been made in a draft. Accordingly, the most effective engagement by advisory bodies tends to be at the earliest stage before the policy which will underpin a bill's terms has been finalised.

Preparing the bill

7. The basis of a bill will be the written policy instructions drafted by the sponsoring department for the Office of Parliamentary Counsel, where the bill is actually drafted. These will explain not only the current law but also the changes which the bill seeks to enact. The final result will emerge from a back-and-forth process between the Office of Parliamentary Counsel and the relevant government department[s]. This process of consulting relevant departments in the drafting process will also extend to the devolved administrations where the proposed bill extends to Wales, Scotland or Northern Ireland. Provisions in a bill which actually relate to matters that have been devolved to the national legislatures will usually need the consent of that body. Similarly, any proposal which might affect competition in markets will be discussed with the Competition and Markets Authority. The bill will not be introduced before its final draft receives the consent of the PBL Committee.

8. There is an additional stage of pre-legislative scrutiny that takes place in respect of some, but not all, bills – publication in draft for consultation before introduction before Parliament. These are published as 'command papers'. Such bills may also be

considered by parliamentary committee in advance of introduction before either of the Houses of Parliament. Committees will take evidence and make recommendations to the government on the bill; and these, alongside public responses to the consultation, may mean that the bill is amended before introduction. However, the public and stakeholders can face difficulties in attempting to engage with the pre-legislative scrutiny process because of concerns about a lack of transparency and unpredictability surrounding the timing of draft legislation and consultations (including whether draft bills will be presented at all).

9. Until 2013 the assumed period for consultation was 12 weeks, to be extended where feasible and sensible. However, in 2013 the government revised its Consultation Principles to indicate that the time for consultation "*might typically vary between two and 12 weeks*".

External scrutiny within the parliamentary process

10. Most bills will begin their parliamentary life in either the House of Commons or the House of Lords. The aspect of the bill's course through Parliament which is relevant to the external sources of scrutiny is the 'committee stage'. This is a detailed, line-by-line consideration of the bill carried out by a committee of members of Parliament ("**MPs**") representing the political makeup of the House as a whole ("**Public Bill Committee**"). It is possible for the committee stage to be taken in the House of Commons, allowing all MPs to participate.

11. The Public Bill Committee in the House of Commons may take oral and written evidence on the bill, and in both Houses it will vote on whether each clause should remain in the bill. It will also consider any proposed amendments (although these must be sufficiently close to the subject matter of the bill, as introduced).

Role of the Law Commission in pre-legislative scrutiny

12. The Law Commission is a body established by the Law Commissions Act 1965 with a function of keeping the law of England and Wales under review, and provide advice and information to government with a view to law reform. Equivalent bodies exist in respect of Scotland and Northern Ireland; and there is formal parliamentary oversight of the Law

Commission's work. The Lord Chancellor is accountable to Parliament for the Commission's activities, and has a number of statutory duties in relation to the Commission, including: appointing its Chairman, Chief Executive and other Commissioners; laying programmes of law reform before Parliament; and laying before Parliament recommendations of the Commission arising from its project work.

13. The driving principle behind its work is to ensure that the law is "fair, modern, accessible and as cost-effective as possible", and its work is in two distinct strands: (1) law reform projects, and (2) statute law work:

14. Law reform projects: the Law Commission follows recommendations that it should review an area of law made by the judiciary (contained in judgments), MPs, government departments, as well as a wide array of other organisations and individuals. In particular, the Commission and Lord Chancellor agree a Programme of Law Reform approximately every three years, which sets out the majority of projects it will undertake. Its statistics suggest that approximately two-thirds of its reports have been implemented in whole or in part.

15. A few examples of the Law Commission's recent work include: a draft bill on unjustified threats to make it easier for small businesses to enforce their intellectual property rights; the Consumer Rights Act 2015 implemented worked done by the Law Commission on consumer remedies for faulty goods and on unfair terms in consumer contracts; and the Care Act 2014 implemented the Law Commission's recommendations on new protection against abuse and neglect of disabled people within the system of social care.

16. It is the Law Commission's ability to devote attention to specialist areas of law which permits it to undertake lengthy and detailed projects that government departments, themselves, would be unable to carry out. Since 2010 a protocol made pursuant to the Law Commission Act 2009 has governed the relationship between the Law Commission and government departments in respect of the work done before, during and after law reform projects.

17. *Overview of a project*: although the precise stages of each Law Commission project will vary, an overview of the typical project lifecycle is useful in appreciating the broader

input into the Law Commission's work. A project will usually be initiated on the basis of a memorandum of understanding with a particular government department, followed by some initial study and scoping carried out by the Law Commission. At this stage a consultation paper is issued inviting comments on possible solutions and calling for additional evidence. This paper is circulated widely and the Commission seeks to engage with a broad range of stakeholders and interested groups and individuals. Once it has analysed the responses it receives, the Commission will submit a final report to the Lord Chancellor, including its final recommendations and reasons behind them.

18. Statute law work: Since the Law Commission was established in 1965, nineteen Statute Law (Repeal) Bills have been enacted. These have repealed more than 3,000 whole pieces of legislation, as well as thousands in part. The Law Commission has also been responsible for more than 200 consolidation acts.

19. *Procedure*: It is important to note that the Law Commission cannot introduce proposed legislation to Parliament. The proper process is that outlined above: a recommendation is made to the Lord Chancellor, and the Commission relies on a bill being introduced either through the government's legislative programme, or through a private member's bill. The government does, however, also enjoy the option of using the Special Parliamentary Procedure for Law Commission Bills: this procedure allows the Second Reading of uncontroversial Law Commission bills to be taken away from the floor of the House, enabling legislation to proceed which would otherwise have had difficulties being included in the government's legislative programme.

Post-legislative scrutiny

20. An interest in the mechanisms of post-legislative scrutiny has significantly developed within approximately the last 15 years. That the scrutiny within the system exists mainly at the pre-legislative stage speaks to the fact that legislation is characterised as the voice of Parliament: scrutiny is thus utilised to ensure that Parliament exudes a useful and effective message and delivers policy outcomes, rather than measure this after the fact. Indeed, post-legislative scrutiny can also be considered in some senses as concurrently pre-legislative scrutiny: in advising on the efficacy of legislation, the advisor is essentially preparing the groundwork if the law needs subsequent amendment.

21. The **House of Lords Constitution Committee** reported on the legislative process in October 2004, including an assessment of the mechanisms of post-legislative scrutiny. It concluded broadly that Parliament tends to end its scrutiny of legislation once the relevant law has received Royal Assent. It recommended that most acts of Parliament normally be subject to review within three years of commencement by select committee. It also posited that Explanatory Notes to bills could incorporate criteria which could be used post-enactment to assist in scrutiny of the legislation's effectiveness. The government's response to these recommendations was in favour of greater parliamentary scrutiny, noting that departments already engage in post-legislative scrutiny in the form of policy evaluation. However it was not convinced by the proposal to judge a law's efficacy by reference to criteria in its Explanatory Notes.

22. The **Law Commission** also reported in response to the House of Lords Constitution Committee's recommendations in October 2006. In short, the Law Commission sought an approach that was evolutionary, building on the infrastructure already in place and that effective scrutiny could take a number of forms. It observed that a parliamentary review process was popular given that Parliament already had a role in scrutinising and considering legislation. Further, there was significant support for a "*new Joint Committee on Post-Legislative Scrutiny*", involving collaboration between both Houses of Parliament, and which would commission specialist research from a variety of sources both inside government and without. The Law Commission also foresaw a greater scope for government departments to enhance the role of Impact Assessments for legislation.

23. The **government** formally responded to the Law Commission's report in March 2008. Its overall approach was that a new process of post-legislative scrutiny should start within House of Commons committees, on the basis of command papers submitted by the relevant government department[s]. This approach sought to ensure that all primary legislation would receive measure of post-legislative scrutiny within government, and would be considered for further assessment by Parliament. It also accepted that there was potential for Explanatory Notes and Impact Assessments to play a greater role in assessing the effectiveness of legislation after it had been passed. However, the government was less persuaded of the merits of a new Joint Committee on Post-Legislative Scrutiny, instead arguing that existing select committees were well-placed to

undertake this exercise – and that this should occur 3-5 years after Royal Assent. Guidance has now been produced by the Cabinet Office to reflect the government's position.

24. By way of example of how this system has operated in practice: in December 2011 the Ministry of Justice published a memorandum to the Justice Select Committee entitled *Post-Legislative Assessment of the Freedom of Information Act 2000* ("**FOIA**"). The memorandum set out the scope of post-legislative review, including an analysis of how FOIA has operated in practice and an evaluation of its success against a list of original objectives. That month the Justice Select Committee also put out a call for evidence to assist in its review of the Act, focusing on particular issues. In response it received 140 pieces of written evidence and took oral evidence from 37 witnesses. It then published its post-legislative scrutiny report in July 2012.

Role of the courts

25. As can be seen the mechanics of legislative scrutiny are chiefly established with Parliament and the government at their core. The courts do not play a formal role as such in this process, but that is not to say that they are absent from the process of legislative scrutiny. The part of the dialogue between legislators and judiciary that emanates from the latter is chiefly to be found in the content of judgments, and is best illustrated by way of example.

26. It is important first to note that it is the courts' function to interpret the law as enacted by Parliament, rather than to impose its own meaning on it. In this interpretive function the courts will apply certain presumptions – such as that against legislation having retrospective effect, or ousting the ability of the courts to exercise judicial review over government functions. This function simply recognises the reality that however well the legislature carries out its function, some interpretation of laws may be needed. Courts will, where possible, remain faithful to as literal a meaning of the words of a statute as practicality permits. *Cunningham v Chief Constable of the Police Service of Northern Ireland* [2016] NIQB 25 provides an example of where a judge was forced to take a purposive approach to statutory interpretation where a literal one would have led to an absurd outcome. In that case an amendment had been drafted for application in England

and Wales and lifted to a Northern Irish context, without consideration of the unique aspects of that jurisdiction. Mr Justice Colton made this point in his judgment providing a typical example of how the judiciary uses written judgments to communicate with legislators in scrutinising legislation:

> *"[22] One of the difficulties that arises in relation to this matter is the fact that a draft appropriate for the jurisdiction in England and Wales has been directly imported into the Northern Ireland jurisdiction. In England and Wales all civil claims commence in the County Court and are only transferred to the High Court when certain criteria are met. The equivalent rule in England and Wales is Rule 30.3 of the Civil Procedure Rules which is in the context of transferring cases from the County Court to the High Court. In our jurisdiction the rule appears in that section which deals with the removal and remittal of proceedings. Notwithstanding this the use of the word transfer remains in our rule. This leads to the complication that the obligation to "transfer" the proceedings is on "the Court"…*
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> *[23] It is perhaps regrettable that the rule was not specifically modified to reflect the architecture in this jurisdiction and that in both jurisdictions it did not expressly indicate that the rule related solely to Section 6 applications which would have avoided any of the issues which have arisen in this case.*"

27. In the particular sphere of human rights the Human Rights Act ("**HRA**") gives the court specific directions in how to construe legislation. The courts are under a duty under section 3 of the HRA to read and give effect to all legislation in a manner compatible with Convention rights "*so far as it is possible to do so*". Only if this is not possible will a court grant a 'declaration of incompatibility' under section 4 of the HRA. The House of Lords considered the scope of the section 3 duty in *Ghaidan v Godin Mendoza* [2004] 2 AC 557, finding the remit to be a broad one: the courts will rewrite legislation by adding words if necessary, or eschew the plain language of the statute, provided that the meaning they wish to give in order to preserve human rights is consonant with the grain of the legislation.

28. The courts are deeply aware of the principle that Parliament is both sovereign and the branch of government instilled with the most democratic legitimacy. In *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, while finding that Parliament's failure to amend the statutory provisions to permit individuals to gain assistance in ending their lives may infringe their rights under Article 8 of the European Convention on Human Rights, at least four members of the Supreme Court remained unwilling to declare the legislation incompatible with the Convention. Parliament was considered better placed to determine the compatibility of section 2 of the Suicide Act 1961. The Court thus wished to give

Parliament the first opportunity to address the issue before the judiciary intervened. Lord Neuberger referred to the "*exceptional jurisdiction*" of the court to allow Parliament to consider whether it would amend the statute before granting the declaration. Such an instance of the court giving direct 'feedback' to legislators in this way is exceptional.

29. The courts are willing to intervene where Parliament has been silent. The Supreme Court did so in *Cavendish Square v Makdessi* [2015] UKSC 67 in relation to the validity of contractual penalty clauses where the matter had been untouched by Parliament; and in *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53 in relation to the property of separating cohabitants because Parliament had made clear that it was not going to act on the Law Commission's report on the issue.

30. There are two other means by which judges less frequently provide feedback to Parliament. There are rarely-used powers under section 5 of the Constitutional Reform Act 2005 by which the President of the Supreme Court and the chief justice of any part of the United Kingdom may lay written representations before Parliament. The power in respect of the President of Supreme Court is limited to matters relating to the Supreme Court and its jurisdiction; for the chief justices it extends more broadly "*to the administration of justice*". Further, judges may sometimes give evidence before parliamentary committees. By way of example, Lady Hale and Sir Maurice Kay gave evidence to the Joint Committee on Human Rights' inquiry into whether the UK should have a bill of rights. To give a sense of the relatively limited frequency of these appearances, judges appeared 65 times before the House of Commons Justice Committee between 2003 and 2013 and 22 times in that period before the House of Lords Constitution Committee.

Summary

31. To summarise the above as it relates to the areas covered by the questionnaire [§ references refer to paragraph numbers above]:

Part 1: Input mechanisms *prior* to the drafting of legislation

a. ***Input from the courts*** - Limited direct input from the courts, save where a judgment may direct Parliament that the law in a particular area ought to be reformed (§28).

b. ***Input from advisory bodies*** – Process driven by Parliament but obvious stages for external input: before policy is finalised (§6); consultation with devolved administrations where appropriate (§7); publication of bills in draft with subsequent committee evidence and recommendation [before introduction before one of the Houses of Parliament] (§8); evidence before the Public Bill Committee (§11); and the broad role of the Law Commission in proposing reform (§§12-19).

Part 2: Input mechanisms *after* legislation has been drafted [enacted]

a. ***Feedback from courts*** – Main function of the courts in this respect involves their function in *interpreting* legislation (§26), with specific duties in this regard in relation to human rights considerations (§27). Overarching view that Parliament is sovereign, but courts may step in where necessary (§29). Certain judges may also lay written representations before Parliament, and some may testify before select committees (§30).

b. ***Feedback from advisory bodies*** – Recent increased focus on post-legislative scrutiny, alongside the traditional oversight at the drafting stage; efforts mainly come, however, from within Parliament, where committees may – as at the pre-enactment stage – take evidence from external bodies (§§20-24).