House of Commons
Modernisation of the House of Commons

The Legislative Process

First Report of Session 2005–06

Report, together with formal minutes, oral and written evidence

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The Select Committee on Modernisation of the House of Commons

The Select Committee on Modernisation of the House of Commons is appointed by the House of Commons to consider how the House operates and to make recommendations for modernisation.

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The following Members were also members of the Committee during the Parliament:

Liz Blackman (Labour, Erewash)
Chris Grayling (Conservative, Epsom and Ewell)
Mr David Heath (Liberal Democrat, Somerton and Frome)
Mr Geoffrey Hoon (Labour, Ashfield) (Chairman)
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The powers of the Committee are set out in an Appendix to the House of Commons Standing Orders. These are available on the Internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at http://www.parliament.uk/modcom.

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The current staff of the Committee are Ms Helen Irwin and Tom Healey (Clerks), Susan Morrison (Committee Assistant) and Jane Cooper (Secretary).

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Summary

The House of Commons should revise its procedures so that it is easier for the general public, as well as lobby groups, representative organisations and other stakeholders to influence Parliament’s consideration of bills.

Pre-legislative scrutiny of draft bills, one of the most successful Parliamentary innovations of the last ten years, should become more widespread, giving outside bodies and individuals a chance to have their say before a bill is introduced and improving the quality of the bills that are presented to Parliament. Members who have served on pre-legislative committees should be invited to return for the standing committee stage, drawing on their experience with the draft bill to contribute to the detailed consideration of the bill itself. This will not necessarily mean an easy ride for the Government; there is evidence that, by informing Members more thoroughly about the issues surrounding a bill, pre-legislative scrutiny can make the Parliamentary stages of a bill more challenging for Ministers.

As a matter of routine, Government bills should be referred to committees which have the power to take evidence as well as to debate and amend a bill, and these committees should be named public bill committees. This is not intended to be a substitute for pre-legislative scrutiny; it is to enable the Members who will be going through the bill in detail to inform themselves about its contents and to give the Minister a chance to respond to questions from the Committee, a process which is likely to be more fruitful than a series of debates on ‘probing’ amendments.

The standing committee stage itself could be improved by increasing the notice period for amendments—giving Members more time to prepare for debates—and Members should have the opportunity to table brief explanations of their amendments. The House should take the first steps towards computerising standing committee papers and providing on-screen access to papers in committee rooms. In the longer term, this could have far-reaching implications for the way that Members use standing committee papers, for example, by providing hypertext links between different documents and showing how the bill would look if particular amendments were made.

Standing committees—a term which, to the extent that it says anything about what they are, is positively misleading—should be renamed ‘public bill committees’ in respect of bills and ‘delegated legislation committees’ in respect of statutory instruments.

A more flexible approach to the timing of bills could bring some benefits. In particular, a move away from the ‘standard’ one-day debate on second reading could allow for longer second reading debates on some bills, and shorter debates on others.

Parliament should improve the quality of the information it provides both for its own Members and for the public. A new series of ‘legislation gateways’ on the internet will provide a single source of information for each bill and the House of Commons Library will produce a Research Paper covering the committee stage of most bills, supplementing the Reports that are currently produced before second reading. Greater use should be
made of information that is already available, such as the Government’s Regulatory Impact Assessments.
Introduction

1. It is in making, or giving effect to the law that Parliament impinges most directly on individuals, by conferring on them a wide range of rights and duties.¹ Individual citizens are also affected indirectly by legislation which confers powers or responsibilities on the Government. The prerogative powers of the Crown encompass matters of fundamental importance such as citizenship, foreign relations and defence. But they are in principle circumscribed, and comparatively few in number, in relation to the functions of the modern state. By contrast, Parliament’s legislative powers are in principle boundless; in Blackstone’s phrase, ‘it can, in short, do everything that is not naturally impossible’.² Most of the edifice of government—the National Health Service, the social security system, the transport network, schools, public libraries and social housing—rests on statutory foundations. The question of how the public can be more closely involved in the legislative process has been a key feature of this inquiry.

2. An effective, democratic legislative process must be as open as possible. This means not only that the public should be able to observe every aspect of it, but that they should wherever possible have the opportunity to become involved as active participants. This is a fundamental point of democratic principle, but also a prudent strategy. Members of Parliament have no monopoly on wisdom; the Government has no monopoly on effective consultation. A system which allows the individual or organisation who has spotted a way in which a pending piece of legislation might affect them to bring this readily to the attention of the legislature is less likely to produce laws which are defective or redundant, or which lead to unintended (even unforeseen) consequences.

Connecting with the public

3. Although the question of involving the public in the legislative process runs through this Report, there are two connected recommendations about the way information is provided on the internet which are intended solely to benefit the public’s understanding of bills and do not relate directly to our other recommendations for improving the legislative process.

4. The House of Commons Library currently maintains on the Parliamentary intranet a set of bill information pages, which provide links to the relevant Library publications, contact details for the relevant Library Researchers and a link to the Leader of the House’s website, which also maintains a page of information for each bill. There are proposals to develop bill information pages further, under the name ‘legislation gateways’. The new gateways will be set up for each bill at the beginning of the next Session, and will provide links to the Bill Index; the Leader of the House’s website; Lords Library papers; e-Politix briefings; bill pages created by Government departments and others; draft bills; relevant briefings

¹ The distinction between making the law and giving effect to it is significant. See, for example, Professor the Lord Norton of Louth, Parliament and Legislative Scrutiny: an Overview of Issues in the Legislative Process, in Brazier (Ed.), Parliament, Politics and Law Making (Hansard Society, 2005).

produced by the National Assembly for Wales research service and Scottish Parliament Information Centre (SPICe); explanatory notes; appropriate subject pages; and parties' and others’ press notices on Bills. They will also contain procedural information, flagging up when the next stage of the bill is expected to be taken.

5. Legislation gateways are intended primarily as a resource for Members, but there would be clear advantages in opening them up to the general public as a one-stop source for information about bills. Some minor details might need to be changed for public use, for example, the replacement of contact details for individual Library Researchers with details of the House of Commons Information Office, and the inclusion of links to factsheets setting out the basics of the legislative process. We welcome the Library’s proposal to develop improved legislation gateways and we recommend that they be made available to the public, with any necessary modifications, on the internet.

6. The Clerk of the House suggested to us that there may be a case for the production of a simpler description of bills, for use by both Parliament itself and the general public. Explanatory notes and the Library research papers on each bill can be lengthy and dense. A simpler summary might set out a Bill’s main provisions in as non-technical language as possible, linking them to its intended purposes and objectives. We recommend that a simple summary of the main points of each bill, perhaps based on the summary of main points in the Library research paper, together with information about the stage in the scrutiny process it has reached, be published on the front page of the new legislation gateways.

The volume of legislation

7. A common complaint is that there is too much primary legislation. As the Chairman of Ways & Means pointed out to us, the extent to which time can be made available for more thorough scrutiny is likely to depend, at least to some extent, on the size and complexity of the Government’s legislative programme for the session. The table below shows the number of public Acts and the number of pages of primary legislation, including acts resulting from private Members’ bills, for each year since 1992. Consolidation and tax law re-write acts are excluded: since these bills, which do not change the law substantially but merely tidy it up, are subject to special, expedited procedures, they do not have any significant impact on Parliament’s overall legislative workload.

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3 Ev 73.
4 Ev 98.
Table 1: Volume of primary legislation, 1992–2004

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Acts</th>
<th>No. of pages of law</th>
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</thead>
<tbody>
<tr>
<td>1992 (election year)</td>
<td>55</td>
<td>1,288</td>
</tr>
<tr>
<td>1993</td>
<td>65</td>
<td>2,041</td>
</tr>
<tr>
<td>1994</td>
<td>42</td>
<td>2,005</td>
</tr>
<tr>
<td>1995</td>
<td>48</td>
<td>2,290</td>
</tr>
<tr>
<td>1996</td>
<td>57</td>
<td>2,248</td>
</tr>
<tr>
<td>1997 (election year)</td>
<td>62</td>
<td>1,534</td>
</tr>
<tr>
<td>1998</td>
<td>47</td>
<td>2,357</td>
</tr>
<tr>
<td>1999</td>
<td>35</td>
<td>2,063</td>
</tr>
<tr>
<td>2000</td>
<td>45</td>
<td>3,610</td>
</tr>
<tr>
<td>2001 (election year)</td>
<td>25</td>
<td>1,232</td>
</tr>
<tr>
<td>2002</td>
<td>43</td>
<td>2,848</td>
</tr>
<tr>
<td>2003</td>
<td>44</td>
<td>3,435</td>
</tr>
<tr>
<td>2004</td>
<td>38</td>
<td>3,470</td>
</tr>
</tbody>
</table>


8. There is significant fluctuation from one year to the next in the volume of legislation passed, but broadly speaking, while the total number of acts has fallen over the years, their aggregate volume—in page numbers—has risen. Nonetheless, it scarcely needs to be said that, given a smaller volume of legislation each year, Parliament could devote more time to scrutinising it.

**Primary and secondary legislation**

9. Is terms of volume alone, the majority of legislation is made not by acts of Parliament (primary legislation) but by secondary or delegated legislation, also known as statutory instruments (SIs). In 2003, for example, there was a total of 8,942 pages of SIs, compared to 3,435 pages of non-consolidation acts. Typically, delegated legislation is made by the Government using powers granted by an Act of Parliament. It can take a variety of forms,

5 QQ 210 & 211.
including Orders in Council, Rules, Regulations and Codes of Practice. Many, but not all statutory instruments are subject to some form of parliamentary control, which usually takes one of three forms:

a) under the negative procedure (also known as annulment), an SI is made and laid before Parliament but will be annulled if either House passes a Resolution calling for it to be annulled within a particular time-limit, usually 40 days;

b) under the affirmative procedure, an SI must usually be laid in draft and approved by a Resolution of each House before it can be made;7

c) under the ‘super-affirmative’ procedure, used for Regulatory Reform Orders (RROs) and Remedial Orders made under the Human Rights Act, a proposal for a draft Order is laid before Parliament and examined by the relevant select committee (Regulatory Reform or Human Rights); a draft Order is then laid and proceeded with in a similar way to an affirmative SI (depended, in the case of an RRO, on how the Committee voted on it).

10. Secondary legislation has the same force in law as primary legislation, except that a court may consider whether the Government was properly exercising the powers conferred on it by Parliament in making the legislation, whereas it cannot look at the processes leading up to the passage of an Act of Parliament. To the extent that currently few SIs take up any Parliamentary time and that those that do are generally taken in standing committee, in a debate which may last up to one and a half hours, they have little bearing on Parliament’s capacity to consider legislation. However there is concern in some quarters at the growing use by Government of SIs and if this led in due course either to moves to give Parliamentary time to consider more SIs or to moves to reduce the number and include more provisions in primary legislation this would have an effect on Parliament’s capacity to consider legislation.

11. The factors affecting the volume of legislation are numerous and complex. Some are within the Government’s control and some are not. The passage of defective legislation, in the sense of legislation which is unclear, unworkable or fails to do what it was intended to do, in itself creates the need for remedial, amending legislation, which in turn increases the legislative workload in subsequent years. Although some witnesses suggested that reducing the volume of legislation would serve to improve its quality, the volume of legislation is largely a function of the programme of the government of the day rather than a matter of procedural changes in the House. However, there are ways in which the flow of legislation can be managed effectively to ensure that, subject to the size of the Government’s legislative programme and the constraints of the Parliamentary year, the best possible use is made of Parliamentary time in order to provide the most effective scrutiny of bills. They include:

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7 Some affirmative SIs may be made and come into force before being approved by Parliament; some are required to be approved only by the House of Commons.
a) publishing bills in draft for pre-legislative scrutiny before they begin their formal Parliamentary stages;

b) making appropriate use of carry-over to smooth the flow of bills throughout the Parliamentary year;

c) using programming to ensure that adequate time is available for each stage of a bill; that time is not wasted, for example, by programming committee proceedings to finish several weeks before time can be found for remaining stages; and that the available time is allocated appropriately to different parts of the bill; and

d) adopting a flexible approach to the time available to each bill, making more time available where it is needed, less where it is not.

In the rest of this Report, we consider ways in which these measures and others can be used to promote better scrutiny of primary legislation and, ultimately, better law.

Pre-legislative Scrutiny

Development of pre-legislative scrutiny

12. The introduction of pre-legislative scrutiny is generally acknowledged to be one of the most successful innovations in the legislative process in recent years. During the second reading of the Charities Bill [Lords], several Members praised the pre-legislative process. One of the Chairmen of the Joint Committee which considered the Bill in draft said,

‘I remain a real convert to the pre-legislative process. ... That process is far less partisan and far more open to analysis and debate, and, as a consequence, makes, where it is possible, for far better law. Indeed, I should like to see it go much further in this House and in the other place’.8

Winding up the debate, the Minister noted that the pre-legislative process had helped to build a consensus around the Bill, and the opposition spokesman commended the Government for taking time to consult properly on the issue.9

13. Pressure to publish bills in draft began in the early 1990s, with a recommendation in Making the Law, the Report of the Rippon Commission, that, where there was no great urgency for a bill, it might be published in draft as a green paper.10 This coincided with particular public concern about the operation of the Child Support Act 1991, widely regarded as defective and having had undesirable, unforeseen consequences.11 Because the

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8 HC Deb, 26 June 2006, col. 43.
9 Ibid., cols. 95 &88.
11 See, for example, Small Change: The Impact of the Child Support Act on Lone Mothers and Children (Joseph Rowntree Foundation, March 1996).
operation of the Act impinged significantly on many individuals, its shortcomings were quickly drawn to MPs’ attention in their constituency caseloads.12

14. Eighteen bills were published in draft between 1992 and 1997, though they were not subject to systematic Parliamentary scrutiny. In 1997, in the first Report from this Committee, our predecessors concluded that

‘There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; the use of the Chair’s powers of selection would naturally reflect the extent and nature of previous scrutiny and debate. Above all, it should lead to better legislation and less likelihood of subsequent amending legislation’.13

The Committee suggested that, depending on the type of bill concerned, it might be considered by a departmental select committee, an *ad hoc* select or joint committee, or possibly a new kind of permanent legislative committee.

15. Table 2 shows the number of bills published in draft since the 1997–98 Session, and the number considered by a committee of one or both Houses of Parliament.14

<table>
<thead>
<tr>
<th>Session</th>
<th>No. Government bills published</th>
<th>No. draft bills, etc., published</th>
<th>No. draft bills scrutinised by committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997–98</td>
<td>53</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>1998–99</td>
<td>31</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>1999–2000</td>
<td>40</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>2000–01</td>
<td>26</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>2001–02</td>
<td>39</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>2002–03</td>
<td>36</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>2003–04</td>
<td>36</td>
<td>12</td>
<td>10</td>
</tr>
</tbody>
</table>

14 The total numbers include draft sets of clauses which fell short of a complete draft bill but were nonetheless published for consultation: draft clauses of the Police (Northern Ireland) Bill and the Gambling Bill in 2002–03, and of the Company Law Reform Bill in 2004–05.
Impact of pre-legislative scrutiny

16. The impact of pre-legislative scrutiny can be assessed against the three related purposes identified by the Modernisation Committee in 1997:

a) connecting with the public by involving outside bodies and individuals in the legislative process;

b) changing the bill to produce better law; and

c) achieving consensus so that the bill completes its passage through the House more smoothly.\(^{16}\)

Connecting with the public

17. A major theme of this inquiry has been the question of how to involve the public more closely in the legislative process. By ‘the public’, we mean not only individuals, but also the non-governmental organisations, lobby groups and interest groups who seek to influence the form and content of laws. It is an important matter of principle, in a democracy, that citizens should be able to make their views known to legislators, and an accessible legislative process provides access to the many thousands of smaller groups as well as to the larger, better-organised interests.\(^{17}\)

18. Pre-legislative scrutiny is an effective way of drawing all those who have a point of view to put across into the legislative process. Inquiries are usually well-publicised (though some are inevitably higher profile than others) and there are clear and well-understood routes for submitting evidence to committees considering draft bills. The Joint Committee on the draft Charities Bill, for example, received more than 360 written submissions and heard oral evidence from 34 individuals representing 28 organisations.\(^{18}\) This is also the only part of the legislative process in which innovative ways of connecting with the public, such as on-line consultation, can effectively be tried out.\(^{19}\)
19. Meetings where committees take evidence are, for a variety of reasons, generally more media-friendly than standing committee proceedings, so pre-legislative scrutiny also has the potential to stimulate and inform public debate in a way that other proceedings on a bill do not. It can therefore be effective in putting Parliament at the centre of the national debate on forthcoming legislation.20

Improving the law

20. There is little doubt that pre-legislative scrutiny produces better laws. As the Law Society told us, ‘it would probably be difficult to prove scientifically that more pre-legislative scrutiny has improved legislation, but it would seem unarguable in practice that it has. ... Effective consultation procedures and processes such as publication and consideration of Bills in draft would appear to have greatly improved the text which is presented to Parliament or to have identified drawbacks in the draft text which require its rethinking’.21 This view was echoed by the Hansard Society, the Members of Parliament who gave evidence to us, and by academic witnesses.22 Witnesses from the CBI, the TUC and the Law Society all suggested that pre-legislative scrutiny could play a significant part in improving the quality of bills.23

21. Examples of pre-legislative scrutiny having a major impact on a bill include the draft Communications Bill, where the Government accepted 120 of the Joint Committee’s 148 recommendations and the Civil Contingencies Bill, which the Minister acknowledged at second reading was ‘now stronger in a number of important ways’ than the original draft, the Government having accepted in full 13 of the Joint Committee’s 50 recommendations, including some key concessions and significant changes in policy.24 In the case of the Disability Discrimination Bill, the Government initially accepted 32 of the Committee’s 75 recommendations at the pre-legislative stage, but by the time it had completed its passage in the Lords and reached the Commons, it had accepted a total of 61.25

22. Even where there has been extensive consultation by Government and others during the production of a bill, pre-legislative scrutiny by Parliament can still make a valuable contribution to the process. A good example is the draft Corruption Bill, which was based on recommendations from the Royal Commission on Standards in Public Life in 1976 and further developed in a Law Commission Report of 1998. It had in the meantime been the subject of numerous reports and consultations of one kind or another.26 Despite the bill’s

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21 Ev 54.
22 Ev 111 & QQ 5, 8 41, 44 and 104.
23 QQ, 150
26 For details, see Report of the Joint Committee on the draft Corruption Bill, HL Paper 157 and HC 705, Session 2002–03, paragraph 1. As well as the Law Commission Report, the original proposals from the Royal Commission were referred to in a Report from the Committee on Standards in Public Life (1992), three Home Office publications (1996–2000), a Report from the Joint Committee on Parliamentary Privilege (1999) and a Report from the House of Commons International Development Committee (2001).
leisurely journey in the direction of the statute book and the amount of expert interest that had been taken in it, the Joint Committee on the draft Bill was critical, noting ‘many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility’. They concluded that ‘modifying the bill by trying to improve it marginally’ would still leave it ‘obscure and unsatisfactory’ and recommend that it be completely re-drafted.

23. The Home Office accepted the Committee’s recommendations and scrapped the bill, issuing a new consultation paper on bribery in December 2005, acknowledging that, in the light of the Joint Committee’s Report, there ‘no longer [seemed] to be broad consensus’ on the approach proposed by the Law Commission.

24. In the case of the Company Law Reform Bill [Lords], the CBI argued that it should have been published in draft. The DTI had resisted this on the ground that the bill had been the product of a lengthy consultation exercise run by Government, but the bill as introduced contained some significant deviation from what had been agreed in that exercise, including important new material. Parliamentary scrutiny at the pre-legislative stage can play an important role in improving the law, even where there has already been lengthy and extensive external consultation by Government.

Smoothing the passage of legislation

25. Our predecessor Committee suggested that pre-legislative scrutiny should lead to less time being needed at later stages of the legislative process. If a consensus has been reached before a bill is introduced, and any points of disagreement or controversy have been resolved, then it would not seem unreasonable to assume that the subsequent passage of the bill through Parliament will be faster than it otherwise would have been. However, research into this question has failed to provide conclusive evidence of this. Jennifer Smookler, a Committee Specialist working with pre-legislative scrutiny committees in the House of Lords, argued that the process of pre-legislative scrutiny may cause a bill to be challenged on a greater number of issues precisely because of the level of knowledge gained by parliamentarians as a result of the inquiry. She cited the example of the Civil Contingencies Bill, which spent ten months in Parliament and saw two key amendments relating to the pre-legislative Committee’s recommendations going to an exchange of Messages between the two Houses.

26. Whatever its impact on the passage of legislation, the purpose of pre-legislative scrutiny is not to secure an easy ride for the Government’s legislative programme, it is

27 Ibid, paragraph 18.
28 Ibid, paragraphs 98–100.
30 Now the Companies Bill [Bill 218]: the short title was amended in standing committee in the Commons.
31 Q 159.
to make better laws by improving the scrutiny of bills and drawing the wider public more effectively into the Parliamentary process. Some bills may enjoy a swifter progress through the two Houses as a result of pre-legislative scrutiny, whilst others may well take longer. If the result is a better Act, then that is a good thing. In an earlier Report, this Committee made the connection between pre-legislative scrutiny and carry-over of public bills. If a bill is to undergo an additional Parliamentary stage, without any guarantee that this will expedite the subsequent stages, then the one-Session time limit arguably becomes more of a burden than a safeguard.

27. The Law Society told us that carry-over had undoubtedly been useful in allowing greater and more considered attention to be given to bill, and getting legislation right, as opposed to getting it through within a given time-scale should be the priority for both sides of the House. Philip Cowley, Reader in Parliamentary Government at the University of Nottingham, went a step further: 'let us stop trying to legislate everything within a year and take instead the norm that we take two years for a run-of-the-mill bill to pass through its legislative stages'. The House of Lords Constitution Committee has also recommended that carry-over should be the norm for bills that have been subject to pre-legislative scrutiny, a suggestion that was also put to us by David Kidney MP.

28. It is important to note that carry-over does not increase the House’s overall capacity to deal with bills, since a bill which is carried over in one Session adds to the total volume of material to be considered in the next one. It does allow longer gaps to be left between stages, providing more time for consideration, reflection and informal discussions and negotiations during the bill’s passage. It also allows greater flexibility in deciding how to divide the available Parliamentary time between bills.

29. The Sessional clock does not start ticking until a bill is formally presented in the first House, so pre-legislative scrutiny does not necessarily mean that a bill needs to be carried over if it is considered in draft in one Session and presented in the next. However, it is possible that the Sessional time-limit is placing some strain on the pre-legislative stage itself, as there is pressure for bills published in draft in the spring to have completed the pre-legislative stage and so be ready for presentation by the late Autumn, early in the following Session. Two chairmen of committees engaged in pre-legislative scrutiny of the draft Legal Services Bill and the draft Coroners Bill have expressed concern to us about the time available for their committees to complete their work. We recommend that, where

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33 Carry-over of Public Bills, Third Report from the Modernisation Committee, Session 1997–98, HC 543.
34 Ev 53 ff.
35 Q 40. He went on to argue that more routine carry-over would facilitate the greater use of special standing committees.
37 Q 30.
38 In the 2002–03 and 2003–04 Sessions, bills were typically published in draft between April and June, and presented in Parliament between October and December the same year. Exceptions were the draft Gambling Bill (draft November 2003; presentation October 2004) and the draft Mental Capacity Bill (draft June 2003; presentation June 2004).
39 Ev 137–138.
a bill is introduced late in a Session because it has been subject to pre-legislative scrutiny, the assumption should be that it will be carried over to the next Session, subject to the same restrictions which currently apply, including the twelve-month time-limit. It is hoped and expected that this would be done with cross-party support. The purpose of carrying over these bills is to relieve pressure of time on both the pre-legislative and legislative stages. We would still expect to see them pass reasonably quickly from second reading to committee to report, with adequate time allowed at each stage.

Making pre-legislative scrutiny more effective

Volume of draft bills

30. The Government and Parliament are both committed to expanding the use of pre-legislative scrutiny. Publication of bills in draft rose from three in 1997–98, to a peak of 12 in 2003–04, equivalent to more than a third of the total number of Government bills that were passed in that Session, though a reduction in the number of draft Bills is to be expected in the Session following a general election, even where there has been no change of Government.\(^{40}\) It has more recently dropped off, to six in the pre-election 2004–05 Session and just two so far in the current Session, though a reduction in the number of draft Bills is to be expected in the Session following a general election, even where there has been no change of Government.\(^{41}\) Many witnesses have argued that pre-legislative scrutiny should be the norm for Government bills, with the exception of the Finance Bill and legislation which needs to be passed urgently.\(^{42}\) In 2003, this Committee said,

‘We recognise that it will never be possible to have every Bill published in draft. There will always be occasions when new developments require urgent legislation. However, we hope eventually to see publication in draft become the norm. We recommend that the Government continue to increase with each Session the proportion of Bills published in draft’.\(^{43}\)

We welcome the Government’s progress in increasing the proportion of legislation published in draft between 1997–98 and 2003–04. We are however concerned by the reduction in the number of draft bills since then, and we urge the Government to increase further the proportion of legislation published in draft. It will never be possible to produce all legislation in draft and there may be occasions, such as the Session following election of a new Government, when very little pre-legislative scrutiny is possible. But we believe that pre-legislative scrutiny should be the usual course for major Government bills.

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\(^{40}\) This is a comparison: the bills which were published in draft in that Session were not the same bills which received Royal Assent.

\(^{41}\) See Table 1, p. 7.

\(^{42}\) Ev 50 & 54–56 (Law Society), and 112 (Hansard Society); David Kidney MP and Natascha Engel MP, QQ 5 & 18; Philip Cowley, QQ 41 & 44; John Bercow MP, Q 104.

31. Pre-legislative scrutiny has so far been used for bills which do not deal primarily with matters of party political controversy. That is not to say that the bills have all been uncontroversial—animal welfare, gambling and nuclear decommissioning, for example, are often the subject of lively public debate—only that they have not tended to deal with areas where there have been significant differences in the settled policies of the main political parties. Professor Robert Hazell of the Constitution Unit, UCL, has noted that pre-legislative scrutiny is rarely used for bills of constitutional significance, having been used in only three of the 55 constitutional bills he identifies in the last two Parliaments.

32. It might be that pre-legislative scrutiny is most useful for bills which are not controversial in the party-political sense but we would not like to see its use confined exclusively to bills of that kind. We recommend that, in increasing the number of bills published in draft, the Government include bills that are likely to be the subject of party-political controversy.

**Continuity of membership**

33. In 1997, the Committee recommended that where a pre-legislative committee had been used the Committee of Selection should so far as possible nominate the same core of Members to the subsequent committee stage, supplemented as necessary. With a few exceptions, this recommendation has not been followed. Table 3 below shows the proportion of Commons members of pre-legislative committees who have been reappointed to the standing committee on the same bill.

<table>
<thead>
<tr>
<th>Proportion of Commons members of pre-legislative committee</th>
<th>Number of bills</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>5</td>
</tr>
<tr>
<td>A quarter or less</td>
<td>14</td>
</tr>
<tr>
<td>Half or less</td>
<td>9</td>
</tr>
<tr>
<td>Three-quarters or less</td>
<td>1</td>
</tr>
<tr>
<td>More than three-quarters</td>
<td>1</td>
</tr>
</tbody>
</table>

34. More than three-quarters of the pre-legislative committee members were appointed to the standing committee on the bill in only one case, the draft Financial Services and Markets Bill in 1998–99, where seven of eight Commons members of the Joint Committee

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44 The draft Nuclear Sites and Radioactive Substances Bill (Cm 5858).


were appointed to a standing committee of 25 members. The norm is that less than a quarter of the members of the pre-legislative committee are nominated to the standing committee, equivalent to one or two Members in most cases. Interestingly, all of the five bills where no members of the pre-legislative committee were included in the standing committee were considered in draft by permanent Commons select committees.47

35. **We recommend that Standing Order No. 86(2) be amended to make it clear that a Member’s participation in the pre-legislative scrutiny of a bill is one of the qualifications to which the Committee of Selection shall have regard when nominating members of a standing committee.** As a matter of practice, we suggest that the Committee aim to include at least four Members who were involved in the pre-legislative scrutiny of the bill (or half the members of the relevant pre-legislative committee, whichever is the fewer) on the standing committee considering the bill.

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### Information about bills

36. The ancillary publications which accompany bills are important because it is often to these documents, rather than to the bill itself, that the general public will turn when trying to find out what a proposed piece of legislation does. Although some progress has been made in making the language of bills themselves more readily comprehensible, it is still often the case that a plain-English summary of a bill’s provisions, such as the Explanatory Notes or a less technical evaluation of its intended effects, such as the Regulatory Impact Assessment, will be more attractive to the general reader than the more technical and precise language of the bill itself.

37. Each Government bill is accompanied by three supporting documents:

a) **The Explanatory Notes (ENs),** which were introduced in 1998, following a recommendation from this Committee.48 They replaced the Explanatory Memorandum, which was printed on the front of the bill and Notes on Clauses, which were produced by the department in charge of the bill and distributed to standing committee members (sometimes in piecemeal fashion throughout the consideration of the bill). ENs are ordered to be printed by each House when the bill is introduced, with a revised version being prepared for the second House, reflecting the changes made by the first House.

b) **The Regulatory Impact Assessment (RIA),** which was also introduced in 1998. This is prepared by the department in charge of the bill. It contains a statement of the purpose and intended effect of the bill; a record of the consultation undertaken within government and outside; a list of all the options for change (as well as the option of doing nothing); a list of the sectors and groups most likely to be affected by the

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proposal, the benefits and costs, a Small Firms Impact Test; a competition assessment; and a note on enforcement, sanctions and monitoring.\textsuperscript{49} RIAs are not peculiar to bills. They are prepared for all policy changes including statutory instruments and non-legislative policy changes.\textsuperscript{50}
c) The Delegated Powers Memorandum prepared for the House of Lords Delegated Powers and Regulatory Reform Committee. This identifies every provision for delegated legislation in the bill, explains its purpose, explains why the power has been left to delegated legislation rather than included in the bill, and explains the choice of Parliamentary scrutiny to which it will be subject (affirmative, negative or no Parliamentary procedure).\textsuperscript{51}

These are the documents which the government is required to produce for each bill. In each individual case, there may be a range of other supporting documentation, such as a white paper, and the House may also have made a contribution, with a select committee report, either on a draft bill or on the general policy area.

38. Parliament has no ownership of RIAs; they are produced within government under the oversight of the Cabinet Office. An RIA is produced in three stages: an initial RIA, which accompanies civil servants’ submissions to their own ministers seeking agreement to a proposal; a partial RIA, which is submitted with any proposal from the lead department requiring agreement from elsewhere in government and is accompanied by a public consultation exercise; and a full RIA, which is placed in the libraries of both Houses when a bill is presented.

39. A study by the National Audit Office in June this year highlighted the importance of Regulatory Impact Assessments in providing ‘a comprehensive assessment of proposals for legislative change’.\textsuperscript{52} The NAO noted that the expansion of the RIA process to include an assessment of the impact of proposed legislation on legal aid, health, race-equality, sustainable development and ‘rural proofing’ had improved its usefulness to policymakers. However, the growing importance of RIAs is not always matched by the use that Parliament makes of them during the legislative process. We recommend that, rather than simply being deposited in the Libraries of the two Houses, copies of the Regulatory Impact Assessment relating to each bill should be made available in the Vote Office and handed out with every copy of the bill and explanatory notes.

40. The Delegated Powers Memorandum is prepared primarily for the benefit of the House of Lords Delegated Powers Committee. It must be sent to that Committee when or before the bill is introduced (in the case of a Lords bill), or when or before it leaves the Commons (in the case of a Commons bill). They are then published with the relevant report of the

\textsuperscript{49} Guidance on the production of RIAs is published by the Cabinet Office Better Regulation Executive at: www.cabinetoffice.gov.uk/regulation/ria.

\textsuperscript{50} Command Papers listing all the RIAs produced in a six-month period are from time to time laid before the House. See Regulatory Impact Assessments: 1st January to 30th June 2005, Cm 6685 (November 2005).


Committee. This means that the Memorandum is often not available in time for the Commons stages of a bill, though the Health Bill team from the Department of Health suggested to us that it might be useful if it were available to the Commons.\textsuperscript{53} Given that the Government has undertaken to produce these Memoranda anyway, and that they could be useful for Members considering a bill, \textit{we recommend that the Government undertake to deposit copies of the Delegated Powers Memorandum in the Libraries of both Houses at the same time as a bill is published.} In the case of bills which start in the Lords, it may be necessary to produce a revised version of the Memorandum for the Commons, if the bill is significantly amended in the Lords.

\section*{Second reading}

41. The problems which have been encountered at second reading have largely been related to timing. We believe that there is a case for some longer second reading debates, as well as a case for some shorter ones. The current practice is to schedule all second readings of Government bills for a single day, providing a maximum of 6½ hours’ debate, but more usually, once any statements, ten-minute rule bills and other business have been disposed of, around five or six hours. In many cases, this is more or less the right amount of time, but a few cases each Session, where a second reading debate is the only substantive business of the day, the debate ends significantly earlier than it could have done. Table 4 below lists the occasions in the current Session when the main business ended more than two hours early.\textsuperscript{54}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Date} & \textbf{Main business} & \textbf{Time available not used} \\
\hline
Tue 14 Jun 05 & 2nd Reading, National Lottery Bill & 2¼ hrs \\
Thu 23 Jun 05 & 2nd Reading, Regulation of Financial Services Bill & 3½ hrs \\
17 Oct 05 & Remaining Stages, Transport (Wales) Bill & 4 hrs \\
Thu 27 Oct 05 & 2nd Reading, National Insurance Contributions Bill & 3½ hrs \\
Thu 24 Nov 05 & CwH and 3rd Reading, EU (Accessions) Bill & 2¼ hrs \\
Tue 13 Dec 05 & 2nd Reading, Criminal Defence Services Bill & 4 hrs \\
Wed 25 Jan 06 & 2nd Reading, Merchant Shipping (Pollution) Bill & 3½ hrs \\
Thu 25 Apr 06 & 2nd Reading, Housing Corporation (Delegation) etc. Bill & 4 hrs \\
\hline
\end{tabular}
\caption{Occasions when the adjournment debate began more than two hours early, Session 2005–06.}
\end{table}

\textsuperscript{53} Q 115.

\textsuperscript{54} There have also been a further 15 occasions on which the main business has ended between one and two hours early.
It can be seen that the majority of cases have been second reading debates, leading to a total loss of nearly 24 hours’ worth of sitting time. In some cases, the subsequent adjournment debate is of such general interest that it expands to fill the additional time and so some of the time is used in other ways. But this is purely fortuitous, and in many cases the time is not used at all.

42. Conversely, there have been 14 occasions when the Speaker has imposed a time-limit on back-bench speeches, indicating that there are more back-bench Members wishing to speak in a debate than can be accommodated in the time available. They are set out in Table 5.

43. The minimum time-limit the Speaker may impose is eight minutes and in practice the longest limit generally imposed is 15 minutes.\(^\text{55}\) There is also temporary provision, which expires at the end of the current Session, which enables the Speaker to call Members to speak for not more than three minutes between certain hours.\(^\text{56}\) This facility is rarely used, but when it is used it is usually to permit a number of Members to speak briefly during the last hour before the wind-up speeches.

<table>
<thead>
<tr>
<th>Table 5: Time-limits imposed on back-bench speeches during second reading debates, 2005–06</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bill</strong></td>
</tr>
<tr>
<td>Violent Crime Reduction</td>
</tr>
<tr>
<td>Racial and Religious Hatred</td>
</tr>
<tr>
<td>Identity Cards</td>
</tr>
<tr>
<td>London Olympics</td>
</tr>
<tr>
<td>Electoral Administration</td>
</tr>
<tr>
<td>Terrorism</td>
</tr>
<tr>
<td>Equalities [Lords]</td>
</tr>
<tr>
<td>Northern Ireland (Offences)</td>
</tr>
<tr>
<td>Health</td>
</tr>
<tr>
<td>Work and Families</td>
</tr>
<tr>
<td>Animal Welfare</td>
</tr>
</tbody>
</table>

\(^{55}\) The minimum limit is specified in Standing Order No. 47.

\(^{56}\) Resolution of 26 October 2004 (Shorter speeches).
44. It can be seen that second reading debates which fall short sometimes occur very close to those in which a time-limit is imposed. For example, the Racial and Religious Hatred Bill on 23 June 2005, in which a ten-minute limit on speeches was imposed, was followed two days later by the Regulation of Financial Services Bill, which finished 3½ hours early. The same is true of the Electoral Administration Bill (12-minute limit) and the National Insurance Contributions Bill (3½ hours early). The 2¾ hours which were made available, but not used, for the NHS Redress Bill on 5 June 2006 could have been applied to the Compensation Bill [Lords] three days later. Where a second reading debate is only going to take half a day, another debate could begin immediately afterwards, be adjourned at the end of the day and concluded later in the week.

45. There is no exact science to predicting how much time will be required for debate on each item of business, but the time available for each second reading debate should depend on the bill, rather than being based on a standard of a single day. By proper negotiation between the usual channels, it should be possible to identify some bills each year for which a two-day or one-and-a-half-day second reading would be appropriate. There are also clearly some bills for which half a day would be adequate. We hope that, by adopting a more flexible approach to the length of second readings, the business managers will be able to make better use of the time available to the House, enabling more Members to speak on more important bills, reducing the need for time-limits to be imposed on speeches and avoiding potential debating time being lost to an unexpected early finish.

Programming

46. Programming of bills was introduced in response to recommendations from this Committee in 1997, and the Committee has produced a further four reports on the subject since then, most recently at the end of 2002. We have not therefore included a major review of programming in this inquiry. There is however one area where we feel that the operation of programming might be improved, and that is in the timing of the programme motion.

47. The programme motion is moved immediately after second reading and the question on it is put forthwith. Because notice has to be given, this means that the terms of the motion must be decided before the rise of the House the previous day, before the second reading debate. Although the terms of the motion are usually the subject of discussions

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between the usual channels, there is no opportunity to take account of what might be said during the second reading debate when determining the ‘out-date’ for the bill.  

48. In 2004, the Procedure Committee recommended that the programme motion should be taken 48 hours after second reading, in order to take account of the second reading debate. During that inquiry, some witnesses suggested to the Committee that the out-date should not be set until the standing committee had begun considering the bill. Similarly, this Committee has previously recommended that the government should be sympathetic to requests from standing committees to extend the time available to consider the bill, and that the programming sub-committee should not normally make detailed proposals about the allocation of time in standing committee until several sittings of the standing committee had taken place. There is a procedure for extending the out-date for a bill after the standing committee has reported a Resolution proposing that it be changed, but this has been used very little in practice: just six times since 2001–02.

49. The idea underlying all these recommendations is that it is better for decisions about programming to be taken on the basis of some knowledge of how the bill is progressing than for them to be taken in advance of a bill beginning its passage through the House. We recommend that the initial Programme Motion moved after second reading should contain only a provision for committal and a provision that proceedings on the bill may be programmed. The out-date should be established by a second Programme Motion, moved one or two days later. This would allow account to be taken of the second reading debate in determining the out-date without delaying the appointment of the standing committee (or, in some cases, its first meeting). For example, if a bill were read a second time on a Tuesday, the Committee of Selection could nominate the standing committee the following day, and the out-date could be determined on the Thursday. The first meeting of the committee would still take place the following Tuesday, as usual.

Committee Stage

50. Early in the inquiry, we decided to focus on the committee stage of bills. There were three main reasons for this:

a) First, the committee stage is where a great deal of the substance of the House’s consideration of a bill takes place, and where most of the detail of the bill is settled.

b) Second, the committee stage permits of several variations—committal to a standing committee, a Committee of the whole House, and split committal between the two are
all regularly used. Committal to a select committee is used every five years for the Armed Forces Bill and special standing committees have been used on a few occasions since 1980.63 We are therefore able to draw on the House’s own experiences in evaluating different approaches to the committee stage.

c) Third, the work of standing committees has been one of the most criticised aspects of the legislative process. This criticism was summarised by the Hansard Society, who told us that standing committees ‘fail to deliver genuine and analytical scrutiny of [bills], their political functions are neutered, dominated almost exclusively by government …, they fail to engage with the public and the media (in contrast to select committees) and they do not adequately utilise the evidence of experts or interested parties’.64

51. Although some of this criticism of standing committees is valid, it is important not to over-state the weaknesses of the system. Partisan debates can be a useful way of testing the provisions of a bill, of identifying its weaknesses and the case for change. Whilst it is unusual for the Government to accept back-bench or opposition amendments in standing committee, it is not unusual for the Government to table amendments at report stage which are intended to rectify problems identified in committee. We do believe that there is a strong case for introducing a more collaborative, evidence-based approach to the legislative process (see paragraphs 58–62, below), but it should supplement, rather than supplant, traditional standing committee debates.

52. We have considered two parallel sets of questions relating to standing committees: what are the alternatives to the traditional standing committee; and how might the existing standing committee system be improved? In order to address the first of these questions, we published a consultation paper in January this year, describing five alternative options which could be implemented with no or minimal changes to the existing Standing Orders of the House.65 The options were:

a) a special standing committee, which at present is able to hold three select-committee-style evidence sessions before proceeding to consider the bill as a standing committee;66

b) a select committee, or a joint committee of the two Houses, which has the power to take evidence, consider and amend the bill;67

c) a first reading committee, as recommended by our predecessor committee in 1997, to conduct an inquiry into the bill before second reading;68

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63 A special standing committee is standing committee which has the power, before it begins debating the bill, to hold up to three sessions of oral evidence. See Standing Order No. 91 and paragraph 67 below.
64 Ev 107–108.
65 First Special Report from the Modernisation Committee, Session 2005–06, HC 810, Committee Stage of Public Bills: Consultation on Alternative Options (‘the Consultation Paper’).
66 Standing Order No. 91.
67 Standing Order No. 63(2).
d) committal to a select committee followed by re-committal to a standing committee, perhaps consisting of the select committee members plus another of others; and

e) split committal between committees of different types, as usually happens with the Finance Bill which is split between a Committee of the whole House (in respect of the more controversial parts) and a standing committee (in respect of the less controversial or technical aspects). 69

53. Most of our witnesses favoured those committee arrangements which provided for an evidence-taking, as well as a deliberative stage. There are several benefits that an evidence-taking stage could provide. It is first and foremost a mechanism for ensuring that Members are informed about the subject of the bill and that there is some evidential basis for the debate on the bill. Evidence-gathering is also, by its nature, a more consensual and collective activity than debate, and there is evidence that those outside Parliament have a more positive view of select committee proceedings than of debate. So there is a reputational benefit to Parliament in being seen to engage in a more open, questioning and consensual style of law-making, before moving on to the necessary partisan debate.

54. An evidence-taking stage is also an effective way of engaging the wider public directly in the legislative process. The Law Society argued that it is important that the process for influencing a committee’s thinking was as straightforward as possible and suggested that many organisations would value the opportunity to give evidence to a committee considering a bill, even if they had contributed to the Government’s consultation exercise. 70 A good example of this is the inquiry into the draft Corporate Manslaughter Bill by the Work and Pensions and Home Affairs Committees. They received over 150 submissions from organisations including victims’ groups, trade unions, lawyers, and business representatives. 71

55. Witnesses from the CBI and the TUC, two organisations which are at the forefront of consultation and lobbying on proposed legislation, told us that they did not always find it easy to influence the standing committee process and that, as a consequence, they devoted more resources to trying to influence the process at other stages. Both organisations strongly favoured increasing the emphasis on formal evidence-taking as a way of improving the involvement of outside bodies in the process. 72

56. All these benefits, of course, are there to be had at the pre-legislative stage and pre-legislative committees usually (though not always) allow a rather longer inquiry than is possible once a bill has begun its passage through the House. But, as we have already noted, there is often a disjunction between the pre-legislative stage and the legislative stage, with few Members of pre-legislative committees finding their way onto the standing committee considering the bill. 73 Furthermore, the bill which is presented is might differ

69 Standing Order No. 63(3).
70 Ev 51.
71 Ev 100.
72 QQ. 152–154 & 160.
73 See paragraphs 33 to 35.
significantly from the original draft, so that parts of it will not have been subject to the pre-legislative stage. Unlike the other stages of a bill, pre-legislative scrutiny is in the gift of the Government. As we have seen since the 2003–04 peak of draft bills, with the best will in the world, extensive pre-legislative scrutiny can never be guaranteed.

57. We do not wish to detract from the success of pre-legislative scrutiny, but we believe that, even with its further development, there is a compelling case for integrating evidence-taking into the legislative process itself. Both the Deputy Director-General of the CBI and the TUC’s Head of Campaigns and Communications argued that introducing oral evidence into the standing committee process itself was the single most important change that they would like to see made to the primary legislative process.74

Special standing committees

58. We recommend that special standing committees should, with some important modifications to the current Standing Order which we set out below, be the norm for Government bills which originate in the Commons. If they are to become the norm, then it is logical to drop the word ‘special’ from their title, and we recommend that this should be done in the context of broader changes to the nomenclature of standing committees set out in paragraphs 63 to 66 below. There will be cases where an evidence-taking committee is not appropriate, such as the Finance and Consolidated Fund Bills and bills which, for whatever reason, have to be passed urgently. There may also be exceptions for bills which would usually go to a Committee of the whole House, such as bills of ‘first-class constitutional importance’. Even for bills outside these defined categories, there may be cases where a special standing committee is not appropriate: very short bills, for example, or those which are highly politically controversial. Some discretion might also be needed for bills which originate in the Lords.

59. There is a clear danger, as witnesses from the TUC pointed out, that over-use of special standing committees could lead to the process becoming ritualistic and unhelpful.75 But we believe that the single biggest improvement that could be made to the legislative process would be to adopt the committal of government bills to a special standing committee as the norm, deviating from it only when there was good reason to do so.

60. Special standing committees were first mooted in the early 1970s and established on an experimental basis in 1980. The temporary Order governing the procedure was made permanent in 1986, following a recommendation from the Procedure Committee.76 Including the experimental period from 1980 to 1986, there have only ever been nine special standing committees, listed in Table 6.

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74 QQ 153, 154 & 166.
75 Q. 171.
76 For a more detailed history, see Special Standing Committees in both Houses, HC Library Research Paper 96/14 (January 1996).
### Table 6: Bills committed to a special standing committee

<table>
<thead>
<tr>
<th>Year</th>
<th>Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980–81</td>
<td>Criminal Attempts Bill</td>
</tr>
<tr>
<td>1980–81</td>
<td>Education Bill</td>
</tr>
<tr>
<td>1980–81</td>
<td>Deep Sea Mining (Temporary Provisions) Bill [Lords]</td>
</tr>
<tr>
<td>1981–82</td>
<td>Mental Health (Amendment) Bill [Lords]</td>
</tr>
<tr>
<td>1983–84</td>
<td>Matrimonial and Family Proceedings Bill [Lords]</td>
</tr>
<tr>
<td>1994–95</td>
<td>Children (Scotland) Bill</td>
</tr>
<tr>
<td>1995–96</td>
<td>Licensing (Scotland) (Amendment) Bill</td>
</tr>
<tr>
<td>1998–99</td>
<td>Immigration and Asylum Bill</td>
</tr>
<tr>
<td>2001–02</td>
<td>Adoption and Children Bill</td>
</tr>
</tbody>
</table>

61. We would like to see the use of special standing committees entrenched in standing orders. A bill is automatically committed to a standing committee after second reading under Standing Order No. 63. However, in the case of most Government bills, this provision is superseded by the Programme Motion, which is defined as a motion, notice of which is given by a Minister of the Crown before the second reading of a bill, which provides

a) for committal of the bill, and

b) for any proceedings on the bill to be programmed.77

62. We recommend that Standing Order No. 83A (Programme motions) be amended so that the definition of ‘programme motion’ includes a requirement that it provides for committal of the bill to a public bill committee with the power to take evidence, to a Committee of the whole House, or split committal between the two. Private Members’ bills would continue to stand referred to an ordinary standing committee under Standing Order No. 63, as would any Government bills which were not programmed (e.g. the Finance Bill).

### Nomenclature of standing committees

63. It is evident that the use of the term, ‘standing committee’, is a source of confusion to many if not most people. It says nothing about the nature and function of the committee and its use to describe a group of *ad hoc* committees is at best unhelpful and at worst misleading.78 Designating the committees by letter is also misleading because, since they...

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77 Standing Order No. 83A(1) & (2).

78 Hansard Society, Ev 109.
have no permanent existence, the Standing Committee A which considers one bill is not
the same as the Standing Committee A which considered another.

64. The nomenclature is a throw-back to the 1880s, when two large Standing Committees
were first appointed to consider bills which, until that time, had always had their
committee stage on the floor of the House. These committees were originally specialised
and consisted of a core of 60 to 80 members, plus a further 15 added members in respect
of each bill.79 In 1907, when it was decided that all bills should be committed to a standing
committee unless the House otherwise ordered,80 an additional committee was created and
the system of specialisation was abandoned. The committees were re-designated as
Standing Committee A, B and C to signal the end of subject specialisation. In 1960, the
House implemented a recommendation from the Procedure Committee, that a new
membership should be appointed in respect of each bill. The Committee remarked that
‘the distinction between the nucleus and added members is already somewhat artificial and
serves no useful purpose’.81 It was at this point that standing committees ceased to be
standing committees in the usual sense of the term.

65. It is exactly ten years since the Procedure Committee recommended that the name of
these committees be changed.82 The recommendation was not adopted at that time. We
can see no reason for persisting with a nomenclature which is inaccurate, confusing and
anachronistic. We recommend that standing committees and special standing
committees on bills be re-named ‘public bill committees’, with individual committees
being designated by the name of the bill allocated to them (e.g. ‘Health Bill
Committee’). For the sake of consistency, we further recommend that Standing
Committees on Delegated Legislation be re-named ‘Delegated Legislation Committees’,
though in view of the lengthy titles of many statutory instruments and the fact that such
committees routinely consider several instruments together, we do not favour
incorporating the title of the instrument into the committees’ names. European Standing
Committees are still standing committees in the usual sense, having a core membership,
and this Committee has already recommended that they be given more descriptive names
as part of a wider package of reform of EU business.83

66. There would be procedural advantages to retaining a common name for this group of
committees, which reflect, in broad terms, the procedures and practices of the Chamber
and engage in debate rather than inquiries. The category also includes the Welsh and
Northern Ireland Grand Committees, the Standing Committee on Regional Affairs and
occasionally other committees such as the Standing Committee on the Inter-Governmental
Conference on the Future of Europe. Their common title reflects the common roots of

79 One to consider bills relating to ‘Law and Courts of Justice and Legal Procedure’ and one to consider bills relating to
‘Trade, Shipping and Manufacturers’. A third Committee considered Scottish Bills.
80 Standing Order No. 63.
81 See Fifth Report from the Procedure Committee, Session 1995–96, HC 595, Nomenclature of Standing Committees
82 Ibid.
83 Scrutiny of European Business, Second Report from the Modernisation Committee, Session 2004–05, HC 465,
paragraph 92.
these committees as the Chamber in microcosm. The familiarity of the procedures in each standing committees benefits Members, who might serve on dozens of such committees in the course of a Parliament. Likewise, the same Panel of Chairmen can be drawn upon to chair a range of committees of the same family. For these reasons, we believe it is necessary to retain a common generic name for the group of committees currently known as standing committees. **We recommend that the family of committees currently known as standing committees be re-named ‘general committees’**

### Making public bill committees more flexible

67. Under the current Standing Order, a special standing committee considers a bill in two phases:

a) The evidence-taking phase. This must be completed within 28 days of the bill’s committal, during which time the committee may hold one private deliberative meeting (to decide when to meet, which witnesses to invite, etc.) and up to three public evidence sessions of not more than three hours each. The committee is chaired for this phase by the chairman of the relevant select committee and has the same powers as a select committee to call for evidence.

b) The standing committee phase. Having completed the evidence-taking phase, the committee proceeds to go through the bill in the normal way. This phase is chaired by a member of the Chairmen’s Panel.

The Minister in charge of the bill is a member of the committee, though he or she may also appear as a witness during the evidence-taking phase.

#### The evidence-taking phase

68. The time restrictions on the evidence-taking phase were proposed in the original Procedure Committee Report which recommended the establishment of such committees. The Committee was

> ‘anxious that the House should proceed cautiously with this new and potentially most useful reform. If experience showed that the standard allocation of three sittings could be enlarged, this could be done later in the light of that experience … the addition of three morning sittings for the investigative stage of each bill would be offset by a reduction in the “amendment” stage whereas a longer allocation of investigative time would be bound to add considerably to the total time taken by each bill in committee’.

The requirement that the sittings be held in the morning was presumably to avoid clashing with the sittings of the House.

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84 First Report from the Select Committee on Procedure, Session 1977–78, HC 588-I, paragraph 2.20 (ii).
69. It is indeed likely that providing for evidence sessions on the bill will reduce the time needed and taken for debate on the bill. For example, many of the 'probing' amendments tabled in standing committee for the purpose of testing a particular piece of wording, most of which are in any event withdrawn, could be dispensed with if Members had an opportunity at the outset to question the Minister and officials on the bill. Direct questioning is perhaps a more efficient means for Members to examine the bill than the use of probing amendments, which often require officials to guess what the amendment might be getting at when preparing the Minister's brief, and then lead to debate on the technical merits of the proposed amendment rather than on the merits of the bill.

70. However, we are not confident that the right equilibrium between investigation and debate will always be reached with three evidence sessions. Some bills might require more evidence to do them justice. Others might require fewer, a single session with the Minister and officials being sufficient. The same applies to the length of the evidence sessions; and the requirement that they be held in the mornings, which was anyway waived in the most recent case of the Adoption and Children Bill, is out-of-date given the introduction of the new sitting hours of the House.

71. The simple purpose of these restrictions—to stop the evidence-taking phase of the committee from becoming unduly drawn-out and unnecessarily delaying the passage of the bill—can now adequately be met by a sensible programme order. We recommend that public bill committees should hold at least one evidence session, with the Minister and officials, in all cases. Beyond that, the general restrictions on the number, duration and timing of oral evidence sessions held by public bill committees should be lifted. Appropriate out-dates should be applied instead on a case-by-case basis in the programme order. The programming sub-committee of the public bill committee should decide on how the committee uses the time available to it, including the division of time between evidence-taking and debate.

Chairing public bill committees

72. As we have already noted, the evidence-taking phase of the special standing committee has usually been chaired by the chairman of the relevant departmental select committee. There are good reasons for this practice, which provides a degree of continuity between select and standing committee work but, if all government bills are to go to a special standing committee, it could become an intolerable burden on some select committee chairmen. All departmental select committee chairmen should expect to chair the evidence-taking phase of a public bill committee from time to time but, in committees whose departments have a heavy legislative workload, we suggest that this work might be shared between the members of the committee. It might also be appropriate for the chairman of a non-departmental committee, such as Environmental Audit or Public Administration, to take the chair in some cases.

Public bill committees and pre-legislative scrutiny

73. The purpose of a public bill committee is not to replicate the pre-legislative inquiry, nor should it be seen as a substitute for a proper pre-legislative stage. The need to
complete both the evidence-taking and the consideration of the bill in reasonable time means that these committees are not a suitable vehicle for exhaustive inquiries, nor are they a substitute for the consultation exercises undertaken by Government before a bill is presented. Where there has been a pre-legislative inquiry, we would expect the public bill committee to take the pre-legislative report as its starting point and not to re-examine the same witnesses on the same issues. In some cases, a more substantial series of evidence sessions will be appropriate but in many cases, it might be that only one investigative meeting is required.

**Making public bill committees more effective**

74. If the new public bill committees become the norm, bills will still be subject to detailed clause by clause consideration of the kind which is currently carried out in ordinary standing committees. We now consider ways in which this part of the process might be made more effective.

**Committee papers**

75. In its 2004 Report on *Connecting Parliament with the Public*, the Committee suggested that it might be possible to make standing committee papers more user-friendly. A participant in a standing committee on a bill typically needs to refer to four documents: the bill, the Explanatory Notes, the amendment paper and the Chairman’s provisional selection list. There may also be other documents, such as the relevant House of Commons Library research paper, briefing notes provided by outside organisations and other background material. There is scope for improving standing committee papers in two ways: by consolidating existing documents for ease of reference, and by providing papers which are more readily understandable.

76. The draft Coroners Bill illustrates one way in which documents could usefully be combined, by printing the Explanatory Notes to each clause on the page facing the text of the clause itself. Though there are some technical issues which might need to be addressed, there is no reason why this practice should not routinely be adopted for all bills. Likewise, it would be possible to re-print clauses of the bill on the page facing the relevant amendments, for ease of reference.

77. A common complaint is that it is difficult to see exactly what effect an amendment will have on the text of the bill. It is often necessary to table several amendments to achieve a particular purpose, and working out exactly what a particular set of amendments is intended to achieve can sometimes be difficult. In order to overcome this problem, civil servants sometimes prepare for Ministers a text of the bill showing how it would look if the amendments were agreed to. We recommend that the Government aim to supply to

85 First Report from the Modernisation Committee, Session 2003–04, HC 368, paragraph 94.
87 Bills are drafted in the Office of the Parliamentary Counsel using Adobe FrameMaker; ENs are drafted by the Department in charge of the bill, using MS Word.
88 Q 144 (Health Bill Team).
members of the standing committee, and publish on the internet, copies of the pages of the ministerial briefing showing how the bill would look if particular sets of amendments were agreed to.

**Notice periods for amendments**

78. Members of the Health Bill team described how they had one working day in which to provide briefing on 76 amendments before the first meeting of the standing committee. Amendments are ‘starred’ on the day after they are tabled and, as a matter of principle, the Chair will not normally select a starred amendment for debate. On the second day, they are no longer starred and may be selected. Since the deadline for tabling amendments is the rise of the House, this means that an amendment tabled just before 10.30 p.m. on Tuesday night can be debated in committee at 10 a.m. on Thursday. This is a problem for civil servants, who have only one working day to provide briefing material for the minister, but it is also a problem for other members of the Committee, who are left with a single day in which to prepare their own speeches. It is likely that, in practice, the short notice period effectively prohibits many Members from participating effectively in standing committee debates.

79. It is also likely that the notice period has a negative overall impact on standing committee proceedings as a whole. If non-Government amendments are to be taken seriously, then the Government must be allowed to give them adequate consideration, perhaps bringing forward its own alternatives. In the some cases, the Minister’s response to non-government amendments is only to identify the flaws in the drafting and undertake to re-consider the substance of the amendments before report stage, effectively deferring any substantive debate on the issues until then. If scrutiny is to be effective, then the committee as a whole and the opposition in particular also need adequate time to consider Government amendments.

80. We recommend that the notice period for amendments in standing committee be extended by one day, though the Chairman should have discretion to select late amendments for debate in exceptional circumstances, as is currently the case with starred amendments.

**Explanatory material for amendments**

81. It has also been put to us that it would assist Members in preparing for debates in standing committee if they were allowed to table a brief explanatory statement with each amendment or set of amendments. It can sometimes be difficult to work out what the intended effect of an amendment would be and a brief statement from the Member who tables it could in many cases greatly assist the reader of the amendment paper. Witnesses from the Health Bill team told us that such statements could help to ‘ensure that, when we are briefing our ministers and advising them how to respond, the issues the Member really

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89 Q 111.

90 Literally, an asterisk is printed next to them to indicate that they were only tabled the previous day.
wants debated are covered and we really are responding to the queries or concerns that are being raised'.

82. There will need to be rules governing the submission of such statements. In particular, they must not be unduly long, nor must they be argumentative. These explanatory statements should be confined to a description of the intended purpose of their amendment which is as short as is consistent with the adequate expression of that purpose. We recommend that the Procedure Committee draw up a set of rules governing the tabling and publishing of explanatory statements to amendments in standing committee, and that a pilot scheme be conducted with a single, substantial bill to evaluate the potential impact of this move. The statements should be optional and it should still be open to Members to table amendments with no explanatory statement, though we would expect the Government to provide them as a matter of course.

83. Another obvious way for government bill teams to find out what a Member intends by a particular amendment or set of amendments is to ask the Member concerned. We appreciate that civil servants might have some reservations about contacting Opposition or back-bench Members directly, and that the bill team’s job is to serve the Minister, not the committee. However, some informal contact between the bill team and back-bench Members can be very useful in clarifying just what it is an amendment is trying to achieve, and we recommend that Ministers make clear to bill teams that they are free to contact members of a public bill committee to discuss the purpose of amendments. This might be done by way of a statement in the relevant section of the Government’s Guide to Legislative Procedures.

Use of computers

84. Another way to reduce the number of pieces of paper that Members have to juggle is to provide papers on-screen. During the course of our inquiry, we visited the National Assembly for Wales to look at the provision of information and communications technology in the new Senedd building. Each Assembly Member (AM) has a computer at his or her place, with a silent rubber keyboard. This provides access to the documents for each sitting via a series of hypertext links from the agenda, as well as Internet and e-mail access. (AMs also use the system to indicate to the Presiding Officer when they would like to be called to speak, and it permits communication between AMs within the Chamber.) However, such facilities are not available in the Assembly’s committee rooms, where paper is the order of the day. There would be advantages to providing working documents for standing committee members electronically in this way. It reduces the costs associated with printing and distributing large volumes of material in hard copy, and electronic documents can be searched and copied.

85. In June 2003, the Liaison Committee decided to permit the use of electronic devices by Members and staff in any select committee which decided to allow their use. This was on

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91 Q 111.

the understanding that use of such devices would be discreet, and that they would not be used for external communications, for example, to send or receive e-mails. So far, there have been no reported problems relating to the use of laptops, personal digital assistants (PDAs) and similar equipment in select committee meetings. We recommend that the Chairmen’s Panel give favourable consideration to allowing Members to take similar equipment into meetings of standing committees.

86. The increasing use of documents in electronic form in a variety of settings will inevitably come to have a greater impact on the way in which the House works than it has done so far, and we see significant advantages in allowing Members to use computers in standing committee.93 Properly developed, it should be possible to provide electronic documents in a more user-friendly form than is possible on paper, for example:

a) tracking changes as they are made to the bill;

b) providing hypertext links between clauses of the bill, the relevant explanatory notes, and the relevant amendments;

c) colour-coding amendments, for example, to identify those proposed by the Member in charge of the bill; and

d) enabling Members to cut and paste text from the bill for the purpose of drafting amendments.

87. It will be necessary to proceed carefully in introducing computers to standing committee rooms, not least because of the complicated technical considerations and the potential costs involved. As a preliminary move, we recommend that the House undertake an initial pilot study involving a single standing committee on a bill in which laptop computers are made available in the committee room. The purpose of the study should be to establish what benefits, if any, providing committee papers in electronic form brings, and what problems, if any, it creates. It should not be necessary for the purposes of this experiment to provide network access in the committee room.

### Reporting the bill to the House

88. The outcome of the standing committee stage of a bill is a new copy of the bill, as amended in committee. Amendments are not shown in the reprinted bill, so the only way to see what amendments have been made is to trawl back through the standing committee Hansard or Minutes of Proceedings, a task which is difficult enough in itself and can be further frustrated by the fact that clause, page and line numbers often change significantly in committee, so it can be difficult to see to which part of the new bill a committee stage amendment relates. This is in contrast to some other countries, such as New Zealand, where committees considering and amending legislation are also able to produce a

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93 The implications of ‘pervasive computing’ for the government and others are discussed in a publication from the Parliamentary Office of Science and Technology: Pervasive Computing, Post Note No. 263 (May 2006)
substantive report explaining what they have done to the bill and why.\textsuperscript{94} Below we consider two issues: the possibility of a substantive, descriptive report which provides a synopsis of the main changes made to the bill; and the possibility of a new format for bills re-printed as amended in committee, which would show every amendment made to the text.

**A substantive report from the committee**

89. David Kidney MP suggested to us that standing committees should be able to produce a substantive report of this kind. Such a report could include a summary of the main amendments made to the bill, a list of the parts of the bill which were not debated in committee (either through lack of time or lack of interest) and identify any areas where the Minister gave an undertaking to re-consider his or her position before report stage.\textsuperscript{95} A report of this kind could clearly be very useful to the House when it came to report stage, as well as to outside observers following the progress of the legislation. However, for the committee to agree a report of this kind would require at least one deliberative meeting, eating into time which would otherwise have been available to debate the bill itself. It could also potentially lead to attempts to re-open debate on some of the issues arising from the bill. An alternative would be for the standing committee report to be a formality, prepared by the clerk and agreed to on the nod, but in that case there is little point in it having the committee’s *imprimatur*.

90. Research by a Library Working Group on legislation briefings found evidence of some demand for updated briefings on bills, and noted that material produced for second readings could quickly become out of date.\textsuperscript{96} What is required is a straightforward, dispassionate account of the committee stage, describing:

a) the main ways in which the bill was amended (though it should not be necessary to identify every last minor, technical or drafting change);

b) any significant areas of debate which did not lead to the bill being amended, for example, on groups of backbench or opposition amendments that were withdrawn or negatived or on clause stand part;

c) the parts of the bill which were not debated, with an indication of whether this was due to the effects of the programme order or whether the issues raised were adequately covered by debates on other parts of the bill; and

d) any areas where the Minister gave an undertaking to reconsider or to bring forward more amendments at report stage or in the Lords.

\textsuperscript{94} This is true of the select committee stage of bills in New Zealand, which takes place between first and second reading. The New Zealand Parliament is unicameral and much smaller than either House of the UK Parliament, with 121 Members.

\textsuperscript{95} Ev 1.

\textsuperscript{96} Report of the House of Commons Library Legislation Briefings Group, 30 March 2006 (not published).
The Legislative Process

The House of Commons Library produces a Research Paper on each bill before the second reading debate, and is already planning to produce follow-up briefing papers on selected bills, such as those which have been heavily amended.97 We believe that a report of the committee stage could best be undertaken by them. **We recommend that the Library produce a report of the standing committee stage of most Government bills, and those private Members’ bills which have a reasonable prospect of being passed, in time to inform debate at the report stage.**

**Showing the amendments made to the bill**

91. It can also be very difficult to see exactly what amendments have been made to a bill in standing committee. A report on the standing committee stage of the kind recommended above would be helpful in describing how the bill has changed, Members and others sometimes also need to know exactly what amendments have been made. Anybody wishing to do so would need to sit down with a copy of the pre-committee bill and the Standing Committee Proceedings,98 look at which amendments were made and where they occurred and reads across to the copy of the bill as amended in committee.

92. There is a strong case for showing the amendments in the reprinted version of the bill. A simple system is needed, for example, showing deleted words struck through and inserted words in bold. There are a number of technical considerations to be taken into account including whether or not such a document could be generated wholly or substantially automatically and whether any additional printing costs would be likely to be incurred. **We recommend that the House undertake a feasibility study of showing the amendments made to bills amended in committee. It might be possible to do this by means of an on-line version of the bill.**

**Third Reading**

93. By the time they have completed committee and report stage, most bills are different from the bill which the House approved at second reading. In some cases, significant new provisions will have been inserted, or the original provisions of the bill will have been modified to such an extent that there are major new questions relating to the principle of the bill. The purpose of the third reading debate is for the House to consider the principle of the bill, as amended, and to reach a final decision on whether or not to allow it to proceed.

94. One undesirable feature of programming has been the contraction of third reading debates. The usual practice is now to leave an hour for third reading at the end of the report stage but in practice, some of this time is taken up with divisions so that there is often little more than half an hour for debate. In 2002–03, the longest third reading of an

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97 Ibid.

98 Also known as the ‘funny minute’, this is a re-print of the amendment paper with the fate of each amendment—agreed to, negatived, withdrawn or not moved—recorded next to it.
ordinary Government bill was one hour and 21 minutes, including a division.\textsuperscript{99} Twelve bills in that Session had third reading debates lasting half an hour or less.\textsuperscript{100} Third reading debates are often no more than an opportunity to offer perfunctory congratulations to all those involved in the bill’s passage; they are rarely if ever now an opportunity for substantial debate on the bill, as amended. Some witnesses argued that this trend should be reversed, with adequate time made available for third reading; others argued that, rather than a perfunctory third-reading debate of a few minutes, it would be better to make that time available for debate on amendments at report stage.\textsuperscript{101}

95. As with second reading, there may be cases where a shorter debate is all that is required. If a bill has not been significantly amended, it is likely that any points which might be made at third reading will already have been made at second reading. But where significant changes have been made to a bill, the House should be given the opportunity for a substantive debate on the bill, as amended. As we have already noted, the contraction of third reading debates is largely due to the fact that Programme Orders invariably require them to be completed by a particular hour, rather than after a specific period of time. The time available is thus often eaten up by divisions at the end of Report stage. \textbf{We recommend that, where a substantial debate on third reading is warranted—as will usually be the case when a bill has been significantly amended—the programming sub-committee should consider recommending the allocation of an appropriate period of time after the end of Report stage for the third reading debate, but not necessarily on the same sitting day.}

\section*{Post-legislative scrutiny}

96. The question of post-legislative scrutiny—systematic appraisal of the impact of Acts of Parliament some time after they have come into force—is currently being considered by the Law Commission.\textsuperscript{102} Though there have been suggestions that post-legislative scrutiny might be conducted by some external body, we believe that this is an area where Parliament has a role to play, and a substantive third reading debate might in some circumstances present an opportunity for Members to express a view on the criteria by which an Act might be judged to have succeeded or failed.

\section*{Consideration of Lords Amendments}

97. The process whereby the two Houses, having each passed a bill, go about reconciling their differences is potentially the most complex part of the legislative process. When the

\textsuperscript{99} The Extradition Bill, on 25 March 2003. This discounts the Income Tax (Earnings and Pensions) Bill for which, as a tax law re-write bill, third reading was the only effective stage on the floor of the House.

\textsuperscript{100} Health (Wales) (9 Jan 03); Regional Assemblies (Preparations) (23 Jan 03); N.I. Assembly Elections (17 Mar 03); Railways and Transport Safety (31 Mar 03); Industrial Development (Financial Assistance) (7 Apr 03); N.I. Assembly (Elections and Periods of Suspension) (12 May 03); E.U. (Accessions) (5 Jun 03); Anti-Social Behaviour (24 Jun 03); N.I. (Monitoring Commission, etc.) (17 Sep 03); Crime (International Co-operation) [Lords] (14 Oct 03); Courts [Lords] (20 Oct 03); and Arms Control and Disarmament (Inspections) [Lords] (11 Nov 03).

\textsuperscript{101} QQ 31 & 100.

\textsuperscript{102} Post-legislative Scrutiny, Law Commission Consultation Paper No. 178, January 2006.
Lords return the bill to the Commons, it is accompanied by a list of amendments that the Lords have made.\footnote{For simplicity’s sake, this description is of a bill which originates in the Commons. It applies equally, \emph{mutatis mutandis}, to a bill which originates in the Lords and is returned by the Commons.} The Commons may agree or disagree to each amendment. They may amend the amendments, propose alternative amendments to the bill in lieu of Lords amendments they have disagreed to, or amend words restored to the bill by their disagreement to a Lords amendment. This is not an exhaustive list—a variety of other permutations are possible—but it illustrates the potential complexity of this stage. Where one House simply disagrees with an amendment made by the other House, it assigns a Reason for its disagreement. Likewise, when a House simply insists on an amendment to which the other House has disagreed.

98. The process continues until either agreement is reached, in which case the bill passes, or double insistence is reached, in which case the bill is lost. Double insistence is reached when one House has insisted on a proposal and the other House has insisted on disagreeing with it. For example, the Lords might propose an amendment, the Commons disagree, and the Lords insist on the amendment. If, at that stage, the Commons insist on disagreeing to the Amendment, then the whole bill is lost. This process can be ‘reset’ at any stage if either House proposes an alternative, such as an amendment in lieu of the amendment which is being disagreed to, rather than straight insistence. The impact of the rule—which could see an entire bill which had passed both Houses being lost over a disagreement over one specific point—is mitigated by the ‘packaging’ rule, which provides that the double insistence rule can be applied to a package of amendments (a group of amendments which, taken together, are intended to give effect to the same proposal), rather than to each individual amendment within the package.

99. There is a limit to what we are able to recommend about the House’s procedures for considering Lords amendments. Many of the potential proposals would require careful consultation with the Lords and a Joint Committee is currently considering the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation.\footnote{First Special Report from the Joint Committee on Conventions, Session 2005–06, HC 1151 and HL Paper 189.} If necessary, we will return to these questions in due course. In the meantime, there are two areas where we feel internal change in the Commons might usefully be considered.

**Programming Lords Amendments**

100. The Committee has, in this Report and in its earlier reports on the subject, consistently advocated greater use in the flexibility of Programme Orders. The current practice in relations to Lords Amendments is relatively inflexible, and that is to allocate one hour for their consideration. The times allocated for consideration of Lords Amendments in 2003–04 (the last 12-month Session of Parliament) and in the current Session are set out in Table 7.\footnote{To 15 July 2006.}
<table>
<thead>
<tr>
<th>Bill</th>
<th>Time allocated</th>
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<tbody>
<tr>
<td>Child Trust Fund (2003–04)</td>
<td>1 hour</td>
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<tr>
<td>Energy (2003–04)</td>
<td></td>
</tr>
<tr>
<td>Horserace Betting and Olympic Lottery (2003–04)</td>
<td></td>
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<tr>
<td>Childcare (2005–06)</td>
<td></td>
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<tr>
<td>Work and Families (2005–06)</td>
<td></td>
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<tr>
<td>Employment Relations (2003–04)</td>
<td></td>
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<tr>
<td>Fire and Rescue Services (2003–04)</td>
<td></td>
</tr>
<tr>
<td>Consumer Credit (2005–06)</td>
<td>2 hours</td>
</tr>
<tr>
<td>Immigration, Asylum and Nationality (2005–06)</td>
<td></td>
</tr>
<tr>
<td>London Olympic Games (2005–06)</td>
<td></td>
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<tr>
<td>National Lottery (2005–06)</td>
<td></td>
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<tr>
<td>Natural Environment and Rural Communities (2005–06)</td>
<td></td>
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<tr>
<td>Armed Forces (Pensions and Compensation) (2003–04)</td>
<td>3 hours</td>
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<tr>
<td>Civil Contingencies (2003–04)</td>
<td></td>
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<tr>
<td>European Parliamentary and Local Elections (Pilots) (2003–04)</td>
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<tr>
<td>Higher Education (2003–04)</td>
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<tr>
<td>Civil Aviation (2005–06)</td>
<td></td>
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<tr>
<td>Electoral Administration (2005–06)</td>
<td></td>
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<tr>
<td>Racial and Religious Hatred (2005–06)</td>
<td></td>
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<tr>
<td>Pensions (2003–04)</td>
<td>4 hours</td>
</tr>
<tr>
<td>Terrorism (2005–06)</td>
<td></td>
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<tr>
<td>Asylum and Immigration (Treatment of Claimants, etc.) (2003–04)</td>
<td>Full day (4¾ hrs available but debate finished after 4½ hrs)</td>
</tr>
<tr>
<td>Housing (2003–04)</td>
<td>Full day (4½ hrs)</td>
</tr>
<tr>
<td>Human Tissue (2003–04)</td>
<td>Full day (5½ hrs available but debate finished after 2½ hrs)</td>
</tr>
<tr>
<td>Planning and Compulsory Purchase (2003–04)</td>
<td>Full day (5½ hrs)</td>
</tr>
</tbody>
</table>
On average, the time allocated for consideration of the first set of Lords Amendments this Session has so far been just over 2½ hours. In 2003–04, it was just over three hours.

101. The time allocated to Lords Amendments includes any time taken for divisions when internal knives fall. In some cases—where Lords Amendments are minor or technical, or relate only to one substantive issue—a shorter period might be perfectly adequate. But in cases where the Amendments fall naturally into several distinct groups, or where they introduce significant new material to the bill, a more lengthy debate is justified. It is particularly important that the Commons, the democratically elected Chamber, have adequate opportunity to scrutinise material introduced by the Lords and we recommend that the Government give careful consideration to how much time to allow for Lords Amendments, especially in respect of the first Message on each bill.

The Reasons Committee

102. Where the House has simply disagreed to a Lords amendment, or has insisted on a Commons amendment to which the Lords have disagreed, without offering any alternative proposal, a committee is appointed to draw a reason for each such disagreement or insistence. The Reasons Committee is a select committee which meets immediately after the consideration of the Lords Message is complete. It can meet for up to half an hour in the case of a programmed bill, though meetings are often significantly shorter. The Minister in charge of the bill, who chairs the Committee, usually simply reads out the reasons the Government has prepared and they are agreed to on the nod. Stephen Laws of the Office of the Parliamentary Counsel described the Reasons as

‘rarely informative, consisting in most cases in a paraphrase of the proposition that the Commons do not think what the Lords have proposed is a good idea’.

103. The exception, he pointed out, is where the Commons are disagreeing with a proposal from the Lords that the Speaker has ruled to be an infringement of the Commons’ financial privileges (i.e. the supremacy of the Commons in matters relating to taxation and expenditure). This is important, as the Lords generally will not insist on an amendment which the Commons have identified as affecting their privilege, nor may they offer amendments in lieu of it.

104. Once agreed to, the Reasons are reported to the House, but the House does not need to approve them. It is possible, even likely, that even Members who have followed the debate closely are entirely unaware of what the reasons are. Nonetheless, we are concerned that any change to the current procedure might be less convenient for the House, and at this stage we make no recommendation about the Reasons Committee.

Making Lords Amendments easier to follow

105. As we have already noted, consideration of Lords amendments can be complicated. One feature of the process that makes it quite difficult to follow is that at each stage the House is working from a list of Amendments, rather than a text of the bill. Each successive stage of exchanges effectively creates another layer of amending text, so the House can find itself considering amendments to amendments to amendments with no clear indication of how the bill itself would look if they were agreed to or disagreed to. Stephen Laws cited the example of an exchange from the unusually lengthy consideration of the Prevention of Terrorism Bill in March 2005. The Lords sent the following Message to the Commons:

‘The Lords insist on their disagreement to Commons Amendments 1A and 1B to Lords Amendment 1; insist on their Amendments 37Q to 37T in lieu of Lords Amendment 8, to which the Commons have disagreed; insist on their insistence on Lords Amendments 12, 13, 15, 17, 22, 28 and 37 in respect of which the Commons have insisted on their disagreement and insist on their disagreement with the Commons in Amendments 37A to 37O in lieu of those Lords Amendments; and disagree with the Commons in their Amendments 17H to 17M to the words restored to the Bill by the Commons insistence on their disagreement to Lords Amendment 17’.

The Commons then replied with

‘The Commons insist on their Amendments 1A and 1B to Lords Amendment 1, insist on their disagreement to Lords Amendments 12, 13, 15, 17, 22, 28 and 37 and insist on their amendments 37A to 37C and 37E to 37O, do not insist on their Amendment 37D, insist on their disagreement to Lords Amendments 37Q to 37T, proposed in lieu of Lords Amendment 8, insist on their Amendments 17H to 17M to the words restored to the Bill by their insistence on their disagreement to Lords Amendment 17 and propose Amendment 37V in lieu’.

What the Lords were, in fact, doing in this case was a straight rejection of the proposals last submitted by the Commons. What the Commons were doing was insisting on their proposals with one change, namely, the substitution of a new amendment, 37V for 37D (which the Commons were dropping). In fact Amendment 37V was different from 37D in only very limited and insignificant respects. The two amendments 37D and 37V (which each consisted of a new clause of nearly two pages) differed only because a difference was necessary to prevent the Lords from killing the Bill using the double insistence rule. The insignificant differences between the two could only be ascertained by a careful comparison of the two clauses.

106. One way of reducing the considerable complexity of exchanges such as this would be for the Lords to return to the Commons in the first instance the bill as amended in the
Lords. Each subsequent stage could then proceed by reference to proposals for amendments to that bill.

107. We have one reservation about this proposal, and that is that it might muddy the waters regarding the proper scope of debate at this stage. Currently, the fact that the House is working from a list of amendments proposed by the Lords makes it difficult for debate to stray into areas of the bill which are unamended, since the text of them is not before the House. It is important that the scope of debate is limited when considering Lords amendments, since debate on those areas of a bill on which both Houses have already agreed should not be re-opened. Otherwise, the legislative process would potentially become never-ending. We are concerned that, if the House were to be presented again with the complete text of the bill, the Chair might find it extremely difficult in practice to limit the scope of the debate to those parts that had been amended in the other House.

108. Another way of making Lords Amendments easier to follow would be the provision of a simple explanation of what each Amendment is intended to do. In practice, the speed with which Amendments are processed would make it impossible for anybody other than the Government to provide such an explanation.\textsuperscript{109} We recommend that the Government provide short explanatory notes to accompany Lords Amendments.

### Timing of Votes

109. The timing of votes, like the legislative process, has been an area of interest for this committee since its establishment in 1997, largely in response to representations from Members, many of whom have been dissatisfied with the current arrangements.\textsuperscript{110} Voting by division has several advantages: it is simple, accurate and proof against fraud; and it offers Members a valued opportunity to meet their colleagues in private. But it is also very time-consuming.\textsuperscript{111} The obvious alternative, a system which allows Members to vote in their places at the touch of a button, would be all but impossible to introduce given the size and layout of the Commons Chamber.\textsuperscript{112} The Committee therefore concentrated on ways of speeding up the current voting system,\textsuperscript{113} by introducing a third desk in each division lobby and reducing the interval before tellers are nominated during a series of divisions.\textsuperscript{114}

\textsuperscript{109} For an example of the timings of a lengthy series of exchanges of Messages on a bill, see Ev 81.


\textsuperscript{111} According the House of Commons Library, the average division takes 11½ minutes (HC Library Factsheet P9, October 2003).

\textsuperscript{112} The alternative systems widely used in other Parliaments and Assemblies—sitting and standing, show of hands and roll-call (as in Commons committees)—have the potential to be even more time-consuming in a House of 646 Members.

\textsuperscript{113} One inquiry, in 1997–98, did look at the possibility of introducing some kind of electronic system for registering votes in the lobbies, but failed to find any consensus among Members, the majority of whom supported the current system over two high-tech alternatives, fingerprint readers and smart cards. See Voting Methods, Sixth Report from the Modernisation Committee, Session 1997–98, HC 779.

\textsuperscript{114} \textit{The Work of the Committee: First Progress Report}, First Special Report from the Modernisation Committee, Session 1997-98, HC191.
It also recommended the introduction of deferred divisions for certain types of question, reducing the number of divisions taking place after the moment of interruption.  

110. In the course of this inquiry, we have again considered the question of timing of votes to see if there is any further room for improvement, subject to two important principles:

a) The voting arrangements must not diminish the capacity of the House to deliver its judgements, nor encroach on the right of any Member of the House to agree to or disagree with any Question that is before the House. This is particularly important when debates are time-limited or Questions are put forthwith, when dividing the House might be the only way open to Members to place their views on the record.

b) It must be absolutely clear at each vote exactly what is being voted on. The House should not be invited to reach a decision on a Question if it is contingent on the decision on an earlier Question or Questions, unless the outcome of those earlier Questions is known to the House.

c) The voting method must not unduly hinder the progress of business.

111. For the reasons set out above, there are a number of exceptions to the deferred division rules, including ‘motions or amendments in the course of proceedings on bills or allocating time to or programming such proceedings’. It would be very difficult to extend the use of deferred divisions further to the amending stages of bills.

112. There is however one group of Questions relating to bills where we believe there might be scope to reduce the number of divisions: the Question on second reading and the ancillary Motions that are put forthwith immediately after second reading: on Programming, Money and Ways & Means. Although there is an element of contingency here—each of the subsequent Motions is contingent on the second reading being agreed to—it is quite straightforward. We do not believe that it would be desirable to defer these Questions at second reading, as this could in some circumstances delay the progress of the bill, potentially reducing the time available for the committee stage.

113. One option suggested was that, at the end of a second reading debate, the Questions on the second reading of a bill, any Reasoned Amendment which has been selected to it, and on any related Programme, Money and Ways & Means Motions, if a division is called, would be dealt with by paper ballot in the same way as deferred divisions. The result would be announced and the decision minuted at the commencement of public business at the next day’s sitting.

114. The main drawback of this proposal is that the time required to count the voting papers—usually about an hour and a half for deferred divisions—means that the result will not be known until after the end of the sitting. This problem might be overcome by
introducing some means of recording Members’ votes electronically in the lobbies. If such a system were introduced, it might also be possible to extend this voting method to other business, such as Opposition days. It is eight years since this Committee last considered proposals for the electronic recording of votes. There was no consensus then about the way forward, but technology has since moved on and it is likely that more reliable, secure systems are now available. **We propose to return to the subject of the electronic recording of votes in due course.**

### Resource implications

115. Several of the recommendations in this Report will require additional resources to be made available if they are to be implemented. These will mostly involve increases in existing expenditure, rather than expenditure for new purposes, but we believe it is important that the House is aware of the cost implications of any changes it may introduce. It is not possible at this stage to come up with an accurate estimate of the total cost involved, but it is likely that, in addition to some increased printing and publication costs, several additional staff posts will be required. **We recommend that the Clerk’s Department and the House of Commons Library produce estimates of the likely cost of implementing the recommendations in this Report at an early date.**

116. The Library will require additional resources if is routinely to produce reports of standing committee stages. It currently publishes around 95 research papers every year. Producing an additional research paper for most Government bills and any private Members’ bills which are likely to become law—the top seven in the ballot, for example—would probably involve a further 35 or more reports, a substantial increase in this area of the Library’s work. A small amount of additional staff time will also be necessary to keep the new internet legislation gateways up to date. Although this might not represent a great deal of work in respect of each bill, there are well over 100 bills, including PMBs, in a typical Session.

117. Increasing the use of pre-legislative scrutiny will also require additional staff. At the moment, *ad hoc* committees on draft bills are staffed by the Commons Scrutiny Unit and permanent select committees usually conduct inquiries into draft bills using existing staff (but with occasional support from the Scrutiny Unit). Any significant increase in the number of bills considered in draft would probably require additional staff. Similarly, increasing the number of bills going to special standing committee would generate significant additional work in organising evidence sessions, preparing briefing material for the committee and handling evidence. It might also entail additional work for Hansard, and would certainly increase printing costs as the page-count of a special standing committee Hansard is longer than for an ordinary standing committee, due partly to the inclusion of written evidence.

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118 Figures published in the House of Commons Commission’s Annual Reports between 2001–02 and 2004–05 range from 91 to 96. See, for example, HC 65, 2005–06, p. 24.
118. Other recommendations are also likely to have an impact on printing costs. Permitting explanatory statements on the amendment paper will inevitably increase its length, at a cost of around £70 per page.\textsuperscript{119} Showing the amendments made to a bill in the version which is reprinted after standing committee is also likely to increase the average length of the document, resulting in increased printing costs.
Conclusions and recommendations

Connecting with the public

1. We welcome the Library’s proposal to develop improved legislation gateways and we recommend that they be made available to the public, with any necessary modifications, on the internet. (Paragraph 5)

2. We recommend that a simple summary of the main points of each bill, perhaps based on the summary of main points in the Library research paper, together with information about the stage in the scrutiny process it has reached, be published on the front page of the new legislation gateways. (Paragraph 6)

The volume of legislation

3. There are ways in which the flow of legislation can be managed effectively to ensure that, subject to the size of the Government’s legislative programme and the constraints of the Parliamentary year, the best possible use is made of Parliamentary time in order to provide the most effective scrutiny of bills. They include:

   a) Publishing bills in draft for pre-legislative scrutiny before they begin their formal Parliamentary stages;

   b) Making appropriate use of carry-over to smooth the flow of bills throughout the Parliamentary year;

   c) Using programming to ensure that adequate time is available for each stage of a bill; that time is not wasted, for example, by programming committee proceedings to finish several weeks before time can be found for remaining stages; and that the available time is allocated appropriately to different parts of the bill; and

   d) Adopting a flexible approach to the time available to each bill, making more time available where it is needed, less where it is not. (Paragraph 11)

Pre-legislative scrutiny

4. Parliamentary scrutiny at the pre-legislative stage can play an important role in improving the law, even where there has already been lengthy and extensive external consultation by Government. (Paragraph 24)

5. Whatever its impact on the passage of legislation, the purpose of pre-legislative scrutiny is not to secure an easy ride for the Government’s legislative programme, it is to make better laws by improving the scrutiny of bills and drawing the wider public more effectively into the Parliamentary process. (Paragraph 26)

6. We recommend that, where a bill is introduced late in a Session because it has been subject to pre-legislative scrutiny, the assumption should be that it will be carried over to the next Session, subject to the same restrictions which currently apply,
including the twelve-month time-limit. It is hoped and expected that this would be done with cross-party support. (Paragraph 29)

7. We welcome the Government’s progress in increasing the proportion of legislation published in draft between 1997–98 and 2003–04. We are however concerned by the reduction in the number of draft bills since then, and we urge the Government to increase further the proportion of legislation published in draft. (Paragraph 30)

8. It might be that pre-legislative scrutiny is most useful for bills which are not controversial in the party-political sense but we would not like to see its use confined exclusively to bills of that kind. We recommend that, in increasing the number of bills published in draft, the Government include bills that are likely to be the subject of party-political controversy. (Paragraph 32)

9. We recommend that Standing Order No. 86(2) be amended to make it clear that a Member’s participation in the pre-legislative scrutiny of a bill is one of the qualifications to which the Committee of Selection shall have regard when nominating members of a standing committee. (Paragraph 35)

Information about bills

10. We recommend that, rather than simply being deposited in the Libraries of the two Houses, copies of the Regulatory Impact Assessment relating to each bill should be made available in the Vote Office and handed out with every copy of the bill and explanatory notes. (Paragraph 39)

11. We recommend that the Government undertake to deposit copies of the Delegated Powers Memorandum in the Libraries of both Houses at the same time as a bill is published. In the case of bills which start in the Lords, it may be necessary to produce a revised version of the Memorandum for the Commons, if the bill is significantly amended in the Lords. (Paragraph 40)

Second reading

12. By proper negotiation between the usual channels, it should be possible to identify some bills each year for which a two-day or one-and-a-half-day second reading would be appropriate. There are also clearly some bills for which half a day would be adequate. We hope that, by adopting a more flexible approach to the length of second readings, the business managers will be able to make better use of the time available to the House, enabling more Members to speak on more important bills, reducing the need for time-limits to be imposed on speeches and avoiding potential debating time being lost to an unexpected early finish. (Paragraph 45)

Programming

13. We recommend that the initial Programme Motion moved after second reading should contain only a provision for committal and a provision that proceedings on the bill may be programmed. The out-date should be established by a second Programme Motion, moved one or two days later. (Paragraph 49)
Committee stage

14. We recommend that special standing committees should, with some important modifications to the current Standing Order which we set out below, be the norm for Government bills which originate in the Commons. (Paragraph 58)

15. We recommend that Standing Order No. 83A (Programme motions) be amended so that the definition of 'programme motion' includes a requirement that it provides for committal of the bill to a public bill committee with the power to take evidence, to a Committee of the whole House, or split committal between the two. (Paragraph 62)

16. We recommend that standing committees and special standing committees on bills be re-named ‘public bill committees’, with individual committees being designated by the name of the bill allocated to them (e.g. ‘Health Bill Committee’). For the sake of consistency, we further recommend that Standing Committees on Delegated Legislation be re-named ‘Delegated Legislation Committees’ (Paragraph 65)

17. We recommend that the family of committees currently known as standing committees be re-named ‘general committees’ (Paragraph 66)

18. We recommend that public bill committees should hold at least one evidence session, with the Minister and officials, in all cases. Beyond that, the general restrictions on the number, duration and timing of oral evidence sessions held by public bill committees should be lifted. Appropriate out-dates should be applied instead on a case-by-case basis in the programme order. The programming sub-committee of the public bill committee should decide on how the committee uses the time available to it, including the division of time between evidence-taking and debate. (Paragraph 71)

19. The purpose of a public bill committee is not to replicate the pre-legislative inquiry, nor should it be seen as a substitute for a proper pre-legislative stage. (Paragraph 73)

20. We recommend that the Government aim to supply to members of the standing committee, and publish on the internet, copies of the pages of the ministerial briefing showing how the bill would look if particular sets of amendments were agreed to. (Paragraph 77)

21. We recommend that the notice period for amendments in standing committee be extended by one day, though the Chairman should have discretion to select late amendments for debate in exceptional circumstances, as is currently the case with starred amendments. (Paragraph 80)

22. We recommend that the Procedure Committee draw up a set of rules governing the tabling and publishing of explanatory statements to amendments in standing committee, and that a pilot scheme be conducted with a single, substantial bill to evaluate the potential impact of this move. (Paragraph 82)

23. We recommend that Ministers make clear to bill teams that they are free to contact members of a public bill committee to discuss the purpose of amendments (Paragraph 83)
24. So far, there have been no reported problems relating to the use of laptops, personal
digital assistants (PDAs) and similar equipment in select committee meetings. We
recommend that the Chairmen’s Panel give favourable consideration to allowing
Members to take similar equipment into meetings of standing committees. (Paragraph 85)

25. We recommend that the House undertake an initial pilot study involving a single
standing committee on a bill in which laptop computers are made available in the
committee room. (Paragraph 87)

Reporting the bill to the House

26. We recommend that the Library produce a report of the standing committee stage of
most Government bills, and those private Members’ bills which have a reasonable
prospect of being passed, in time to inform debate at the report stage. (Paragraph 90)

27. We recommend that the House undertake a feasibility study of showing the
amendments made to bills amended in committee. It might be possible to do this by
means of an on-line version of the bill. (Paragraph 92)

Third reading

28. We recommend that, where a substantial debate on third reading is warranted—as
will usually be the case when a bill has been significantly amended—the
programming sub-committee should consider recommending the allocation of an
appropriate period of time after the end of Report stage for the third reading debate,
but not necessarily on the same sitting day. (Paragraph 95)

Consideration of Lords Amendments

29. We recommend that the Government give careful consideration to how much time
to allow for Lords Amendments, especially in respect of the first Message on each
bill. (Paragraph 101)

30. We recommend that the Government provide short explanatory notes to accompany
Lords Amendments. (Paragraph 108)

Timing of votes

31. We propose to return to the subject of the electronic recording of votes in due
course. (Paragraph 114)

Resource implications

32. We recommend that the Clerk’s Department and the House of Commons Library
produce estimates of the likely cost of implementing the recommendations in this
Report at an early date. (Paragraph 115)
Formal Minutes

Tuesday 25 July 2006

Members present:

Mr Jack Straw, in the Chair

Ann Coffey Mr Adrian Sanders
Mr George Howarth Graham Stringer
Mr Greg Knight Sir Nicholas Winterton
Mrs Theresa May

Draft Report (*The Legislative Process*), proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 118 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the First Report of the Committee to the House.

*Ordered*, That the Chairman do make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Several papers were ordered to be appended to the Minutes of Evidence.

*Ordered*, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Wednesday 11 October at 9.30 am.]
Witnesses

**Wednesday 10 May 2006**

Natascha Engel MP, David Howarth MP, and Mr David Kidney MP

**Wednesday 17 May 2006**

Professor Dawn Oliver, Professor of Constitutional Law, University College London, Mr Philip Cowley, Reader in Parliamentary Government, University of Nottingham, and Dr Alexandra Kelso, Department of Government, University of Strathclyde

**Wednesday 24 May 2006**

John Bercow MP

**Wednesday 21 June 2006**

Mr John Stewart, Bill Principal, and Ms Joanna Warner, Bill Team Member, Health Bill Team, Department of Health

**Wednesday 28 June 2006**

Mr John Cridland CBE, Deputy Director-General, CBI
Mr Nigel Stanley, Head of Campaigns and Communications, TUC
Mr Richard Schofield, Policy Manager, Business and Property Law, Law Reform Team, and Ms Patricia Barratt, Solicitor, Clifford Chance, and Member of Law Reform Board, Law Society

**Wednesday 5 July 2006**

Sir Roger Sands KCB, Clerk of the House, and Dr Malcolm Jack, Clerk of Legislation, House of Commons
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Oral evidence

Taken before the Select Committee on Modernisation of the House of Commons

on Wednesday 10 May 2006

Members present

Mr Paul Burstow Mr Adrian Sanders
Ms Dawn Butler Mr Richard Shepherd
Ann Coffey Graham Stringer
Mr Greg Knight Linda Waltho
Mrs Theresa May Sir Nicholas Winterton

In the absence of the Chairman, Sir Nicholas Winterton took the chair

Memorandum submitted by Mr David Kidney MP (M 42)

A PAPER ABOUT THE REPORT STAGE

This is a brief response to the Committee’s inquiry into the legislative process, containing a suggestion for improving the Report Stage of legislation.

My suggestion is that Members should have available to them for the Report Stage a REPORT. I mean a report of what happened in the Committee Stage.

We can obtain from the Vote Office, Explanatory Notes about a Bill before its Second Reading. I believe it would be helpful for Members to be able to obtain a Report from the Vote Office ahead of the Report stage.

WHAT NEEDS TO BE IN A REPORT OF THE COMMITTEE STAGE?

It would not normally be a very long document. At its simplest, it would point out the changes that were made to the Bill in Committee (or merely state that the Bill was unamended). This would at least catch any Government amendments made at Committee Stage, amendments proposed by other Members and accepted by the Government and any amendments made against the Government’s wishes.

Additionally, the Report could perform another function that would aid debate at Report Stage. It could draw out the issues where there was most contention, the issues that were resolved without much difficulty and those issues that were less extensively considered in Committee.

The Report would set out any matters that were not reached in Committee and therefore were not debated at all nor voted on. (Personally, I would obviously like there to be extra time granted in cases where there is a danger of this happening and perhaps the prospect of this kind of Report would focus minds on delivering that extra time instead.)

Finally, if the Government undertook in the Committee Stage to reconsider any matter debated in Committee, or gave notice of an intention to bring forward amendments at Report Stage, these could be flagged up in the Report.

For me, the benefit of such a Report would be that it aids Members in preparing for the Report Stage (irrespective of whether they were Committee members or not). For those who were not Committee members, the Report allows them to “catch up” with what went on in committee before the debate starts at Report Stage. It would also help focus minds on what have by this time been identified as the key issues of substance.

All of this leads me to anticipate that Report Stage debates would thereby become even better quality than they are already and all Members would have the benefit of a more inclusive approach.

February 2006
Q1 Sir Nicholas Winterton: This will be a relaxed session. I warmly welcome Natascha Engel who represents North East Derbyshire, David Howarth who represents Cambridge and David Kidney who represents Stafford. The purpose of this session this morning is to ask for your comments and ideas and for us to put questions to you as to how you view the current legislative process and how you would like to see it changed. I know that Natascha Engel has to go fairly promptly, but may I ask each of you—and I shall start with you, Natascha—as to how you view the current legislative process and how you would like to see, very briefly, things changed. Then we can get down to specific questions.

Natascha Engel: Thank you very much for inviting me to give evidence today. From my perspective as somebody who arrived in May, I find a lot of the legislative process confusing and extraordinary. I am starting to find my way through it but I think there is a great deal that can be done to make it much, much clearer, easier and much more straightforward. I would like to focus on the things that I think are very, very good. The one thing that I have felt since I arrived in May is that select committees are the single best thing that I have ever seen. They are absolutely fantastic and a very, very good way of looking at not just pieces of legislation but events and departments; it goes from pre-legislative scrutiny to monitoring outcomes right at the end. If we take select committees as a model of something that is excellently well done, then I think that the ideas all come from there. What I would really like to see is the use of select committees and the idea of the way that select committees work carried out far more widely, so that it involves more Members. The other thing I have felt as a new Member is that, through the select committee, I have become very much more educated than I would be and I have developed much more an expertise in Work and Pensions, which is the Select Committee that I am on, than I would otherwise have had. I have also had access to information that I would otherwise maybe not have had or would have found more difficult to find. It has allowed me a way through the legislative process that I think has made it much easier. The other thing that it has allowed me to do—and I know that this is moving on a little—is the public engagement aspect of the legislative process. I have found in the constituency the understanding of the legislative process is very, very poor. The average public understanding of how things work is unsurprisingly very, very poor. What I have tried to do is use the idea of the select committee and the style of how we do things and take that to the constituency and use large set pieces of legislation to set up select committees in the constituency and call in local witnesses and maybe, in the long term, thinking about compiling reports and feeding those into the consultation process of individual select committees. Also, to do that further on down the line in order, when legislation is going through the House of Commons, to take reports from the constituency. You have interest groups—people will naturally attend some things and they will not attend others—and could have reports sent to ministers and get reports back before pieces of legislation go through. That means that people have a direct input into the legislative process and it is only when they have that direct input that they will really want to pay attention and see how it works. That is my ideal.

David Howarth: It is really interesting to be on this side of the table looking that way! I often wondered what it looked like from the other end! My view, after being here for only a year, is that the legislative process should be doing two things and it often has to do them simultaneously, which makes the process inherently complicated. One is that it has to examine what the Government’s purposes are in bringing forward new legislation and to argue about whether those purposes are good and proper purposes, whether this legislation should exist at all and whether the Government have the right policy. On the other hand, it has to examine whether the means chosen, the specific words chosen, to further those ends work, whether they go far enough or, as is often the case, too far and go beyond the purpose that has been declared. In a way, I think that we spend far too much time on the second and not enough time on the first. I have been very interested to read the regulatory impact assessments that are associated with various parts of legislation which do give some clue, although often not enough, about what the legislation is for. I would be keen to find ways of making sure that those assessments are better discussed, not just at second reading but in Committee. I think it is the one thing that gets missed out of Committee, that we go straight into the discussion of a line-by-line view of means of how the policy has been put into operation. It does seem to me that if what we want to do is more post-legislative scrutiny/post-legislative assessment of whether the legislation has worked, you need to have a very clear view of what it was for. You cannot tell whether something has worked unless you know what it was for in the first place.

Q2 Sir Nicholas Winterton: Are you in favour of pre-legislative scrutiny as well as post-legislative scrutiny?

David Howarth: Yes. The pre-legislative scrutiny has to be about establishing what exactly it is that the Government want to do with this legislation. The other thing that strikes me is that there is far too much legislation and, if you have more scrutiny of what it was for in the first place, it might become clear that the legislation does not have any particular purpose except to make a political point, and I think that we could replace a number of the bills that we discuss with simple motions, for example motions that say, “This Government are tough on crime and the Opposition are not”. That would save us vast amounts of parliamentary time.

Mr Kidney: Two good things, two bad things. One good thing is more and more bills are being published in draft; I think that is very good because we can start pre-legislative scrutiny and select committees are doing that. We have even had some
very useful online consultations which mean that the public and the lobbyists can have their say in good time before the politicians start to do their work on the process of passing legislation. The second good thing, which some people might hesitate about, is that there is a good aspect of programming that I found in standing committees. Just looking back, I have just served on six standing committees in one year, which I think is pretty good going, and the good thing is that because the length of the debate is now controlled, the Government’s supporters are able to take part in the debate like the Opposition. In the past when I started, I was on the governing side and I was told, “Don’t say anything, just vote at the right time because, the more you say, the longer you prolong the proceedings”. So, a good thing is that everybody now takes part and we get much better quality debates in standing committee as a result. The two bad things are first of all programming. What is bad about it is that it is far too tightly controlled by the Executive, some of the programmes are far too short and you get bills coming out of standing committee that have not been fully debated, or there has been a very minimum amount of debate in order to fit into the timetable. So, you get rushed legislation, you get a government who are said to be not listening and you get reliance on the House of Lords to do our job for us, which is very bad for democracy. The second thing that I want to talk about as being bad is resources for MPs and I do not necessarily mean that I want us to set up another department with some more people to help us, although some specialist support on legislative processes would be useful, but one good resource would actually be timeliness information for MPs and my suggestion in my paper about the Report stage is one example of what I mean by timely information for MPs to enable us to do our jobs properly.

Q3 Graham Stringer: David Howarth, I think you made a very good point about regulatory impact assessments; I think they are under-read by Members both at second reading and Committee stage. I think that if Members do read them, they will find them varying in quality. What do you think of the idea of having them either independently produced, basically a cost benefits analysis and definitive of objectives and alternatives, or independently assessed before they are attached to the bill?

David Howarth: Probably the latter rather than the former. I see the purpose of them as setting out what the Government want the bill to achieve and giving some indication as to why the Government think that the Bill will achieve what it is setting out to achieve. It would be quite useful to have some independent assessment about that latter aspect, that is whether the means chosen will reach the ends. In the end, what is really being set out is policy, that is what are the aims to be achieved, and that is what needs to be debated more. Just in itself, not just whether the means chosen are appropriate and proportionate and accurate but whether the policy itself is worth having. That is what I think second reading debate should be about, about whether the policy is worth having, but you are also right that it would be useful to have a more detailed discussion of policy in Committee. When we move from second reading to Committee, we are moving to a stage where the policy discussion is had in the interstices of the discussion about words and we tend to lose focus on what the bill is trying to achieve at that point. I think it would be worth thinking about the way debates in Committee work, so that instead of just going through the bill line by line, we discuss the bill in terms of alternative ways of achieving those ends or alternative ends that this kind of Bill could propose, so you have programmatic amendments that cover the whole bill.

Q4 Sir Nicholas Winterton: I think it was you, David Howarth, who said there was too much legislation. If there is—and maybe from the chair I should not express a view but I am inclined to agree with you—what could be done about it?

David Howarth: The suggestion inherent in what I said was, if the Government were to be obliged to say what the legislation was for rather more clearly, that would discourage the Government from bringing forward what I think of as purely symbolic bills, those bills which do not have much of a purpose to achieve in the world, they are there to make some political point. I do not want to bring in a controversial note about a bill which we have not discussed yet but the Constitutional Affairs Select Committee had a certain amount of concern about the Compensation Bill, and particularly about clause 1 of the Compensation Bill, which did not seem to be aimed at achieving any effect in the outside world. It seemed just to be a kind of press release. I do not think that legislation should be used as a press release. There are easier ways of issuing press releases and ways which use up less parliamentary time.

Q5 Mr Burstow: Mr Howarth may have partly dealt with this but I just want to pick up on David’s point about being a lot clearer about purpose and how one translates that into practical procedural arrangements here that facilitate focus on principle and purpose. Second reading is meant to be about debate of a principle of a bill and then Committee one tends to see as being very much the detailed examination of the means. What I would be interested to hear a little more about is (a) how you think a second reading could be either arranged or facilitated or procedurally serviced to actually make it more likely to focus on those issues of purpose and (b) what would be the change in the way in which a Committee stage would have to be scheduled to actually allow for sufficient time for that sort of scrutiny and purpose not just the means?

David Howarth: One very small point, which goes back to the point about regulatory impact assessments not being read, is that we have the explanatory note on the bill but that does not incorporate anything, as far as I am told, from the regulatory impact assessment. In fact, the explanatory notes are simply a list of the often
obvious, this clause does something that it says. Well, we know that. So, focusing Members' minds on purpose is one way to do this simply by changing the kind of material that Members get as a matter of course in preparing for the debate. The other thing is that the Government should be encouraged to issue clear statements of purpose and the Minister introducing the bill should make the focus of the introduction of the bill. Often what you get is a short statement of purpose which is too short to debate followed by a little political banter followed by a list of sections. There is a leadership role from the Government here about the way in which Ministers introduce bills. They introduce bills in ways which concentrate on the ephemeral, on the passing political headline, and the debate that focuses on the same thing. It seems to me that the one problem with Committee stage—and I have only done two, once under your chairmanship, Sir Nicholas, and it worked very well without any programming at all—is that one of the effects of just going through the bill line by line is that you do not get any sense of the options for how this bill might work according to a different political view. We tend to debate the words in this clause and follow-on words in that clause. Whereas, if we were allowed, in a sense, to have a Conservative amendment to the bill and discuss that, or a Liberal Democratic amendment to the bill and discuss that, or there may be some backbench amendments to the bill as a whole, so that people then propose amendments and then say why they want to do that rather than why they want to change this word and that word, then you get more focus on purpose.

Q6 Sir Nicholas Winterton: Do any of our other witnesses wish to come in briefly on that?

Mr Kidney: I have two things. First of all, the debate about purpose goes on all the time and we are closing our eyes if we are forgetting our setting in the middle of a democracy where everybody talks about the purpose of legislation. The way to have this debate about focusing the legislation is to continue the good practice of producing draft bills to enable people to see legislation earlier enough to have a say and influence its eventual structure in Parliament for the debate, and more online consultations and more involvement of the public are all beneficial things that you should be, I suggest, pushing for.

Natascha Engel: I think that the more pre-legislative scrutiny that you have, the more effective it will be and the less post-legislative scrutiny you will need. That makes sense to me.

Q7 Ann Coffey: I was very interested in the point that Natascha raised because she has obviously spent quite a lot of time thinking how you connect the legislative process with the people you represent. I think you are absolutely right because part of the process, namely what goes on here, is very opaque to the people outside. I wondered what you thought of the idea of involving more people in the legislative process itself. For example, having people come to give witness statements to the Committee in order that, before the Members of the Committee start to look at the bill itself, they could hear from people outside what they thought about it.

Natascha Engel: The constituency that I represent is quite far away and people feel a geographical disconnection with what we are doing here. That is first and foremost and then everything else follows on from there. One of the ideas was that by holding a local select committee that addresses the issues locally, it means that they have an input into the process that overcomes that geographical dislocation. Also, it means that, if there is something that should come out that is of interest to a select committee, then that is something on which the select committee can pick up and can invite people to give oral evidence about. All it is doing is having a go at seeing what I have found works really, really well. Also, having only been recently elected, it means that I feel I am much closer to the public than to Westminster, though I am sure that will change in a couple of years! At the moment, that works quite well. I would also like to see whether it is possible to do that in all the different stages of the bill. So, if what we are doing is this kind of thing at the pre-scrutiny stage, whether that means that people do take more of an interest in all the tiny little things. There is public access to everything: people can come and sit and listen to absolutely everything and it is their right to do so, but people do not take it up.

Mr Shepherd: The point about purpose is a very important question and everything follows from it in point of fact. Historically, the House often gave two and even three days to second reading debates. What we have now condensed this into is a very short political macho process: the Government must get its legislation. The other thing that follows from that, which is David Howarth's point, is that governments are often very muddled in their own minds as to purpose and have many purposes within the bill. I just cite Criminal Justice Bills for instance. I am sorry that that was more of an observation and I accept the pre-legislative scrutiny point and all the rest of it involving that, but you then moved to a Committee stage, having had maybe a longer debate at second reading. You can amend a Bill within the terms of the long title and actually try and put in a scheme that achieves purpose as an alternative. My experience a long time ago of standing committees is that approach is rarely attempted partly because of the nature of party organisation, I see a better road than I think the Government are taking. That means actually very significant rewriting, as long as it is within the terms of the long title, of a bill. Everything is possible under the existing arrangements. Is not the burden of the argument that they are not functioning?

Q8 Sir Nicholas Winterton: I would like to add to that because I think that Richard has tackled a very important point. Does the fact that very few non-government amendments are made to bills as they go through the standing committee mean that standing committees are to all intents and purposes ineffective?
**David Howarth:** I suppose the test is how many of them are subsequently accepted at Report rather than how many are accepted at Committee. It seems to me to be in the nature of the order in which we do things to make it very difficult for non-government amendments to be accepted because they are voted on in a non-programmatic way, they are voted on in a way which, if one of them gets through, it then has consequences for the rest of the bill in terms of policy which makes the bill incoherent and so the Government can say, “Obviously we cannot accept this now because it would leave the bill as a hodgepodge, as a mess”.

**Q9 Sir Nicholas Winterton:** That is not always the case. There are many—and I suppose I can speak fairly objectively chairing standing committees—amendments put down by Opposition parties which genuinely would benefit the bill and improve the bill but, for perhaps the macho reasons, the Government are unwilling to accept any amendment. You have a view and I wonder whether you want to add to that but I would like to bring in David Kidney.

**Mr Kidney:** The two words that Richard used which I think are very relevant are “time” and “macho”. Enough time for a mature debate in order to make convincing arguments, and then a minister or a ministerial team of a Government or a Civil Service that is willing to accept that somebody has a stronger argument than the people who are putting forward the original proposal. In my six standing committees in the last 12 months, two were behind Jim Knight as a junior Minister at Defra and he has been excellent at accepting other people’s arguments and changing his bills. It is right, as David said, that changes took place at Report stage and they probably took place in the Government’s name rather than the Opposition Member who put it forward originally, but the changes were made.

**Q10 Sir Nicholas Winterton:** David Howarth, is there anything that you would like to add?

**David Howarth:** That was my experience as well although another aspect that I have noticed is that, if the Minister is a very junior Minister, he will often find it very difficult to get authorisation to change bills, especially so, as you will all remember, when there was a junior Minister who did not have a senior Minister to refer to. So, the Government structure sometimes comes into this as well.

**Q11 Mrs May:** I have a couple of specifics and one general question for all of our witnesses. I would like to ask David Kidney a little more about the timely information for which he is looking for Members. I am very taken with his idea about the report that comes back from the Committee stage. It seemed to me that one of the difficulties at Report stage has always been trying to understand, if you have not actually sat on the standing committee, what on earth has happened to this bill at that stage. I wonder what else you had in mind in terms of timely information. I think that the way we produce amendments for people in debates and the difficulty of actually finding out what an amendment on the order paper is going to do to a bill is another problem that Members have. I wonder if you have any thoughts in other areas like that.

**Mr Kidney:** From start to finish, we could do a lot better. A draft bill obviously is the starting point. There was talk about regulatory impact assessment and I have to say that sometimes you get those in draft halfway through a standing committee stage. So, earlier production of those would be very helpful. If there is a pre-legislative scrutiny that involves the public, the report of what the public said is a very useful document to have for us. I think there becomes procedural constraints regarding knowing about amendments in time to be able to prepare a case for or against. There is a little assistance that could be given through the process of selection, which obviously the Chairs of the standing committees do and they do them at quite short notice. It is quite a modern innovation that the Clerk to a standing committee now emails Members of the Committee with the selection the day before, which is an improvement. However, there will always be that time constraint. The major change that I look forward to one day is when we have a Business Management Committee which takes control of these things away from the Executive of the day and makes sure that we do have as much time as the procedure permits for each of those stages. I am glad that you are taken with my Report stage note because it is something that I have worried about ever since I started here in 1997.

**Q12 Sir Nicholas Winterton:** Your response to what Theresa May asked is essentially very helpful. Do you think that Members who table, whether it is in opposition or an individual Member, an amendment should actually indicate in a couple of sentences what the amendment seeks to do, i.e. an explanation?

**Mr Kidney:** It is a little like explanatory notes of a bill. Why should there not be an explanatory note for an amendment? In the times when I have been used by outside bodies to put forward their amendments, they have actually provided me with the explanatory note with amendments. So, it would not be difficult.

**Q13 Sir Nicholas Winterton:** They have not been difficult for you but could you actually translate that to assist other Committee members?

**Mr Kidney:** My point is that it would not be difficult to do that. So, if you are happy to recommend that, I think that would work well.

**Q14 Ann Coffey:** Do you not think that is actually part of the difficulty, David? Do you not think that what tends to happen is that the outside bodies, who do have perfectly genuine interests in it, present their interest to the Committee indirectly through a Member of Parliament who may or may not be interested and will present their evidence depending on their particular experience? Do you not think it would be better if those outside bodies had an
opportunity to come to the Committee themselves and to be examined directly on what they are proposing?

Mr Kidney: Yes. If you take what Natascha said earlier, with which I thoroughly agreed, that first of all at the pre-legislative stage you could have a select committee that could take evidence, travel around the country and conduct an online consultation, all of those things... If in a moment we come to special standing committees, maybe we could talk a little more about the rules for allowing Members to hear directly the voices of people who have something useful to contribute.

Q15 Mrs May: My other specific question was to David Howarth who is absolutely right to pinpoint this issue of the purpose of any piece of legislation and then the means by which that is going to be achieved, but it seems to me that actually there is a pre-stage before that. I agree with you that there is too much legislation. All the debate takes place in the context of the piece of legislation. Is there not a pre-stage which is about general debates about issues which are completely divorced from legislative proposals? You could have a substantive vote; you could have a free vote in the House; you can get Members’ views on the issue and what should be happening with an issue. That can then translate into a policy which becomes legislation and you then have a policy debate and then the legislative debate. I just wanted your comments on that early stage.

David Howarth: I agree, absolutely. Strangely, it appears that this is what we did in the 17th century, we would have a debate on a motion that a bill should be brought in to achieve a certain end and, if the motion were carried, then the bill would appear. It seems to me that there is a need for a separation of the general debate about an area and this particular—

Q16 Sir Nicholas Winterton: Was it done on a free vote, Mr Howarth?

David Howarth: It is difficult to tell but my guess is that the whipping arrangements under Mr Cromwell were quite severe!

Q17 Mrs May: I would be interested in comments from all the witnesses on this. We have very much focused so far on primary legislation. I would like your comments on the fact that increasingly so much more legislation today is done through secondary legislation. Statutory instruments get minimal amount of debate, if they are debated at all. Large numbers go through without any debate whatsoever. I just wondered what your comments are given what you have been saying about the need to involve the public, having greater debate on policy and purpose and so forth.

Natascha Engel: That is actually the point, that the purpose of any changes really do need to get to it because that arguably is the ultimate post-legislative scrutiny—has something not worked? Is that why it has to be amended? Has it become obsolete? At that point, I think we do least well and I think that is the point at which we should be doing absolutely more.

I go back to your point that certainly a consultation document may be produced, which is absolutely excellent, because I was so surprised that there were so many different mechanisms that already exist for us to be doing things that I had never even heard of and they sound like really fantastic ideas and why are we not trying them out? I think that is where we could really exploit certain stages of bills where we could be involving people. We could be exploiting individual MPs’ areas of expertise, their skills and their background, and that is all stuff that we are not doing at the moment.

Q18 Mr Knight: May I go back to the point about the macho approach. Are we not always going to get that where a minister presents a bill in its final form as government policy? He then commends and defends it at second reading. Is it therefore unsurprising that thereafter he is unwilling to see his baby tampered with? Is the way around this to seek to have all legislation published in draft, to have pre-leg in every single case, so that a Minister comes to the House saying, “These are my broad proposals. This is my intended vehicle to deliver this policy but I am willing to listen to what the House has to say in terms of amending it”? If we have that in every case, would we not have ministers more likely to accept amendments because then amendments would not be seen in themselves as an attack on government policy? That is point number one. Point number two is, is not the other problem that the quality of interrogation of the scrutiny in standing committees is patchy? David Kidney mentioned the pre-guillotine days when Government Members were told not to say anything. It also used to be the case in pre-guillotine days that Whips would deliberately put on standing committee Government Members who knew absolutely nothing about the subject because they did not want them to become involved in the process of debate and discussion. Therefore, should we not be looking at making our standing committees quasi select committees, so that you actually build up a bank of experience and expertise? I have said to my Whip that I am happy to go on any bill and any SI Committee that deals with transport issues because I feel that I have some knowledge there and I am interested in it. If we had a culture where standing committees actually specialised and you had the same Members dealing with the same areas in a Parliament, would that not also improve matters?

Mr Kidney: Of course you are right that the more bills we produce in draft, the more opportunities there are to make changes before we get stuck with the trammel lines of party political debate and I expect we will reach the stage where they will all be in draft except for the obvious exceptions, the routine bills, the urgent ones and I presume a Finance Bill. You would want to exempt those. As regards the standing Committee stage, I think that we should sweep away all those distinctions that Natascha has just reminded us of from your consultation paper and say that all those powers exist in every case. So, you could have a standing committee that wants somebody alongside them to give them advice all the
way through. For example, when I did the Joint Committee to do the pre-legislative scrutiny in the Financial Services and Markets Bill, we had one of the team who drafted the Bill with us at every session to ask them, “Why did you draft it that way?” and “Couldn’t we make this change?” and we had somebody from the notional Financial Services Authority with us to find out what the powers they were seeking were and why they wanted them. We found that immensely useful, in addition to the witnesses we called from time to time. At the moment, the Standing Order for a Special Committee says that, if you want to call a witness, it has to be in the first 28 days, no more than three sessions of three hours each and, except for taking the evidence from the witnesses, you have to sit in private. You have to sweep away those rules and people ought to be able to make a decision. I would think it would be that little programme sub-committee, if you would want them on your Committee, when you would want them and for what purposes. There might be a number of times when you do not need to disturb the usual standing committee and others when you want those kinds of support. I would like to say one thing about statutory instruments because, for my sins in this Parliament, I have been put on the Joint Committee on Statutory Instruments and we have the superb resource of staff from both Houses. We have a fantastic team of lawyers and clerks who do a wonderful job going through all these statutory instruments and they tell us what they have found. Of course, we cannot do anything with the information except report that they are defective. We cannot say, “This is a bad idea” or “We should scrap this and start again”. There is not going to be any debate and vote in the House of Commons, they cannot be amended, yet, when we are doing the standing Committee stage, we have none of that resource where we could make a difference. So, it seems to me that it is a bit of a topsy-turvy world.

Mr Sanders: The big problem here is the fact that, as politicians, we are presented with problems and, in a sense, the pressure is on us to find a legislative solution to it. Quite often, the answer may not be a new piece of legislation but to look at the legislation that exists and see whether it is working and whether, if it is an act, for example, that is a criminal offence, it is actually being enforced. In a sense, there is no monitoring of existing legislation to see whether it is working properly. That ought to be the first task before a new piece of legislation is introduced. I am not sure that you can change the Committee stage. The Committee stage is there to deal with the detail of the bill; it is actually before you reach the Committee stage that you must have established the need for that legislation and must have discussed the principle, not forgetting that there is also another opportunity to discuss the principle when you come back to third reading where you can have another go at it. If you try and build into that Committee stage something other than the line by line, you actually lose the focus. Is the second reading stage—and this is specifically to David in building on Richard Shepherd’s point—where we are deficient? Is the second reading too short? Is there something about the way we conduct a second reading that could be improved to look more at the principle? Is there somewhere where we could slot in a specific requirement for the regulatory assessment to have been undertaken and considered in the same way that, whenever I see a bill, there is always that question asked, is it complaint with the European Convention on Human Rights? In our judgment, it is otherwise it does not go forward. Is there somewhere for some marker like that at second reading stage to say, “Yes, there is very definitely a need for this legislation in this area because there is nothing else on the statute book that covers this”?

Sir Nicholas Winterton: In answering that, could all three of you also indicate whether you think that second reading debate should be longer in order to allow greater participation.

Q19 Sir Nicholas Winterton: Do you think that on the first you should be able to make a difference and you should be able to alter the statutory instruments?

Mr Kidney: I think this comes back to what I would call the old fogey argument, that there is too much legislation in this place. I think that, in a modern, complex world, there are always going to be pressures for legislation and the trick is to design modern, timeless legislation that can last a long time and the only way in which you can do that is to have things underpinning the Act, like codes of practice and statutory instruments. Where we have to get better on our feet is having the procedures for scrapping out-of-date rules and regulations and codes of practice and bringing in the new ones that fit the bill for today. We do need a system there where we can have less than the whole House debating each individual one but making real decisions about the content of them.

Sir Nicholas Winterton: It is very radical and I would love to see progress.

Q20 Ann Coffey: You cannot get people into second reading!

David Howarth: I think it is a factor that, since Natascha and I were elected, there have been no second readings more than one day. I have read second reading debates of more than one day; some of them were very useful and some were not. I think you are right to say that there needs to be a more detailed analysis and discussion of the regulatory impact assessment or something like it. Whether the whole House is the best place to do that is another question. It might well be the case that, on some very important bills, it is, but I tend towards the view of the other witnesses that, if you are going to get more detailed discussion and scrutiny, a Committee is often the best place to do it and it should be concentrating not just on the words but also on the policies. The other thing that struck me is that sometimes second readings are too long. There are some bills where it seems to be absolutely pointless spending the entire day doing second readings but we have a convention and that is what we do. I
would like to add one other comment to what you said right at the start about how Parliament behaves on legislation in general. One of the things that surprised me about what we do here is how little we scrutinise and even suggest changes to the most important aspect of government policy, which is what government spend the money on. You were talking about legislative answers to political problems. Government has two outputs: laws and money. I think that because we have so little influence over the money side that we here tend to think too much about the law as the answer when it probably is not the answer. I have spent some time in local government and, in local government, of course it is the other way round. Local government has very little legislative power at all and therefore all the debates are about the money. All the motions are to spend more or less on a particular thing. Local government tends to think that the answer is always money and we here tend to think the answer is always law. In fact, it is one or the other or both in most cases. The Standing Orders which prevent or almost end discussion of government expenditure or different sorts of patterns of expenditure except on the motion of a Minister of the Crown strikes me as a big obstacle to our functioning as a Parliament that can control the Executive.

Q21 Sir Nicholas Winterton: Do you have any comment, David, on whether you think that maybe use can be made of second reading Committees to deal with non-controversial bills?
Mr Kidney: I think David has just described the Government’s roles and we should be talking about Parliament’s roles to make legislation and to hold the Executive to account. We do have a national leadership role which is often overlooked. Just to go back to Adrian’s point, I thought that his point was leading towards post-legislative scrutiny; when you have passed a law, is it any use before you talk about if you should bring in another law or not? I think we ought to make it a routine of post-legislative scrutiny. As far as the time for debate is concerned, I was on this Committee in the last Parliament when we looked at the way we choose who is going to speak in a debate and for how long and we hit a rather large obstacle called Mr Speaker in trying to make changes. In the House of Lords, they have a sensible system where people put in to speak and then they divide the time between the people who are going to speak. If we were given enough information in advance of our second reading debates, we could allot two days when a number of people want to speak and we could allot less than one day when there are not many people who want to speak. I do not mind second reading Committees being used for the least controversial bills but mostly all of us want to feel that we had the opportunity to take part in a second reading debate.

Q22 Ms Butler: I agree with that last point. I want to talk about making more time to hear oral evidence and so on and how we need to create more time at Committee stage. Do you think that there should be a limit on contributions because often at Committee stage people get up and talk for hours on end when it is totally unnecessary? I will not embarrass the opposition doctor by naming him but, I was in a Committee recently when, every time he got up, there were huge groans and moans and that was from his side! Do you think there should be some constraints in contributions when we discuss at Committee stage? Second, technology. What role do you think technology can play in making Committee stage easier and simpler? I always mention technology!
Natascha Engel: I would like to answer that because I think that I was on the same Committee as you were! It was such a pity; I was really looking forward to being on the Committee because it was quite a meaty one; I was quite excited about it. However, as a mealy little backbencher, I knew that I was never really going to have a chance to take part in it. It was a real pity because it was important but I came out of it after weeks feeling that it was entirely pointless because the same points were made over and over and again and it often felt like filibustering when that was the Opposition and I could not understand why on earth ... It was entirely pointless and it was a real shame because, given the subject of the Committee, there were a number of people who were expert and who could have made some really interesting contributions, but that was an entirely macho Committee. I have been on other Committees where that has not been the case and the whole mood has been completely different and it has been very odd to see how committees end up reflecting the personality of the Minister and whoever is leading the Opposition debate.
Sir Nicholas Winterton: Natascha, I ask from the Chair whether you would name the Committee on which the macho behaviour—

Q23 Ann Coffey: Do not go there, Natascha! Natascha Engel: I will not. That would be terrible! Natascha Engel: Thank you. It goes back to the point of saying that there are many Members, both in the Commons and in the Lords, who have expert knowledge, understanding, skills and background which is not being used and it is such a pity. It is such a waste of resource. It is awful when you know that there are so many other things that you could be doing and it is worse than watching paint dry! That seems to be a crime, an absolute crime, and we need to do something that is better. Very briefly in answer to your point, what you are describing in terms of the whole of the legislative process from beginning to end, it is kind of Kafkaesque, you get into a complete panic about which point where, when actually it is entirely organic. I thought that a very good example of pre-legislative scrutiny was the corporate manslaughter legislation that is just beginning and a very bad example was the Education Bill in terms of the way that we do things. I think that we can learn from both of those because there is corporate manslaughter legislation in existence and there is education legislation in existence and we are
building on them. It is not here is the beginning and here is the end, the whole thing must be seen organically and, if we see it like that, I think we can identify for different pieces of legislation different points at which we need to be improving things.

Q25 Sir Nicholas Winterton: Natascha, I know that you have to go very shortly but may I put two quick questions to you. How could proceedings on the Report stage, that is the remaining stages of the bill, be improved from your point of view as a new Member and do you see any real purpose in the third reading of a Bill?

Natascha Engel: I am really stumped! I have been thinking for days now about exactly these stages of bills and I think absolutely there does need to be improvement. With the third reading, I may be missing the point but I just cannot see the purpose of it at all. That may be because I am new and I have not grasped it. The later on in the legislative process you get, the worse it seems to become.

Q26 Sir Nicholas Winterton: Thank you and, if you do slip away, I am sure the Committee will understand. I know that you have an important engagement.

Natascha Engel: Thank you very much and thank you very much for inviting me.

Q27 Graham Stringer: I have two points to follow on from what Natascha said on the point of the third reading debate where there is a change which changes the balance in the House of Commons which may or may not happen on the Education Bill. Without the third reading, you would lose the opportunity for the Government to change their mind. The point that I really want to ask is, we have discussed how we deal with the macho side of “The Government are always right issue” when it gets into the legislative process. It seems to me that a lot of bad legislation actually comes where everybody agrees and it is the smaller end, the Dangerous Dogs Bill where there is no real definition of dangerous dog, so the legislation did not work. The bigger end, the Child Support Agency Bill was debated and I think it was probably a collective failure in that we all did not understand that if you pass a bill that actually affects the individual incomes of people, then that is very problematic, and I do not think that was only the failure of Parliament, I think it was probably the failure of the outside groups as well to bring it to our attention and maybe it would have benefited from pre-legislative scrutiny, but I have to say that the Lottery Bill did have pre-legislative scrutiny and still turned out to be very controversial. What I want to return to is this idea of pre-legislative scrutiny, but I have to say that the Lottery Bill did have pre-legislative scrutiny and still turned out to be very controversial. What I want to return to is this idea of saying what a bill was for. It has been suggested that perhaps third reading should be an opportunity for the Government to say, “We have put this bill on the statute book, this is what the bill is designed to achieve”, which should actually be the beginning of that kind of post-legislative scrutiny and I wondered what you thought about that.
**David Howarth:** I think there has to be a third reading stage especially when there have been changes. The Government have to be able to sum up what they think the bill is doing now and the opposition parties have to be able to say whether they are in favour or against the bill after it has been changed and backbench Members of Parliament as well. I think that third reading is important. In fact, the standard practice where there is an hour for it and most of that hour is taken up with thanking people is part of the devaluation of that stage and a lost opportunity, as you say, to get going with post-legislative scrutiny.

**Mr Kidney:** I agree very much with that. I see the second reading and third reading debates as gates that legislation passes through. The second reading, principle of “Okay, this might need amendment but I am prepared to support this” and third reading, “Well, I now know what it does look like and I do or I do not support it”. Thinking about your point regarding post-legislative scrutiny, which I think is a very good one, my view is that we should open the post-legislative scrutiny at a particular date later on, though I do not know what it is, and maybe, just as the second reading debate has tacked on the motion about the outdate for the bill from Committee, the third reading should have tacked on to it the day when the post-legislative scrutiny door opens to be the second anniversary of passing or the third anniversary or whatever is thought to be appropriate, or no date if it is not regarded as one that needs it.

**Q32 Sir Nicholas Winterton:** You have dealt with programming. Mr Kidney. Do you believe that it is appropriate that the programme motion should take place without debate immediately after the second reading or would you support the view that the second reading gives an idea of the areas of concern and that the usual channels should then take, say, 48 hours or 72 hours to decide how long that bill should be in standing committee for instance and that then a motion should be tabled on the programme motion 48 or 72 hours after the second reading?

**Mr Kidney:** I do not claim to be the font of all knowledge on when this should happen. My own vision would be that I think that the programme sub-committee from the standing committee gets together to sort out things. Actually, you could usefully do that as well if there was then an appeal process when there is no agreement, which there probably often would not be, to something that people trusted and, for me, that would be the creation of this Business Management Committee which we do not have in this place and, whilst we do not have that, I am happy to go along with alternatives like yours.

**Q33 Sir Nicholas Winterton:** Are you of the view that there should be a Business Committee of the House of Commons?

**Mr Kidney:** Very much so, yes.

**Q34 Sir Nicholas Winterton:** Do you have any comment, Mr Howarth?

**David Howarth:** I agree. It works very well in the Scottish Parliament. The other point about your interim suggestion, with which I would agree if we do not have a Business Committee, is that there are often issues raised in second reading about the constitutional importance of a bill which might not have been noticed previously. So, an argument breaks out about whether part of the bill should be taken on the floor of the House in Committee and it seems to me that having a programme done on the spot brings in all the machismo that the Government are often subject to at the wrong time and some delay would be very helpful.

**Q35 Mr Shepherd:** This is going to be a little controversial but I have to come to it. We ignore the elephant in the room. I think David was with the predecessor committee that went to Finland and their European Committee, which is very important, says that 70% of their legislation now comes from Europe. Angela Merkel suggests that it is 70% or slightly over perhaps in Germany, and yesterday Klaus Václav in a lecture in London asserted that 65 to 70% of their legislation derives from the European Union. That means that what we are actually talking about over where we have confidence, if it is the same level in this country, although at the time we were looking at this with the predecessor committee, the Cabinet website suggested that it was merely 40% in this country in that we put legislation on the margin or something. Why would one, when one is talking about purpose and therefore the subsequent stages of examination of legislation, feel that we have any role in this then?

**David Howarth:** These figures often reflect volume rather than importance. I think they are often based on the number of pages. So, it is not necessarily the case that, by importance, 70% of legislation comes from Europe, it tends to be page after page of detailed stuff about quite minor issues. However, that is not always the case and I think there is a problem about the role of National Parliaments in the European legislative process and the accountability of ministers to Parliament for what they do. The idea of pre-legislative scrutiny should apply to what ministers do in our name in Brussels. The Scandinavian countries have far stronger systems for demanding that ministers talk to parliamentary committees before they go and legislate than we do.

**Mr Kidney:** Richard knows this because we went to Finland.

**Q36 Mr Shepherd:** I was not on that.

**Mr Kidney:** We reported back in our report that in Finland they do have a very strong link between their Parliament and their ministers who are in Europe negotiating for them; but I think people who are hostile to Europe as a proposition tend to forget that a lot of the law that they say comes from Europe is actually implemented in this country by UK law, often secondary legislation, and we ignore that at our peril. This Committee, when I was on it, did
produce an excellent report, which is awaiting implementation at the present time, to improve our scrutiny of EU legislation.

Sir Nicholas Winterton: Thank you. Dawn Butler asked a question on technology which I do not think our witnesses responded to in any detail at all. Dawn, do you want to put the question again.

Q37 Ms Butler: In your view, what role do you feel technology could play in the legislative process from the beginning to the end, where we can maybe get rid of some of the paper work at Committee stage and amalgamate it all? One of the questions that somebody raised was where amendments are made, how it affects the whole bill. I think if we put those amendments on our computers, then it could be highlighted throughout the bill. I was just wondering whether you feel that technology has a role?

Mr Kidney: I have a feeling that Michael Jack is still campaigning to be allowed to have a laptop with him in a standing committee. It seems to me an obvious point that, if we have everything online, why should not MPs when they are doing their job have access to it. If we did have witnesses in standing committees giving evidence, if they had something to display visually to make their point, we ought to make that possible. If you go back to the issue about people at home wanting to study what we are doing and following from home what we do, it is still the case that many of the committee rooms over in the palace are not even wired up for television and cameras so that people could not watch from home even if they wanted to. There is a lot still to be done to bring us into the twenty-first century with the technology to enable the possibility of using it to its best effect, and then we have got to change our rules to allow us to use it.

David Howarth: The most important change is the tracking facility that you can use to see what the bill would look like given various possible changes, in fact, even colour-code them by party, because a lot of the amendments come forward just as words referring to lines. What you need to know is what it would look like in one state or another state, and that is where technology can help you.

Q38 Sir Nicholas Winterton: Thank you very much. Do any colleagues on the Committee wish to put any further questions to our witnesses? I think we have covered all the ground. Is there any final word that you would like to leave with the Committee? I can say that your evidence has been extremely helpful, some of it very sensible, some of it even radical, but sensible nonetheless.

Mr Kidney: The only other point that I would want to make is this. You had my paper on the Report stage, and I was very pleased to hear Theresa say she found it very helpful, and I hope it does lead to changes in the future.

David Howarth: Thank you for listening to me. I also support David’s idea of a Report stage. It seems to me we should have a report on at that stage.

Sir Nicholas Winterton: On behalf of the members of the Committee, can I thank all our witnesses, in her absence Natascha, David Howarth and David Kidney, for the very valuable evidence that they have given to us and the very forthright way in which they have expressed their views in answer to our questions. Thank you very much indeed.
Oral Evidence

Taken before the Select Committee on Modernisation of the House of Commons

Wednesday 17 May 2006

Members present

Mr Jack Straw, in the Chair

Ms Dawn Butler
Ann Coffey
Mr George Howarth
Mr Greg Knight
Mark Lazarowicz
Mrs Theresa May

Mr Adrian Sanders
Graham Stringer
Paddy Tipping
Mr Edward Vaizey
Sir Nicholas Winterton

Witnesses: Professor Dawn Oliver, Professor of Constitutional Law, University College London, Mr Philip Cowley, Reader in Parliamentary Government, University of Nottingham and Dr Alexandra Kelso, Department of Government, University of Strathclyde, gave evidence.

Q39 Chairman: Good morning. Thank you very much Professor Oliver, and Dr Kelso for coming. You are probably more familiar with the workings of this Committee, having read your papers, than I am. You are very welcome. I will ask you, Professor Oliver first, and then your colleagues on either side, just to make any brief statements you may want to make and then we will pick it up from there. If I may just say, although this is my first meeting as Chair of this, which I myself found quite helpful—could cover informational matters, procedural matters and substantive matters. So informational matters, of course that does happen to an extent, but Parliament and its Committees should be provided with information about the evidence base for the Bill, the objectives of the Bill—why there is a problem, how the Bill, it is thought, will solve the problem, any regulatory impact assessment—and I know there are RIAs—but depending on the subject matter environmental impact, constitutional impact, family impact and so on, so that Parliament is informed about what the government thinks this Bill will do. It does not follow from that that the Committees would say, “That is fine, there is a Regulatory Impact Assessment,” or whatever; my idea would be that that would give the Committees something to get their teeth into. They might say, “You say that the regulatory impact is going to be X but we are not so sure, can you expand on this?” So it would open up a debate. That is the informational side of things. The procedural side would be for Parliament to be informed of what kind of consultation has taken place with interested outside bodies—I think consultation is the main thing—possibly what sort of process has been gone through within government, but that is probably something more for government. Then thirdly, I think it would be helpful if there were what I call substantive standards. These might be not generic to start with, but particular Committees might articulate substantive standards. The obvious examples would be the Joint Committee on Human Rights. Their standards are largely, of course, set out in the Human Rights Act and the European Convention but also in other international instruments, and the question would be: does this Bill meet the requirements of Human Rights Instruments, and so on? But for the Constitution Committee and for

1 Not printed.
other Committees concerned with constitutional matters I think there are a whole lot of standards which are not written down very explicitly anywhere, but I found quite a lot in the Constitution Committee’s reports—and one could do the same with other Committees’ reports—like is there provision for access to a court if an administrative person under this Bill makes a decision that affects people’s rights and they need access to it? And are tribunals subject to the Council on Tribunals, does this affect the criminal law and so on? So there could be standards of that kind which I call substantive, which are not, by and large, party political. I think there is pretty broad consensus on a lot of these things and I have given some illustrations in my article, which you may have seen, and there is a whole lot more that I extracted from the Constitution Committee reports. But it would be quite possible for people to go through the reports of other Committees and identify recurring concerns that if set out in some kind of a checklist would help the Committee when it is dealing with particular Bills, and also might feed back into government. So it would say, “We are going to be asked about X, we had better get our explanation or justification for not doing it sorted.” So that really is my interest in the legislative process.

Q40 Chairman: Thank you very much. ?
Mr Cowley: I would make three brief points. The first would be—and it was not, I think, my paper that you referred to—that there probably is a consensus amongst academics that the changes since 1997 have made things more efficient but not necessarily more effective; I think that would be a good way of summing it up. More efficient for government but I think also for Members—I think they have probably made the life of Members better, and that is not to be sniffed at.

Q41 Sir Nicholas Winterton: Better or easier?
Mr Cowley: Probably both but that is not to be sniffed at and I think that the demands we were placing on members before 1997 were excessive, and I think something that enables people to have a more normal life is not a bad thing—just because you go into politics does not mean that you should be strapped to the rack whilst you are down here. So I see no problem with that. The problem has been that it is difficult weighing up the changes since 1997 to conclude that they have also made the legislature better against the executive. Some of them have done no harm but taken on the whole it is difficult to say that they have made Parliament stronger. That said, they have not made Parliament necessarily worse either, and I think that would be my second broad point, that if you compare Parliament of today with Parliament of, say, 50 years ago, Parliament today is much more effective than it was 50 years ago in a whole range of ways, and I think parliamentarians themselves are partly to blame for the way that the media flagellates you for somehow being useless and ineffective compared to some mythical politicians of 40 or 50 years ago; there is no evidence for that at all and, if you want, we can talk through why that is.

The third broad point I would make is that I can think of ways I would like to change the structures and the procedures of the Commons, and I expect you all can as well, but actually you would not need to change many of the structures and procedures of the Commons to make things better than they are, all you would need is the political will to use the structures that already exist—more pre-legislative scrutiny, please, lots of use of special standing committees, for example, and a range of other things which we can talk about. More carry-over—let us stop trying to legislate everything within a year and take instead the norm that we take two years for a run of the mill Bill to pass through its legislative stages. Let us have special standing committees as the standard and force government to insist that they are not used if they want them to go to a normal standing committee or to some other mechanism. There is a whole range of things we can do already without needing to implement drastic changes to the legislative process, although I can think of, and presumably other witnesses and people around the table can also think of things that they would do.

Q42 Chairman: Dr Kelso.
Dr Kelso: Just as an opening remark, I would like to echo much of what Philip Cowley has said. The efficiency/effective distinction is one that I think you really need to be aware of when you look at any kind of attempt to reform the legislative process within the House of Commons. It struck me, certainly when I have done recent research, when I have spoken to MPs about this, that often times the two terms are used interchangeably as if efficiency and effectiveness mean the same thing. I think actually what you have to be aware of is that when you talk about something being efficient in the context of Westminster, when you talk about an efficient system it is about making the best use of limited resources. It is the same as it would mean in any context; you have limited resources be it time, be it money for Committees or what have you, and you have to use those as efficiently as you possibly can. That then, for me, goes into two different areas. There is perhaps a streamlining aspect of it which often can refer to things like changing sitting hours, which means making the way things work just a little more sensible perhaps—changing them, adapting them, perhaps to make sitting hours suit different people in different ways, and of course there are various views on what that means. There is also the aspect of expediting legislation, expediting the legislative process, which is perhaps what this particular inquiry is more interested in, and I think that refers to having a process by which government gets its legislation with the minimum kind of interference from Parliament, the minimum input of resources in terms of ensuring that the legislation comes out accurately at the other end in terms of what it wanted to see. When you talk about effectiveness, by contrast, it has a very different view of the relationship between Executive and legislature, in as much as if you want to make Parliament, or the House of Commons in this context, more effective what you specifically want to
do is rebalance in some way the relationship between the executive and the legislature. It often starts from the assumption that there might be something wrong with that relationship and that it should be rebalanced in some kind of way in order to make it perhaps more in favour of Parliament. Those two things, effectiveness and efficiency, are not necessarily mutually exclusive, and I think that is a key thing that can be overlooked, the assumption that if you are pursuing an effectiveness agenda it is somehow at loggerheads with an efficiency agenda. That does not necessarily have to be the case; but, that said, looking at what the Modernisation Committee has pursued since 1997 it has very much fallen into efficiency type issues with less attention to effectiveness issues, and in fact the one key time that effectiveness was looked at was perhaps with respect to the Select Committee Reforms in 2001/02. Perhaps to finish up in my opening remarks, what struck me—and before I came down here I wanted to think of some things I wanted to say that I thought might be useful to you—I pulled out the first report from the Modernisation Committee way back in the heady days of 1997/98—that was HC 190, The Legislative Process—and reading that through I was struck by how optimistic it sounded about the potential for what could be done about the potential for actually making a difference, particularly with the new intake of MPs and what actually could be done with that. Then when I looked at the terms of reference for what you are trying to do now it actually seems you are trying to do the same thing that you were back then, but a great deal of it simply has not been achieved. So I think in this kind of exercise what perhaps is the most useful thing to do—and I think you do acknowledge that in your terms of reference in your briefing paper—is that you are not trying to come up with vastly new or great innovations, but make better use of what is already there which was what the aim was those nine years ago.

**Q43 Chairman:** Thank you very much. If I might ask a couple of questions and then pass the baton on to others. Professor Oliver, when I read your paper I was struck by the examples you gave of this idea of standards and being, as it were, on the other side of the wire for some time, I am struck that the introduction Section 19 of the Human Rights Act, with the certificate, and the requirement for Regulatory Impact Assessments has quite significantly affected consideration inside government of legislation, and neither were there when we came into administration, and both require there to be a greater degree of seriousness. That is fine, but my only reservation about what you suggest is whether you would end up with a tick in the box mentality, and I would like to hear what you have to say about that.

**Professor Oliver:** I do not think it would. For example, if standards of this kind were articulated a bit more in government—and I absolutely accept that the Human Rights Act and Regulatory Impact Assessments mean that that is done—if there were any kind of a tendency to tick box in government as Bills were produced there is no reason at all to think that the parliamentary Committees would tick the same box because, apart from anything else, on every Committee there are opposition Members and they are not going to say, “The government says this is compatible with human rights so we do not worry,” or “The government says the regulatory impact is fine.” So I do not think there would be any chance at all of parliamentary Committees ticking boxes, unless it was obvious, and I think there would be people on every Committee who would be saying, “I am going to look at this carefully, I do not see why we should believe them.”

**Chairman:** Mr Cowley you say we should not reinvent the wheel but make use of existing procedures which have not been used as much as they should. I am attracted to the idea of special standing committees and I recall that I used a special standing committee once when I was Home Secretary for what became the Immigration Asylum Act 1999, and I think it improved the Bill and improved the way that Parliament looked at it. The problem that I ran into when I next wanted to use a special standing committee was the Whips saying, “Not enough time”—and that is an eternal verity. Do you have any evidence from overseas where this kind of mixed arrangement is used, that in practice it does lead to a logjam, or could we argue that it may lead to slightly more time being spent in the Commons but actually less difficulty when the matters go to the Lords?

**Mr Knight:** Sorry, but presumably when you were told that by the Whips that was before you could carry a Bill over?

**Q44 Chairman:** That is true, Greg, but it does not affect that many Bills.

**Mr Cowley:** The Whips will always tell you that there is not enough time—that is the point of Whips—and part of that is because we have this culture that we have to get these things through, out and on to the statute book, and certainly before carry-over it was a more legitimate argument than it would be now. I would quite like to see almost all Bills carried over and then you have two years and then you would have absolutely no reason to argue that the evidence gathering in the special standing committee, which is a matter of weeks not months, would excessively add to the time that Bills were taking. There may be occasions when that is not possible, there may be occasions when time really is so short that things have to be curtailed, but I really cannot see the time involved in special standing committees is so great that we could not use it almost as a matter of course on Bills. Not just your experience but all the experience from the early 1980s when they were first tried was that almost all the people involved in the Committees thought they were a vast improvement on the standing committees that were previously existing; it was something which at the time lots of people thought, “Here is the future” and then for a variety of political reasons, predominantly being the Whips in the 1980s also told people that there was not enough time to do things. There is no great evidence from overseas one
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way or the other because the systems overseas tend to be so different, so in lots of legislative systems it is quite common for Bills to be introduced and then work their way very slowly through Parliament, sometimes taking two or three years, and sometimes they are just sitting on the agenda and have never been resolved because they do not have the idea of a cut-off either after one or two years in many systems. But even with a system which says that if they are not through in two years they die I see absolutely no reason why we could not use them more than we do at the moment.

Chairman: Thank you. Nicholas Winterton.

Q45 Sir Nicholas Winterton: Alexandra Kelso talked about what people thought, that there might be an imbalance between the executive, ie government, and the legislature, ie the House of Commons. Is that your view, because I think it is widely shared by many Members of Parliament in all political parties? And do you believe that a Business Committee, albeit the government would have a majority on that Business Committee, which would well represent backbenches as well as the official usual channels, might create a situation in which that imbalance between the authority of the executive and independence of Parliament and the authority of Parliament might be put more in balance than it is at the present time? Because you posed that question, that there was something wrong between the executive and the legislature. Could a Business Committee, representative of the House as a whole, actually contribute to putting that right?

Dr Kelso: I think the issue of an imbalance comes in with what is it that you want Parliament to do ultimately within the political process? Once you work out that is how you get a sense of whether there is an imbalance or not. I think on one hand you have to be very, very careful—and I think Philip Cowley brought this up—of the sort of declinist rhetoric that you hear about Parliament going down the tubes. You really have to dismiss that. Simply reading Philip Cowley’s book on how backbench behaviour has developed over recent years is testament to the real power that Parliament has when it decides to use it. So I think in one respect you have to be very, very careful about drawing conclusions which suggest that Parliament is weak, it is in decline from some mythical golden era that has long since passed—you have to be very careful about that. That said, there is no question that there is some kind of asymmetry between Parliament and the executive, but that is simply a product of the Westminster system; it is simply a product of the political system that we have in this country, and it is no good to lament that there can never be complete symmetry between the two, it is just not the way it works. So hoping for a time when there is some kind of strong Parliament which consistently thwarts government or imposes its own legislation over government legislation is pining for a time that is simply never going to come about, and possibly never really should come about either. Under the system we have governments are elected, not necessarily Parliament—it is governments which are elected to do something, not Parliaments in that particular respect with respect to legislation. That does not mean to say that there are not things that can be done to make sure that Parliament actually does the things it is supposed to do, and it goes back to the question what is it that you want Parliament to do? If you want Parliament to govern then you have the wrong political system actually, for a start—that is a fundamental problem. If you want government to govern then actually things are perfectly okay, but the point is that Parliament is there as a scrutiniser of government and that is the point at which you have to start looking at things that can be in hand. It is not to complain that Parliament is weak or it does not do its job—it clearly does do its job and it is clearly not weak—it is about enhancing the way it can scrutinise government. At that point if then perhaps leads on to your second point about the potential for some kind of Business Committee. I think when you start to look at issues like that what you are talking about is to what extent can Parliament or the House of Commons have some kind of corporate identity? This is something I have been quite interested in recently. We know what we mean when we talk about government or when we talk about parties, but we are not always necessarily sure what we mean when we talk about Parliament—is it the executive and the legislature. Could a Business Committee, representative of the House as a whole, actually contribute to putting that right?

Chairman: Ann Coffey.

Q46 Sir Nicholas Winterton: The reason I asked that question was that in our evidence last week a Labour Member of Parliament, David Kidney, actually supported the idea of a Business Committee giving Parliament greater say over the use of its time so that there was a meaningful role for backbenchers.

Dr Kelso: And I think it is a valuable thing; it would be a good institutional innovation in that regard.
Q47 Ann Coffey: In one of our previous inquiries we spent quite a lot of time talking about private Members’ Bills and the opportunity for individual Members to put statutes—in fact my colleague here, Mark, has very successfully sponsored a private Member’s Bill—which are traditionally on a Friday. But I think it is one opportunity that Members have as individual Members to make a difference, and have you any observations on the opportunities for private Members’ Bills and how Members use them, their effect on Parliament and their usefulness or otherwise?

Dr Kelso: Perhaps the first observation to make is that often the private Members’ Bills which are successful are the ones that are sponsored or in some way enabled by the government, in as much as it is something that the government would like to see, that is not too fussed about seeing or not seeing and is happy to relent and let the thing go forward. Whether that is how MPs want the system to be is an entirely different matter. There is certainly no question that some of the most important, particularly social or conscience legislation, has been the result of private Members’ Bills where government perhaps feels that it does not want to deal with the subject, and in that respect it is obviously valuable, and the fact that it does not come from government perhaps speaks volumes for the way that private Members are willing to go ahead with something. To the extent to which does that mean you should enable more private Members’ legislation—possibly, if you think that is the way that Parliament should function. Do MPs feel that there is a great deal of legislation out there that could have a private Member’s route but of which government simply would not be happy to see? I think what it comes down to is that you can have the mechanism but is government happy to, in a sense, sit back and enable these pieces of legislation to proceed, or is it going to let the vast majority of it fall away before it gets beyond second reading?

Mr Cowley: I am going to get the date wrong but the killer fact is that since I think it is 1956, and that is expertise?

Q48 Mr Vaizey: On the special standing committees, how would you see them working? Would you see them merging with select committees or do you see them as having distinct functions?

Mr Cowley: If you were designing the system from scratch you may well try and do something like they are doing in Scotland and you effectively merge the select and standing committees together and you would have them meeting before the second reading of the Bill—all of those developments. But you are not designing it from scratch so in order to get it achieved and make it practicable I would go with the existing arrangements, they are standing committees but at the beginning they can have, I think it is three evidence taking sessions. That would not be ideal and it would not be perfect but it would be better than we have at the moment and that is the way we should be going. So you do not get the full benefits of the select committee about cross-party development and a weakening of partisanship, but at least you have some evidence taking, you have the ability of outside people to come and present evidence and there is some clear evidence from the ones in the 1980s that that resulted in people changing their views on the Committees and it involved government backbenchers more than would happen on a standing committee at the moment. And then you revert back to being a normal standing committee. As I say, that is not how I would design it if I were designing it from scratch but it would work and it would be better than we currently have.

Q49 Mr Vaizey: Would you not want to have permanent membership, as it were, over a Parliament so that Members built up a particular expertise?

Mr Cowley: Ideally that would be wonderful but I would settle for having ad hoc Committees but which took evidence.

Q50 Mr Vaizey: On the way that standing committees work, it struck me as a new Member only sitting on one standing committee that the opposition really is left to sink or swim. Do you have any views in terms of the kind of clerical support that the opposition could get in terms of being able to scrutinise a Bill more effectively?

Mr Cowley: Not really. I have never thought about it from that angle, if only because I have never assumed that that was the real problem. I would assume one could give you lots more secretarial support and research support and it would not make standing committees any better. They have always been the weak point of the system and they still are. I remember—it is frightening to think—it must be almost 15 years ago sitting in a standing committee and then talking to a Conservative Minister then about what he had just been doing in the standing

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2 Witness correction: 1959.
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committee and he accepted then that this was a complete waste of time and he was simply batting away—going through the motions and batting away.

Q51 Mr Vaizey: Why, because it is simply seen as a process to be got through as opposed to an actual process to properly scrutinise legislation?

Mr Cowley: Far too often, yes.

Q52 Mr Vaizey: Even by the opposition as well? A process to score points as opposed to a process to scrutinise legislation?

Mr Cowley: I think the opposition probably find it more useful than the government backbenchers do, but that is not saying much.

Chairman: Theresa May.

Q53 Mrs May: If I can draw your attention to what I think is another weak point of the system, where the effectiveness in Parliament as a scrutinising body actually is reduced and the balance between the executive and Parliament shifts in favour of the executive, is the increasing use of secondary legislation, vast amounts of which get absolutely no scrutiny whatsoever, and that which does get scrutiny gets very limited scrutiny. I wondered whether all three of our witnesses could comment on that increased use of secondary legislation; whether any of the ideas that you have in changing the legislative process, for example the better scrutiny of primary legislation, longer time for primary legislation and special standing committees, do you think that would lead to a reduction in secondary legislation?

Professor Oliver: I do not know that it would myself; I do not feel an expert on it. I do not honestly see primary legislation dealing with the sort of matters that are often in the secondary legislation. I do not think I have any deeply interesting thoughts about it, except something that does come into my mind occasionally, both with primary and secondary legislation, is whether it would not be helpful if there were independent bodies or bodies reporting to Parliament, but non-politicians, who undertook more of the objective type of scrutiny that is often called for with delegated legislation and, come to that, with Bills. I am not pushing that but a lot of this is very boring work, to be honest. Sometimes there will be politically important or constitutionally important points to make about delegated legislation and a lot of the points will be political really, and that obviously is for Parliament.

Q54 Mrs May: You yourself talked about setting better objectives for legislation in the first place, and one of the problems increasingly today is that primary legislation is drafted in rather vague wording which allows for the detail to come in the secondary legislation rather than trying to put that in on the face of the initial Bill and I wondered if the better setting of objectives upfront could in fact give more scope for putting the detail into the primary legislation because everybody would know exactly what the Bill was aiming to achieve and therefore would presumably be better able to judge the detail that was necessary to do that.

Professor Oliver: I do think that would help, although there is a limit to the extent to which setting out objectives lends itself really to going into a Bill or into legislation. Certainly if there were ministerial statements about what the objectives were then that could be taken as a guideline as to whether the subordinate legislation that is brought forward is consistent with what the government said its objectives were. So that might be helpful.

Dr Kelso: I was going to say, the point that Dawn raised, that when it comes to things like secondary legislation there almost seems to be a sense within the House of Commons that there are some things that are deeply unsexy and that people just do not want to spend time working on them, and things like secondary legislation unfortunately fall into that category along with other things. There are some Committees, for example, looking at these types of issues, like the Delegated Legislation Committee, where it is hard to find people perhaps to go on them. I think as long as that attitude prevails then there can be a great deal of hand wringing about so much of our lawmaking comes through the secondary legislative process, but until a sufficient number of MPs are willing to step up and actually do something about it you can have as many discussions about it as you like but they are not going to get anywhere.

Mr Cowley: I was going to say exactly the same really. It is clear that anything to do with secondary legislation is like a sort of punishment Committee—it is like the Crossrail Bill Committee is at the moment; you get put on it if you have done something very, very naughty.

Q55 Chairman: The Chairman is getting a salary so I cannot accept that!

Mr Cowley: The Chairman is but the infantry is not. The rise of secondary legislation is one of the evils of modern government, there is no doubt about that, and most people would rather see much less secondary legislation. It is a rise that predated this government and you can see it throughout the whole of the post-war era, and some of it is simply to do with the complexity of modern government and therefore some of it is inevitable, but I think there is currently a desire to push some of it on to secondary legislation rather than deal with it in primary legislation. I am really attracted to the idea of being more explicit upfront about the objectives of pieces of legislation. I think if we could try to move towards that would be a real step change, and ideally I would like to see that combined with more use of sunset clauses, and in particular almost self-destructing legislation that required renewal, which said in the Bill that the aim would be it would only be renewed if X, Y and Z had been achieved by the piece of legislation, and then if it had not been achieved by the piece of legislation the legislation would lapse.

Chairman: George Howarth.
Q56 Mr Howarth: Could I just agree with the earlier part of Mr Cowley’s comments about private Bills? As a veteran of the Spitalfields Market Bill nearly 20 years ago, which was sold to me by a then pairing Whip called Ray Powell on the basis that I would only be on it for an afternoon, six months later I was still sitting on it. In fact I had not even been here long enough to deserve punishment for anything! I think he was relying on my good nature. On the other general points about how we do legislate, the thing that has struck me quite forcibly over the last few years is that those on select committees build up a body of expertise, but then it remains contained within the select committee. I have recently had the useful experience—at least for me, I do not know about for anybody else—of chairing the Armed Forces Bill, and I do not know if any of our guests have had the opportunity to look at that process but it is in fact a hybrid process whereby the Committee starts off, to all intents and purposes, with the same role as a select committee and then, having completed that process, converts itself into, again to all intents and purposes, a standing committee, and I have written to the Chairman about that. I found that a very satisfying experience because first of all you had the opportunity to build up a body of expertise and then you had the opportunity in a more formal way to apply it to a piece of legislation. I suppose the question is: has anybody had the opportunity to study that process and, if so, what do you think?

Professor Oliver: I have not, I am afraid, no, but it sounds a good idea.

Mr Cowley: The problem, and it is why in my answer to Ed Vaizey I said I would accept the practical step of just moving to special standing committees rather than using select committees for a piece of legislation, there is a real risk of overburdening the select committee, and that what you would find is that instead of doing good scrutiny work, which many select committees now do—and it is one of the huge changes in the Parliament of now compared to the Parliament of the 1950s or the 1960s that we have a really well developed embedded and relatively select committee system—these bodies would simply become legislative machines. It may work once or twice and there is no reason why, therefore, not to do it occasionally, but I would not like to see that at the moment as the default position for pieces of legislation. For one thing you might discover, if select committees were permanently dealing with legislation, that some of that cross-party working that currently goes on would cease to go on because the realities of partisan politics would intervene and they would stop them being quite as effective as they currently are. I have not studied the Armed Forces Bill but it is always cited as an example of quite an effective process in the same way that special standing committees are and in the same way that pre-legislative scrutiny is currently, by and large. So it would be another of those things that we could do with the existing procedures and we should encourage, but I think probably as a default position is going too far.

Chairman: Greg Knight.

Q57 Mr Knight: I take your point about not wanting to overburden select committees but I still think that the biggest weakness in our system is the *ad hoc* nature of standing committees and because of the *ad hoc* nature they do not have the appetite for in-depth scrutiny and they do not have the knowledge, and you get appointed to a standing committee not because you have expertise in a particular area but because the Whips say, “You have not done a Committee yet this year and it is therefore your turn.” I think this could be fairly easily remedied by having, as Ed Vaizey said, special standing committees set up for a Parliament, and I think then you would see the process moving in the same way as we have seen select committees moving where the expertise has developed over a Parliament and Ministers cannot get away with not answering the point because they are facing a detailed and thorough grilling. I think the other problem with the standing committee process, which is almost in every case a worthless exercise, is that Ministers treat any attempt to change the Bill as an attack on them and as an attack on their policy, and I am afraid they are encouraged to take this position by civil servants, who have also worked to get the Bill together and who will hand the Minister a piece of paper the first word of which is “resist”, when even a constructive and helpful amendment is made. So I would value your comments on that. I think the only way we are going to make the Committee process of a Bill worthwhile is to have Committees that are there for a Parliament and Ministers treating their Bill more as a draft Bill and where they are willing to look at constructive amendments which do not go against the grain of government policy.

Mr Cowley: If you could achieve that that would be wonderful. I wonder whether this is an example of at the best being the enemy of the good though. If you were able to get a change like that through the Standing Orders of the House through the House and get it as the default position that would be much better.

Q58 Mr Knight: We have a new Chairman, so we live in hope.

Mr Cowley: We do, but what does strike me is that it might be easier simply to change the rule. At the moment the default position is that Bills go to standing committee unless decided otherwise and it might be easier to have Bills going to special standing committees unless decided otherwise, and that might be an easier change. It would not be as effective as that which you are suggesting but would still be a step in the right direction. I would have thought that one of the lessons of the last eight or so years is that things that look too radical and which frighten the horses too much do not get achieved, and whilst personally I would be delighted if what you are suggesting happened I would much rather see some change than no change.
Q59 Chairman: Can I offer this observation really for Members of the Committee? I agree with Greg Knight that it never seemed to me to be sensible to have a standing committee run where you are resisting everything because you are often resisting good ideas; but in addition to that you are also storing up problems for yourself in the Lords. This is something which I have discussed informally with colleagues, and I think that one of the things we have to address in this Committee is the need to give the Commons a more active role in scrutinising legislation because otherwise there is reputational damage for the Commons vis-à-vis the Lords, and it ought to be the elected House which is doing at least a significant part of the work and effectively scrutinising Bills. Adrian Sanders.

Q60 Mr Sanders: Before I came here nine years ago I used to think that government legislated and Parliament questioned the need for that legislation, but being here what I actually find is that governments indeed put forward legislation but Parliament tries to amend it, or occasionally on pure partisan grounds tries to block it. Where in the process can you build in an effective questioning mechanism of the need for that legislation in the first place?

Dr Kelso: That really ought to be happening at the second reading anyway.

Q61 Mr Sanders: But it is not.

Dr Kelso: Yes, but in terms of the theory that is where it should be happening. So perhaps before you start thinking more about the Committee stage take a step back to the broad principle of the debate which should be taking place at second reading. You say it does not take place and perhaps that is where some of the concerns are then raised at the Committee stage, that the broad principle is that people want to question it again in Committee because it has not been done at the second reading, and whether perhaps these stages need to be collapsed, that there is a sense that there are too many stages with too many discrete things happening in each when perhaps more things should be happening across fewer stages.

Q62 Mr Sanders: When was the last time a Bill was defeated or withdrawn at second reading?

Dr Kelso: Was it the Shops Bill?

Mr Cowley: 1986. It partly depends what you are talking about because often Bills are introduced and then withdrawn, or occasionally Bills are introduced and then withdrawn. But the last time a government lost a Bill at second reading was 1986 and that was the only time in the whole of the twentieth century that a government with a secure majority lost a Bill at second reading. One or two other Bills lost at second reading but the minority administrations—

Q63 Chairman: The Shops Bill.

Mr Cowley: The Shops Bill. So the answer very rarely. I think my answer to your question would be that in practice once government has decided that it wants to legislate it is going to legislate and, again, if I were choosing where to concentrate my energies in terms of reforming the process it would not be to try to somehow increase the likelihood that government gets defeated at the second reading because I think is a pointless exercise; it would be instead to think about how you improve the Bill once it is here. I do agree with the point made earlier about the House of Lords.

Q64 Sir Nicholas Winterton: What about the legislation because otherwise there is reputational government withdrawing the Northern Ireland (Offences) Bill after the Standing Committee stage? That is very recent.

Mr Cowley: I said Bills are occasionally withdrawn but not very often. I cannot think of many others in the last 30 years.

Chairman: Theresa May.

Q65 Mrs May: I apologise to my colleagues on the Committee because they have heard me say this before—but then Nick always raises the Business Committee—but I just wonder if there is another way around this particular problem, which is to have an initial stage before the second reading, which is a debate about the issue? One of the bees in my bonnet is that Parliament spends most of its time talking about specific bits of legislation, we do not talk about the issues and we do not talk about the issues in ways therefore that are relevant to most people in hearing what Parliament is talking about. I wondered if we could insert a stage where government comes forward with, “This is the problem and these are the sorts of ways that we might think of solving it,” where there is a much more open debate, which if it is on a vote is not on a Whipped vote necessarily, where you are getting a view of Parliament as to how an issue should be addressed and what the problems are, and then government is able to formulate legislation with the information that has been gleaned in that debate. There is an enormous issue about political will there, which I entirely recognise, but it seems to me that what we are trying to search for is to get that debate about the principle, about the objectives, about what is this legislation for, and I think that is better taken aside from any specific piece because as soon as you have something written on paper people start debating what the piece of paper is saying rather than just the principle.

Mr Cowley: The problem with that surely is that the time period between that debate and any Bill actually appearing, given how long it takes to draft a piece of legislation, will be so vast that it would not be clear what the connection was between those two. In a sense we already have lots of debates about issues; Parliament, as I understand it, spends less than half of its time actually legislating and the rest of the time is debating and questioning and so on. So I am not sure that we need any more general debates. I could see the point of having a debate linked to some prospective Bill that might come but the time period involved would have to be immense. You would either have to have civil servants working 24 hours around the clock to try to get some pieces of
it—and it would then be very badly drafted legislation because it would then have been drafted in such a rush on the back of the debate anyway that I am not sure that it would work in practice. In theory it is a lovely idea and as a second best solution that is always partly what I would hope pre-legislative scrutiny could do, although I appreciate that is not as broad a point as you are making. But it has always seemed to me that the advantage of having pre-legislative work was that the battle lines are less widely drawn. Still, it has not got around the issue that has been raised a couple of times here about do you need this in in the first place at all? But I think that is a fight that is not worth fighting, frankly. There are fights worth having but that one is not one of them.

Professor Oliver: I think that is a really interesting idea, particularly this idea that Parliament should have an opportunity to know what the government considers to be the issue and what the various options for solving it might have been and why they have decided that this is the way to do it. It strikes me that if that has to be done at second reading, if the government were required to produce documents setting out those various things and saying, “We have considered criminalizing it, taxing it,” or whatever it is, “and we think this is the best that they will be able to get their amendments”—I think she has tried to make it more relevant, more programming means that MPs feels excluded from colleagues, Theresa May, is trying to get at, but I report that the combination of report and legislation and that is to an extent part of what myself, but I think there is a growing problem at present arrangements are not working or they would not work better if there were more civil servants change perhaps both the procedures—but it may not work better if there were more civil servants change perhaps both the procedures—but it may work better if there were more civil servants change perhaps both the procedures—but it may also be a question of changing the culture of what MPs do as well, I accept that—how do we change the situation so that these report backs from putting forward a proposal anyway unless it was pretty sure that it could satisfy Parliament that it was needed.

Chairman: Paddy Tipping.

Q68 Paddy Tipping: We have not talked yet about the Report stage, which is a pretty unsatisfactory process with sometimes only the Minister and the enthusiasts who have been on the Committee, who have the stamina to go forward, understanding what is going on, with very large groupings of amendments and many groups these days do not get discussed at all and go up to the Lords. What would you do to improve Report stage?

Mr Cowley: One thing I have discovered recently, I suppose over the last four or five years, from talking to Labour MPs, is that one reason why it is now more common to see large rebellions against the Whip at second reading, which never really used to happen in the way they currently do, is because Labour backbenchers feel excluded from the Report stage debate—the combination of the nature of the report but also the programming of the report.

Q69 Sir Nicholas Winterton: Exactly.

Mr Cowley: And because they are not so confident that they will be able to get their amendments debated and voted on at report the small focused targeted rebellions on pieces of legislation, which used to be the way you would deal with these things, have been replaced over the last four or five years by large rebellions at second reading. MPs are now much more likely than they ever have been, for certainly the last 40 or 50 years, to try to kill a Bill in its entirety. They have not been successful at it but they have been trying to do it, and recently they only stopped doing it because the opposition voted with the government. That is because they feel shut out from this process. That is not an answer about report itself, but I think there is a growing problem at report that the combination of report and programming means that MPs feels excluded from the process.

Chairman: Mark Lazarowicz.

Q70 Mark Lazarowicz: There is another interesting point on which I am tempted to comment, but I will keep my comments to the last point made by Paddy in relation to the Report stage where it tends to be, as he rightly points out, the Members who took part in the standing committee, and if you go to Westminster Hall debates or anywhere else it tends to be the Members responsible for producing the report are the ones who do all the speaking in the debate and no one else even tries to get in. So the process which is presumably meant to be Parliament as a whole responding to what the Committee or other bodies have done is actually just a reiteration by the people on the Committee in the first place, so it seems to rather miss the point. I wonder if you have any suggestions as to how we could actually change perhaps both the procedures—but it may also be a question of changing the culture of what MPs do as well, I accept that—how do we change the situation so that these report backs from
Communities of various sorts become more of an opportunity for Parliament as a whole to consider issues? That is my main question, and a second brief comment is in relation to making standing committees more effective. It seems to me that trying in some way to make sure that standing committees and even SI Committees include people with some interest would make so much difference to the way of operating. You referred to the example that SI Committees are normally boring to most Members and they have no expertise on the issue, but actually if you go an SI Committee you can see that there would be some Members who might well be interested in the subject matter but they are extremely unlikely to end up on the Committee. So I wonder how one could make more practical use of Members’ expertise, not just on standing committees but on SI committees as well?

Dr Kelso: I was interested in terms of what you were saying that at the Report stage it tends to be the same people who actually participated at the Committee stage. Actually if you think about it that has been a concern about select committees as well, that select committees work hard and make these great reports and then when they debate them on the floor of the House is it the select committee that turns up to do it, so really is there any feedback mechanism taking place there that is of any use to anyone? And it seems to be a similar situation with the standing committees in as much as it is the same people coming along to discuss things that they already know. Of course the two things are not the same sort of procedure and there has been the comment that at the Report stage it is only ever really government amendments that are accepted at that stage so what is the point in turning up and making a point if it is not going to be of much particular use? In one respect what is really wrong with it only being government amendments that are being accepted anyway? Is it really the job of Parliament to undo government’s legislation? Probably not. So in one respect that might not be so much of a problem, depending on the nature of things that are taking place behind the scenes, in as much as government will often accept amendments or put them forward itself, rather than have the embarrassment of accepting an opposition amendment actually on the day. In terms of creating some kind of body of expertise, that is up to MPs to actually want that to happen. They pushed for it in the late 1970s in order to secure the select committee system, which is only now really starting to come into its own in terms of its capabilities and its potential. What interest does government really have in seeing MPs get together and share all their expertise and become a real force within the House of Commons in terms of real information and real expertise on certain areas? If you think about it in realist terms why would they be interested in that? At one level they could be interested because it is useful for them, and that is always the reason that has been put forward—government benefits by having a collection of MPs who know what they are talking about on a certain issue. But in terms of a mechanism to put it together I think MPs themselves have to decide whether they want to actually be in some kind of institutional structure which enables the pooling of these resources and expertise rather than acquiesce, in a sense, with the current system, whereby they are thrown to the four corners by the winds, if you like.

Mr Cowley: I would quickly add that for all its flaws one great thing about the Report stage is that the Whips do not select who is there, which they do on standing committees, and therefore you can be pretty certain that almost no matter how controversial the Bill it will go through at Standing Committee stage without too much difficulty. You cannot be that certain at Report stage, and although there is a frustration amongst backbenchers about Report stage that is where the defeats have happened recently—two of them were at report, rather, and two of them were at Lords’ amendments. There is still a function for it, and interestingly it would not have been the bit that I would have flagged up as the problem. That is not to say it cannot be improved—almost everything can be improved—but I would have thought that standing committee is more of a problem than report, and I would have thought that Lords’ amendment stage at the moment is probably more of a problem than the report, if only because the Lords’ amendment stage is becoming increasingly important as the Lords becomes more assertive and may become more assertive still.

Chairman: And the problem there is shortage of time?

Mr Cowley: Shortage of time and the fact that it becomes adversarial and things just ping back and forth. I do not think that anybody thinks that those debates that take place at three in the morning as the Bill is pinging back and forth fulfil any function at all, except as a formal structure around which the real negotiation is taking place behind the scenes.

Mark Lazarowicz: But it is going to be hard to avoid that situation, in any sort of system with bicameral chambers with a different majority, is it not? That point is the real crunch, it is always going to be contentious; it is not going to be easy to have a sedate inquisitorial system.

Mr Cowley: The crunch area occurs because of the time compression and the time compression is caused either because the Bill has not been carried over so it is the end of the session or, as in the case of the terrorism legislation, it has to be enacted now because the existing legislation is no good. If you carried more Bills over and you had a two-year span and government was sensibly structuring the Bills to reach the Lords way before the end of the session there would be absolutely no reason why you could not have a much more sedate and sensible consideration of Lords amendments.

Chairman: Thank you. Dawn Butler.

Judy Butler: Somebody mentioned about whether there are laws already out there that the government has already tackled an issue or is there a better way to tackle the issue. Do you think that if we had a more robust post-legislative kind of policy that would help identify whether we have
already identified the problem and can just improve on that? There are two other things. The benefit for the
government in having a pool of knowledge and expertise together so that we can have better legislation, which is more relevant to the public and which, as it goes through the stages, will have less amendments, I think is one of the benefits and that is why we are looking through all of this. Also the point that Philip raised about backbenchers perhaps not feeling so much a part of the process or that they have an input to the process, I think that would help if they were able to utilise their expertise. The other issue about which I would like your views, which the Committee knows that I always bring up, is how do you think we could improve accessibility for the public and Members of Parliament in regard to Bills and how the legislative process works and how Committees work, and how do you think we can utilise technology in that?

Dr Kelso: If I can come in on the final point, but I will say something briefly about the post-legislative stage first, if I might? It seems to me that there are so many things that people want Parliament to do. Post-legislative scrutiny has always been one that perhaps is not always done particularly well. At some point you have to address the resource implications of getting Committees or MPs to do these things. It is always the poor select committees that are nominated to do all these tasks and I always feel quite sorry for them because they do such a good job that whenever there seems to be something that Parliament does not do just as well as it could it is always the select committees that are nominated as being the best way forward. So if we are going to get select committees to do even more then there has to be a resource implication for that and it is not going to work if the resources are not there. In terms of accessibility, I think this is a really interesting issue and here is why. It tends to be the case that whenever there is a suggestion that people might want to follow legislation, they might want to see how it makes its way through, they might want to see the current format of a Bill, there is always the sense of why on earth would anyone want to spend their free time doing something like that because it is really deadly dull. If you even look at what a Bill looks like it is not the sort of thing you want to spend your free time doing, possibly, there may be other more enjoyable things to do. That said, that does not mean that you set it aside and assume that it is so extremely boring that no one is ever going to want to follow it so we can do as we will. There are of course many people, not just atomistic in terms of individuals, but small groups, interest groups, who perhaps do not have access at the earlier stages of the policy process—and I am not talking about the legislative process—when government is dealing with it and putting the thing together. There are plenty of organisations and groups that do not get access at that stage, and it may well be that they would like to have more capabilities to look at things at that stage, and that is when the accessibility issue is a real problem. As a brief test I decided to go online yesterday to see how easy it was to find out stuff about any given Bill that was making its way through the House, and as somebody who uses the website quite a lot it is relatively easy to find out where you are going. That said, I think if it was your first visit to the site there is every chance that you would either fall asleep within a few minutes or simply never, ever find what it was that you were looking for. So when you do then find the Bill, even if you want to press on—there is some material, of course you can look at Explanatory Notes, and then of course there are amendments depending on what stage the Bill is at—at the stage of putting those pieces of information together it is actually really, really hard. For example, in most word processing packages that you can use on your computer, if you make changes to the document there is some rudimentary way of highlighting how you are making those changes—it is not hard, it is not difficult and is really straightforward—and why is that not something able to be done at the stage of making information available? Here is the original material, here is the original Bill, here is the Explanatory Note and let us show you how this all links in; here is what we are explaining; here is how the amendments have come up; here is what it would change. That is not reinventing the wheel at all, that is really, really straightforward stuff that should be available in terms of the technical aspects of it, and it is really not hard at all. So it is not surprising that if people have to print out reams of material in order to sit in three piles and cross-reference it is not hard to see why people do not go ahead and do that.

Q74 Mr Vaizey: I am afraid that suggestion is far too sensible; it could not possibly be taken forward!

Dr Kelso: It does go back to the sense that most of what you are suggesting is not new, it is not really hard and most of it is commonsense, and the fact that it has all been suggested before suggests that at some point you actually have to do something about implementing a reasonable number of these things.

Chairman: Time passes on, but thank you, that is very helpful. Ann Coffey.

Q75 Ann Coffey: Again in a previous inquiry we spent a lot of time talking about how we can make discussions in Parliament better fit in with what was happening in the media, the wider news media outside, and one of the things we did was to shorten the notice that you put in for oral questions. But again, at that time we also discussed the idea of having a topical question. To some extent that happens if the government makes a statement about something that has happened, or the opposition can get an urgent question agreed by the Speaker, but I guess that is a kind of hit and miss affair, and the idea was that in fact maybe opposition parties or individual Members could have a time where they could discuss a particular issue that was happening at that moment outside and was seen to be relevant to people, because part of the problem was people not seeing this place as being relevant because what was being discussed in here was not actually connected with what was happening out there, and therefore Parliament was sidelined to a large extent. Do you have any observations on that? Maybe
Parliament should be sidelined and maybe we should just plough on legislating irrespective of what happens out there?

**Dr Kelso:** I think in terms of the sidelining debate Parliament does not simply want to follow what the media says are the big issues of the day. You as MPs are in the almost evinible position, depending how you look at it, of actually having a constituency base where you can see for yourselves what it is that is annoying people and what troubles them, what they are concerned about and so on. To what extent does that link up with how the media portrays those issues is the first thing to think about. There should not be an exercise in Parliament chasing the media spotlight by any stretch because that is not really going to happen. Parliament has been sidelined in as much as it can be slow to do things and slow to respond to things. I do not think there is any question about that, unless you see changing the notice for questions as one step in that direction, and in terms of topicality there are probably a number of things that you can do. I think what you do not want to do is simply chase the spotlight and always trying to have the media attention on you because that comes by virtue of the nature of the thing that you do, not by how quickly you respond to issues. Of course, the two are linked at some level—if it takes you two or three weeks to debate things that are really crucial of course people are not going to see you as doing much of a particularly relevant job. But at the same time the decision to focus on Parliament comes out as the nature of the level of the work that it is doing and I think if you look at the media attention focused on Parliament during the Iraq War debate, for example, it had an unprecedented level of media attention because it was seen to be addressing a really interesting topical issue that people were keen to talk about and it was doing it in a really reasoned and mature way; it was not simply because it was chasing an issue, it was quite clearly something that had to be debated.

**Q76 Ann Coffey:** I understand the difficulties of balance, but I am asking whether a topical question is a way of getting a better balance.

**Dr Kelso:** I guess like most of these suggestions these are all good ideas.

**Chairman:** It is not quite on the main point of the inquiry.

**Ann Coffey:** It is.

**Chairman:** It may be on the main point of the inquiry but nonetheless time is running out. Nick Winterton.

**Q77 Sir Nicholas Winterton:** Can I pick up Philip Cowley on a matter that he raised because I think he is the only one of our witnesses this morning that has, and picking up a response from our Chairman, the Leader of the House, who said that the House of Lords is proving to be more and more important because large tranches of legislation are leaving the House un-debated, and therefore the Lords are obliged by the duties and the responsibilities that they have particularly to give in-depth consideration to those parts of the Bill that have not been properly debated. This is very often due, as Philip Cowley said, to programming. I have read Philip Cowley’s book, *The Rebels*, and I have a copy of it here, and I have to say that it makes interesting reading. It is particularly about the period of Labour government but it is very revealing. Philip, you said that backbenchers are now rebelling at second reading because they can no longer guarantee to get called or to have their amendments debated at Report stage because there is a limit put on Report stage under programming motions. Firstly, on programming, do you think that a programming motion should not be put immediately after second reading debate without debate, but should be put some 48 or 72 hours later when the usual channels, government, opposition have actually seen what the issues are that are raised during the second reading debate, upon which they can judge then the importance of how long the standing committee and subsequent stages might be? Do you also think there should be no programme motion on Report stage, which is the only occasion that any Member of the House is guaranteed to get called because they cannot guarantee to get called on a second reading debate because they are generally now only one day rather than over a longer period, and therefore there is a limit, and they cannot speak on a standing committee unless they are selected to go on the standing committee, so the only stage at which a Member of Parliament can speak and should be allowed to speak, particularly if that matter is important to him or her or their constituency or their own interests, is the Report stage? So how do you think that programming, as part of our legislative process should be adjusted to allow proper scrutiny and proper participation?

**Mr Cowley:** I am struck not only by your very flattering words about the book—all good bookshops!—but also by the fact that if we had been here, say, 20 years ago and you had invited three academics to give evidence on ways of improving the legislative process and you had mentioned programming we would all have been in favour of programming. Programming was one of the great reformist ideals from the 1960s onwards, that the legislative process was a mess because it was not properly structured and we would need to improve the structuring by having some sort of programming. So the problem is not programming *per se*, it is the type of programming we currently have and we moved, I think, very swiftly downhill from the initial proposals that came up after 1997 to what we currently have. The reason we shifted downhill, as Members of the Committee know, was a combination of the desire of the Whips to control debate, with frustration on the Labour benches about the way that some Conservative MPs were opposing that, and there was an unholy alliance working to almost nobody’s benefit between the two groups, I think.

**Q78 Sir Nicholas Winterton:** Absolutely.

**Mr Cowley:** So I would like to see programming relaxed somewhat, it is currently too tight; I think the automatic programming in the way that it currently functions is too harsh. I am not sure that
having a pause between the second reading debate and the programming vote would necessarily matter since at the moment there is no reason why, in that the usual channels can consult with one another anyway, and what is currently happening is that often the desire of the Conservative side is simply being overruled and that would happen anyway, even if you had a two or three day gap. I would have thought, between the second reading and the vote.

Q79 Sir Nicholas Winterton: But you would at least know what the major issues were that had been raised by backbenchers during the course of the second reading debate, which at the moment you do not.

Mr Cowley: You would, but if the Whips are doing their work they will know anyway what the major issues that are going to be raised are, and they are choosing to ignore them now more often or not, and they would, I think, continue to choose to ignore them even if you had a gap between the second reading and the vote. It is not to say that I would not do it but I could not necessarily see any great advantages. Similarly, it would be great if we debated programming motions but everybody in this room knows why we do not debate programming motions because the same issues came up time and time again, it was not being constructively used and therefore there was a desire to save Parliament’s time instead of giving certain Conservative Members, many with whom I have good relations, the chance simply to repeat the points they had made at every other programming debate. So it will require a combination of political will to shift to a situation which would be better. As for the Lords, I would say that I think the reason the Lords is currently sending more legislation back is not primarily because more and more legislation is leaving this House un-scrutinised, but it is because the House of Lords was reformed and is now far more willing to stand up to the government than it was before, and a far more effective second chamber than we used to have and probably more effective now than at any time since 1911, and I think it would be doing that almost regardless of whether this legislation were leaving this House un-scrutinised. But I do agree with the point that the Chairman made that there is a problem at the moment, which is amongst informed circles that there is a perception that it is the un-elected House that does the scrutiny work and not the elected House and that the balance is wrong there.

Q80 Sir Nicholas Winterton: What about the Report stage being un-programmed?

Mr Cowley: Again, it would be great if the Report stage then was not abused by people in the way that I suspect it might be.

Chairman: Could I put a final question, which is a point that was raised by one colleague, on the staffing support for standing committees as compared with select committees? This strikes me as being very stark, that for select committees you now have really very substantial underpinning of what Members do from the House. As I say, I have never served on a select committee, apart from this one, but I have seen that because if you are a Minister going before a select committee you face people who are really pretty well informed and who have the clerk’s expertise and also the advisers to the Committee feeding them with questions, providing them with support in private discussions and so on, which means that if you are a Minister you really have to think very carefully about how you are going to perform. Let me say, I have not been on a standing committee as a Minister because on the whole that is a matter for Ministers of State and Party Secretaries, but I was on many standing committees in opposition from the frontbench and the backbenches, and the absence of support from the House—

Sir Nicholas Winterton: In opposition.

Q81 Chairman: In opposition, but also for the government Members as well, meant that you were under huge pressure from pressure groups who are outside, they did provide support and in a sense they picked on individual Members and developed them, nurtured them, patted them on the head if they were reading out the brief and not if they were not. You are always going to get some of that but you do not get that so much in select committees because people are able to think more for themselves, and I think if you moved to the special standing committee arrangement, dealing with that disjuncture, where one minute there is support and then suddenly there is not is an issue. That is my instinct; I do not know what your view is?

Mr Cowley: I cannot see any good argument against increasing the resources to MPs on standing committees. It is worth saying that the stark distinction between the resources for the select committees and the standing committees is a fairly recent phenomenon; if we had gone back even eight years you would have found select committees with far fewer resources than they currently have, and it has been one of the improvements over the last four years really that there has been a sharp increase in resources available to select committees. I cannot see any reason not to do it. What it will not do though is remove the fundamental weakness of the standing committee, which, as it stands at the moment, is the lack of any formal outside contact and the fact that it is merely replicating the debate at second reading in terms of its structure.

Q82 Chairman: Any last comments from Professor Oliver and Dr Kelso?

Professor Oliver: On that, I suppose a difficulty is the extent to which the Members of standing committees require the sort of non-partisan support that the House can provide, obviously, or the more partisan political support which it would not be appropriate for the House to provide.

Dr Kelso: One final comment on that. There has always been a fear whenever it comes to discussing resources, whether they are select or standing committees, that it will result in a system like the
American congressional system where the Committees are actually run by the staff. This always seems a strange concern for me in the Westminster context because it is MPs who are in charge and as long as MPs ensure that that continues to be the case then there should not be any fear, and it almost seems that when you put it in comparative perspective I am sure that Parliament spends far less than other legislatures do and it does not seem too much to ask to have the basic tools to do the job. 

_Sir Nicholas Winterton:_ But surely you must take account of the Short money which is made available to opposition parties, which gives them the opportunity of having an input for research and policy and the rest. So there is rather more assistance to standing committees and their Members, particularly the shadow spokesman, than there was. _Chairman:_ Professor Oliver, Mr Cowley and Dr Kelso, thank you very much indeed; I certainly found it very interesting and my colleagues have too.
Wednesday 24 May 2006

Members present
Mr Jack Straw, in the Chair
Ms Dawn Butler
Mark Lazarowicz
Mr Richard Shepherd
Graham Stringer
Paddy Tipping
Mr Edward Vaizey
Sir Nicholas Winterton

Witness: John Bercow, a Member of the House, gave evidence.

Q83 Chairman: Good morning. I gather that this is your debut as a witness before a select committee.

John Bercow: It is.

Q84 Chairman: I have just been told that you are a member of the Chairmen’s Panel.

John Bercow: That is true.

Q85 Chairman: You are very welcome. You have been asked to give evidence to this inquiry into the legislative process. I think you have been chosen to give evidence from a Conservative perspective because of your interest as to what happens in the House. What I would be interested in from you, as somebody who has been in for quite some time and has been very active, is for you to give your sense of where you think the legislative process at this end is okay and where you think it could significantly be improved.

John Bercow: Thank you very much for inviting me. I am privileged to give evidence. It seems to me that the overriding task is to try to combine efficiency, that is to say getting through the business without taking an excessively long time about it, with effectiveness which means rigorous scrutiny of legislation and, in some sense and on a number of occasions, putting the interests of the House, of scrutiny, of the public, very much before our own personal convenience if there is a clash between the two. I am one of those who think that some of the changes that the Government have made over the last nine years are perfectly justified. I do not think that we are at our best at 3.00 in the morning. We might think that we are at our best at 3.00 in the morning but that is a very different thing. So, some of the reforms that have been made which have streamlined the process and ensured that we do not sit all hours of the day and night are justified and you look pretty anachronistic if you argue against them, for the very good reason that you are! On the other hand, I do think that it has been a series of reforms which has tended to be dominated by the wishes and interests of the Executive and not by the wishes and interests of backbench Members with no higher ambition. I think there is a long way to go. I think there are a number of fascinating issues: pre-legislative scrutiny, post-legislative scrutiny and the way in which standing committees and, if I may say so, colleagues, select committees are constituted. One could have an interesting discussion about the Committee of Selection and the extent to which there would be a good argument for saying, “Let’s have much more backbench influence on who goes on committees”.

Q86 Chairman: Do you mean on standing committees?

John Bercow: On standing committees and indeed on select committees. There is a very interesting question as to whether people are just picked to serve on committees because it is buggins’s turn and they all have to do their quota or whether actually they have a particular interest, knowledge, expertise or passion. Time limits are perhaps worthy of discussion in speeches. The question of secondary legislation and how we scrutinise it and again whether people are just turning up because they have been put on it and have a note from the whips at the last minute that they are supposed to turn up at 4.30 for some what they consider to be obscure, archaic and uninteresting statutory instrument or whether actually they can make something of it and maybe the person on the Committee could not make something of it because he or she is not frankly very interested but there may be other Members of the House who would like to sit on it. We all know that anybody can turn up at those committees but, in practice, unless you know about it, you will not and, if you cannot vote, you feel very much a second-class citizen. Sunset clauses I think are something that the Government once trumpeted but for which they seem to have lost enthusiasm. I do try, particularly in what I would call Bercow 2006 as opposed to the very abrasive and callow youth who entered in 1997—

Q87 Chairman: Never!

John Bercow:—to be as fair minded as I can. I do not slate everything that the Government have done. I think that some of what ministers have done is justified, we would not reverse it, but I do think that it is still too Executive led and I would love to see a House of Commons in which the backbench Member was accorded a greater opportunity and his or her role shown greater respect.

Q88 Chairman: You have talked about one change that you would like to see in standing committee which is time limits on speeches, but are there wider changes that you would like to see about how legislation is scrutinised line by line, which is after all the purpose of standing committee?
John Bercow: Yes. Incidentally, if I did not make myself clear, I think there is quite a good argument for a time limit on most speeches, not just in standing committees but in Commons debates as a whole.

Q89 Chairman: Are you thinking of the frontbench? John Bercow: Possibly by the frontbench. The only downside with imposing a limit on frontbench speeches is that there is then a danger that a minister—of course it would not happen in your case because your preference for taking interventions and your ease in doing so are well known—might say, “I would take the hon gentleman’s intervention but I do not have time”. I am slightly uncertain about that. I would rather all the points be dealt with and the minister go on a little longer and leave it to his or her discretion, but I do think that backbenchers ought to be subject to time limits not just in standing committees but also on the floor of the House. In terms of the process itself, looking at some of the evidence, I see that there has been a suggestion that perhaps instead of a preoccupation with the tradition of line by line scrutiny, there ought to be more debate in standing committee on the principles of a bill, the purpose of a measure, the justification of a policy itself... I have doubts about that.

Q90 Sir Nicholas Winterton: Is that not the purpose of the second reading? John Bercow: Yes. I am in favour of change where I think it is justified. I think that one ought to try and build on what is good and not try to create something on the strength of some sort of abstract theory and if you ask me, do I think we should change the whole basis on which we scrutinise in standing committee, the honest answer is, “No, I do not”. I think we should have a very, very, very thorough exploration of the principles of the policy and broad content of the bill at second reading. Some second readings frankly should probably be longer but, equally, I am not one of those who says as a matter of principle that it is an outrage if a second reading is given only three or four hours. I do think it depends on what the issue is. I think if an issue is very important—and we all have some antennae politically—and controversial, it is a little unfair to have a very short and truncated second reading and one point that I would suggest to colleagues is that, on the day of second readings, I think ministers ought to exercise a self-denying ordinance unless there is an overwhelmingly good reason why they have to make an oral statement that day. Can it not wait? On the day of the second reading of the Legislative and Regulatory Reform Bill on 9 February of this year, which I think was a Thursday, there were three statements: there was a business statement, there was a statement on the Child Support Agency and there was a statement on offender management. We all now know that the Legislative and Regulatory Reform Bill has proved to be controversial but I think it was a fairly safe bet then that it would be. Was it really necessary to smother the parliamentary day with all that stuff before we got on to the main business?

Q91 Sir Nicholas Winterton: John, you are a member of the Chairmen’s Panel and you chair standing committees and secondary legislation in committees. How do you see the performance of the House in dealing with standing committee, ie the line by line almost word by word scrutiny of legislation? If you could wave a magic wand and change the situation—and you have commented in broad terms about the standing committee stage—how would you like to see the legislative process change for the benefit of the House, not necessarily of the Executive?

John Bercow: So that I do not come here under false pretences, I ought to say that I have so far chaired quite a number of statutory instrument committees and a few sessions of European Standing Committee and I gather that a bill is about to come my way in the next couple of weeks. I have not actually done a full-scale bill but I gather that I am going to be asked to do so. My feeling is that, if you have interested people on the committee, interested in the subject or simply people with a sort of insatiable appetite, not for the sound of their own voices but for scrutiny and probing questioning, then those secondary legislation statutory instrument committees can go very well. If, frankly, people are looking at their watches, regarding it as an unavoidable evil and their duty to the whips to avoid being summoned to a meeting without coffee, well then, frankly, it just does not work and my feeling is that if the Executive gives the impression that it thinks secondary legislation is not something which should take very long when it is considered almost bad manners to spend more than half an hour on an instrument which could last an hour and a half, and there is a sort of informal, sometimes not even a very informal, pressure to get it over with, then colleagues will take their cue from that and they will think, clearly the whips do not want me to speak, they think it is going to be a nuisance, the minister does not want to be late for his next meeting. I think that is a shame. I think it could be done better. I do not think that there is something very fundamentally wrong with the scrutiny in standing committee other than this. Sometimes the programming—and programming is justified—is excessively tight. I wonder whether it is really necessary or wise, colleagues, for the Government to have their programme motion tabled and voted on without debate immediately after the second reading of the bill. Might it not be a good idea for there to be a pause for reflection for a few days, an opportunity both for negotiation between the usual channels and also for ministers to consider not just how long the debate lasted on second reading or how many issues were raised but with what degree of intensity and seriousness and potentially valid objections to that form of the bill and then have a programme motion? It seems to me that it is too formulaic; it is too much a question of a sausage factory with the emphasis on the number produced rather than the quality of the ingredients.

Q92 Sir Nicholas Winterton: You talked earlier on about the appointment of the individual Members to standing committee and you said that we should
look at the selection process and I happen to agree with you, I think we should. Often, particularly government are going to appoint their Members to the standing committee because they are amenable, agreeable and are not likely on the committee to create any difficulty. That is one point. Would you like to see a different way of appointing people to committees, perhaps have an independent body making that appointment and people could apply to go on a standing committee? Secondly, why do you think that Government are so reluctant, under whatever party is in power, not just the present Government, to accept any amendments that are tabled by the Opposition Party, however good, however justified or however effective those amendments would be without detracting from the Government’s objectives in the legislation that they have introduced? Do you not think that this is unfortunate and negative and it means that we do not get the best and most effective scrutiny at the standing committee stage?**

*John Bercow:* In terms of composition of the standing committees, I would like to see a process for determining membership that was more driven by the backbenches and much less by the whips’ offices on either side. Let me clear about this. I am genuinely not seeking to stir it. It is not a question of trying to be a troublemaker. One is perfectly entitled to make life difficult for the Government but I am not trying to stir it in the sense that I am suggesting that it would be a thoroughly good thing if we were to operate a system, which would really be a form of chicanery, whereby the Government simply could not get their business through standing committee. I do not argue that. I do think that the Government are entitled to have a clear majority representation based on strength in the House on the standing committee. On the other hand, I think they should have some regard to interest in the subject and expertise and the balance of debate that took place at second reading and I think what is quite unattractive is when one senses that perhaps the Government—and not just this Government but perhaps earlier Governments—have a punitive or admonitory attitude to the construction of the standing committee. In other words, simply because somebody was against, maybe on very, very good grounds of principles sincerely held at second reading and was not prepared to vote for second reading with reservations on the basis that he or she would then be allowed on the committee but insisted on voting against at second reading and the government whips take the attitude, right, stuff you, we are not going to put you on the committee, you did not behave, you deprived us of your vote, you actually voted with the other side and you are off. Just to give very briefly three examples. The Higher Education Bill: I think there were over 70 rebels on the Tuition Fees Bill, something like 73 rebels, at second reading who actually voted against the Government. Only two opponents of the Bill were on standing committee which consisted, I think, of 20 Members or thereabouts: ID cards: over 20 rebels and not a single one of the rebels who voted against the Government at second reading was put on the standing committee; in the case of the Education Inspections Bill, 52 Labour Members of Parliament voted against the Bill at second reading and none of them, not one of them, was appointed to the standing committee. That seems to me to be wrong. On the second point, as to why government always say no to amendments either good or valid if they come from the Opposition, I think that is a rather old-fashioned practice, frankly. It is really a question of party pride, standing on one’s dignity and not wanting to accept that the other side has a good point. I think that is a great shame. I think that probably will not change very radically and therefore it does seem to me to reinforce the argument for perhaps having very much more widespread pre-legislative scrutiny with the opportunity at that stage for the Members of the Opposition Parties as well as Members of the Government Party, to put forward alternative ideas and then, frankly, the Government can beat a retreat when justified and necessary without feeling that they have suffered a great political humiliation. I also think—and one wants to avoid personalising what is an important constitutional issue—that some ministers are much more gracious about accepting when they are wrong and it massively strengthens.

**Q93 Sir Nicholas Winterton:** Of course.

*John Bercow:* I was hearing colleagues say the other night that the new Schools Standards Minister, Jim Knight, has a terrific manner in committee. I did not have the pleasure of hearing him in the latter part, the very end, of the Education Inspections Bill in committee, but I am told that he is seriously good at it and we can all think of ministers who are absolutely brilliant at it and those ministers who, whether on standing committee or at second reading, are prepared to take a gracious step, which does not mean being a pushover and giving in to the views of the party with which he or she does not agree but accepting that we are all trying to get a better bill, those people are respected. That is why the late Robin Cook was so tremendously respected and that is why a very large number of colleagues on my side viewed your appointment as Leader of House as hugely welcome. You are respected because we know that you have the self-confidence to argue your case, you treat all Members, however new and inexperienced, with respect and decency, and actually that is the way most of us conduct our day-to-day lives.

**Chairman:** Thank you very much. I do not know why people do the opposite, but there we are.

**Q94 Mark Lazarowicz:** I have two related questions which I will roll together. First of all, a theme running through our questions and evidence has been how one can draw the best from what is seen to be the strength of the select committee procedure and standing committee procedure, and various suggestions have been put forward about making more use of special standing committees and various devices of that nature. I wonder if you have any views from your experience of what might be a way to operate a system, which would really be a form of...
What in practice I think that would mean is putting John Bercow:

in which we can draw those strengths from the select committees and that is to say that those too, which have an important role and sometimes are given pre-legislative scrutiny responsibilities, should not be handpicked by the whips. I think there is a great deal to be said for a system of election of members of select committees. You can either do it across the House or you can say that only Conservatives will elect Conservative Members and only Labour will elect Labour Members etcetera. I think that the present arrangement is very unsatisfactory. Do I think that there is an argument for saying that one should have Q and A on the European Standing Committee model before you get on to line-by-line scrutiny? I do. I would not want to lose line-by-line scrutiny time because I think that is important, but would it really hurt if we were to say at the start of each standing committee scrutiny that there should be perhaps an hour in which such questions which Members have had a chance to consider beforehand could be put either about further doubts on the principles of the bill or more likely about the architecture of the bill or the means chosen or the wording, but slightly broader issues than just line by line? My own view is that that would be a better use of an hour than what last time I was on a bill committee happened, which is that we had this debate at the start on the sittings motion. The sittings motion, frankly, is just a waste of time; it is an excuse, to be candid, for those of us who may feel that we won the argument but we have lost the vote on the subject of the programme motion simply to amendments which are simply just a way of asking a question?

John Bercow: On the first point of how to get the best from the select committees represented on standing committees, I think there is a lot to be said for a much wider use of special standing committees. What in practice I think that would mean is putting together a list of colleagues across the House who have demonstrated a consistent interest in a particular issue or set of issues and regarding them as prime candidates for appointment to such a special standing committee. So, it should not be the case that you are put on a committee when you are frankly not very knowledgeable or interested or capable in that area simply as a reward for good behaviour. We should have a completely different mindset. Let us get together groups of people who have a persistent and longstanding interest. I think I am right in saying that a member of this Committee, Mr Knight, has demonstrated that he would be very happy to serve on a European Standing Committee which I attended for the first time, in standing committees to allow a real debate on issues that concern Members and avoid the artificial probing amendments which are simply just a way of asking a question?

Q95 Chairman: Mr Bercow, you are almost perfect and so am I, but we both share a fault which is being slightly prolix!

John Bercow: I beg your pardon.

Q96 Mr Vaizey: Time limits on contributions!

John Bercow: I need to be saved from myself!

Chairman: I know the problem because I have exactly the same one.

Q97 Mr Vaizey: I do not want to get you into trouble, Mr Bercow, but I expect we probably agree on most things about some of the changes that should be made. I return briefly to debates. You mentioned time limits. What would be your view on speakers lists where Members would know whether they were going to be called during a debate and know roughly when they were going to be called?

John Bercow: I would not be against the idea subject to one caveat, which I suspect would have been and still is the traditionalist argument against, because the main traditionalist argument against is not really the power of the Speaker and the mystique of it all. I think that the main argument against it is that, if you have that, people will simply turn up for their own contributions and not bother to listen to anybody else’s. What you could do is experiment. We are grown-ups. Let us try it for a while. Let us say that we will have a published list on the day of those who are the top 12, top 15, top 20 to be called and if
people then turn up really for their own contribution and scarcely stay for anybody else’s, I think that frankly should be regarded as a black mark on the record for that individual.

**Q98 Mr Vaizey:** You could maintain the convention that you were present for the frontbench speeches, present for the speech after your speech and present for the winding-up.

**John Bercow:** Yes, I do not think that I am in favour of closing the list too early because I think that we want to preserve the topicality of the occasion, if you like, and the capacity for a Member who had not previously been planning to speak at second reading to be struck by something, perhaps over the weekend, to say, “Yes, I would like to take part in that debate” and to put his or her name in quite late in the day. Similarly, I do not favour too many privileges for very senior Members. I think that if a very senior Member, a former Cabinet Minister or whatever, who has something quite serious to contribute who happens to have been away and not to have realised and only put in his slip, so to speak, his letter to speak at the last minute, I do not think that we should mechanistically say, “You were late, so you are excluded”. Yes, I like the idea of a published list. Nobody could criticise the Speaker or the Deputy Speaker because they are doing their job, but I do think there is a certain arcane quality about the present arrangement whereby you can try to get an idea as to where you are when you say things like, “Can I go to the loo because I am bursting and, if I do, will I miss out?” or “Can I have a cup of tea?” and so on and so forth. We are grown-ups; we are adults; let us be a little more open about it.

**Q99 Mr Vaizey:** On the standing committee, I agree with what you agree with which is that we should have special standing committees with membership and, in my view, they could be over the lifetime of the party, so you would have the Home Affairs Standing Committee and the Members of that standing committee would know that they would be scrutinising every piece of Home Office legislation and potentially every statutory instrument. I do sympathise with what I would imagine is the commonsense view of the Government that you need to maintain a certain amount of control, partly because sometimes the Opposition may not be using a standing committee to scrutinise a bill but may be using it to cause trouble, to extend proceedings or to put down frivolous amendments. I just wonder whether one of the answers to that argument would be to strengthen the power of the chairman in the sense that they became a sort of behind the scenes referee and were able to sit down with the Opposition or indeed the rebel Members on the Government benches and say, “Come on, this amendment you have put down is not very serious. Let us go through these amendments and say which are the ones where you generally want to improve . . . “. Is that the sort of thing you see the role of the chairman sticking to? Does it already happen?

**John Bercow:** I am not aware that this happens though I think there is a lot to be said for it. I stand by the view that it cannot be right if one person takes up a disproportionate amount of a pre-programme that therefore limited standing committee time. I am not saying that I quite have the answer as to how you stop it, but I think that you can lead by example. You can develop a culture in which it is strongly frowned upon for one person who rises almost to audible groans from Members on all sides. It may well be that there is an element of autobiography in some of those observations! I think that you learn by experience. We have all made these mistakes. We came on this point a moment ago: one of the reasons why there is a lot to be said for a time limit is that otherwise speeches tend to expand to fill the time available. We know that. I have done it myself. We all know the old story about the person, I think it was a minister or it might even have been Churchill, who said, “I am sorry to have made such a long speech but I didn’t have time to prepare a short one”. That is true. I think there is a lot to be said for that.

**Q100 Graham Stringer:** What is the purpose of third reading? You have talked about more flexibility in the timing of second reading. Could that not be accommodated in the third reading debate? We have two examples at the moment: the Legislative and Regulatory Reform Bill which is very different from the bill that was introduced. I thought that the third reading on that was absurd. It lasted about 45 minutes: Hilary took up 20 minutes and the Tory frontbench spokesman took up another 20 minutes, but actually there was quite a lot to discuss about where it was because it would shortly come back from the Lords. Today, the third reading of the Education Bill. Again, it is a substantially different bill that will be voted on on third reading that was introduced into the House. Should there not be flexibility there to have much longer third reading debates and should we consider doing what I understand they do in the Lords which is to have amendments, a limited number of amendments at third reading?

**John Bercow:** Yes, in answer to the second point. On the first point, I think that there is an instinctive preference of the bureaucrat for something that is very simple and uniform. It may fit with the tidiness of the mind of those who produce such ideas but it is not necessarily the best idea for precisely the reason in the sense you imply; it is not flexible. Sometimes, a third reading of an hour might be quite adequate; other times, it might be a good idea to have three hours. Although I express some scepticism about time limits on frontbench speeches and I certainly would not favour time limits without a hell of a lot of persuading on frontbench speeches at second reading, which I think on the whole would be very damaging to the flow of debate and so on—
Q101 Graham Stringer: I agree with that.

John Bercow: I think there is something to be said for a time limit on frontbench speeches at third reading. Most of the time you can leave it to colleagues' natural sense of the mood of the House and their normal courtesy, but occasionally it is quite shocking that frontbenchers seem to think that the debate is between themselves and it is either on a third reading or it can be sometime when Lords' amendments return. I can think of one occasion when I wanted to contribute about 18 months ago and there was an hour for the debate. The Government Minister and our frontbench took something like 50 minutes and I sat there feeling afraid? Have there been unintended consequences? That probably is a process on the whole better done by a select committee or a joint Commons/Lords committee rather than by a debate on the floor of the House, but I am open to the idea of both. As to legislation that it should be published in draft form after the bill has been put into electronic form, or it can be done by select committees. I know that select committees on the whole tend to choose themes, but I do think that we should expand that and use the public and, in particular, what do you see the role of technology in our committee stages, etcetera?

Q102 Ms Butler: That was just bringing back some memories! What do you think is the purpose and the role of the post-legislative scrutiny work that we do? Do you think that we should expand that and use that further in any way? My second question is regarding the accessibility of bills. How do you think we can make them more accessible to MPs and the public and, in particular, what do you see the role of how we can extend the use of technology in our committee stages, etcetera?

John Bercow: Post-legislative scrutiny can be done either by debates on the floor of the House a certain period after the bill has been put into effect, or it can be done by select committees. I know that select committees on the whole tend to choose themes, but there is no reason why a select committee should not choose an area of policy which after all has absorbed some of the number of occasions when ministers at Report stage have said, “Well, with great respect to the hon gentleman, these matters were discussed in some detail at the standing committee” and I have been left with the rather valid but sneered at defence of, “I am sorry, but I was not one of those fortunate people knowledgeable about this subject. Secondly, my 50-plus bills probably subject to that screening but there was some people sitting behind the standing committee and the rest of us in the House who look at things at Report stage. I have lost count of the number of occasions when ministers at Report stage have said, “Well, with great respect to the hon gentleman, these matters were discussed in some detail at the standing committee” and I have been left with the rather valid but sneered at defence of, “I am sorry, but I was not one of those fortunate enough to be asked to serve on the standing committee”. I may have looked at some of the material but surely we are all entitled to take part in Report stage with some knowledge not just of the content of amendments and new clauses proposed at earlier stages but with some note from colleagues on the rationale behind them.

Q103 Mr Shepherd: Have you had an opportunity of reading any of the evidence submitted to this Committee on the subject of the legislative process?

John Bercow: Yes.

Q104 Mr Shepherd: What stands out in your mind as the telling arguments that have swayed your judgment, if any?

John Bercow: I think that the most persistent and compelling theme so far in what I understand to be the two sessions you have conducted, one with parliamentary colleagues two weeks ago and the other with a group of academics last week, has been the merit of pre-legislative scrutiny and the need for more of it. If you ask me to pick on one thing, I think it is a thoroughly good thing. I think it is fair to say as a sort of gentle prod to ministers that the practice has not quite matched the promise because on I think it was 4 February 2003 the representative of the Government said that the presumption should be for government departments putting together legislation that it should be published in draft form for pre-legislative scrutiny unless there were good reason for it to be otherwise. Okay, there have been 50-plus bills probably subject to that screening but the impression gently given there was that it should start to become the norm rather than the exception. Let us face it, it is still very much the exception rather than the norm. I am tempted to think—and I may be unfair—that the late Robin Cook had a particular passion for this and I am not sure that it has been prosecuted with a comparable zeal since he departed, which I think is a great pity. I think it would be a really good thing to have more of this. It
is absolutely outrageous that the Legislative and Regulatory Reform Bill, which was a pre-eminent candidate for such scrutiny, did not receive it. Moreover, the Government at one point some time ago, in fact last July, flagged up about six measures that were going to be subject to pre-legislative scrutiny and, as yet, we have seen no evidence of that commitment being fulfilled.

Q105 Mr Shepherd: You have said very little about the volume of legislation and is that not part of the problem to achieve the objectives that many who have come before this Committee seek, namely the dutiful and proper examination of legislation? I am thinking of a department like the Home Office. Over 40 substantial pieces of legislation in nine years. Can any system cope with the volume of legislation which now modern governments use either as press releases or spin or whatever it is? Can we actually cope with it?

John Bercow: No, not adequately and that is why a modern government under governments of both parties is frankly inadequate. To some extent, that is inevitable because we are imperfect beings doing our best and we are not always up to it. I do not say that is a great scandal, but we should not make it worse by producing more than we need and in that context I suppose what I would say, going back to my original theme, is that I can see some merit in some of the reforms the Government have made. I see problems in terms of the Executive getting a better feel for the legislature. I would say that if the Government want to persist with the concept of efficiency and modern working hours and not overdoing it or sitting until 3.00 in the morning and saying that colleagues should not be allowed to bang on for 40 minutes beyond the time limits for speeches, I think that is perfectly reasonable. I think that the Government should exercise a self-denying ordinance as to the volume of legislation that they introduce. There is too much; it is often very poorly drafted; it is often produced in response, one fears, to the wishes of Mr Richard Littlejohn or Mr Paul Daker and it is not entirely evident that it is required in the public interest. It is in response to a headline. I think that both governments have done this and I think it is a great pity. Some bills seem to be really just an elaborate press briefing and it is not entirely clear what merit is going to flow. I think that process could be handled differently. In particular, I feel very strongly that we need to change the way we go about secondary legislation. One of my hobby horses is that it is very important that there should be proper scrutiny of that secondary legislation and, in particular, that it should appear earlier. It may well be that there is a justification for it, although it is a little upsetting and somewhat unsatisfactory when you see bills that seem to be virtual skeletons with just clause after clause after clause subject to secondary legislation. It ought to be published earlier and I asked this of Alan Johnson yesterday, I hope in a reasonable spirit. He started talking about some regulations and I asked him whether they would be subject to the negative or affirmative procedure of the House and therefore what opportunity there would be to debate them properly and at whose initiative but, more particularly, whether they were available in draft form and, if so, whether we could see them before we went further with the bill and, if not, why not? He said that a real effort had been made to get them ready, they were not but he hoped that they would be before the bill completed its passage in the House of Lords. My feeling is that, if the Government know that they are going to introduce a bill and they know that quite a lot of it is going to be subject to regulations and order making powers, there is a real responsibility on that department to try to come up with draft regulations which Members can consider before the bill has gone through the House and not afterwards.

Q106 Sir Nicholas Winterton: I have three questions but they can be answered very briefly. Firstly, the Report stage is the only stage of legislation at which any Member of Parliament should be able or can actually speak. Do you believe that the Report stage should not be programmed? Secondly, Members on all parts of the House often say that we cannot debate issues that are important to backbenchers in all parts of the House. Do you think that some time during the course of a month there should be two slots, or maybe one slot only, when Members of Parliament, perhaps through the early day motion procedure, could dictate a debate on the floor of the House? Finally, linked to my last question, do you believe that a business committee comprising backbench Members together with of course the Government which would have a majority should be set up in order to decide how the business time of the House should be allocated?

John Bercow: My answer to the first question is, no, Report stage should not be so tightly and proscriptively programmed. I think that you have to have a finish point but I think it could be done in a slightly looser and less proscriptive fashion. Secondly, I think that, yes, there should be an opportunity for backbench initiative for debates periodically. Thirdly, I am passionately in favour of the establishment of a business management committee of the House which would be a real force and, at the risk of being extremely presumptuous, I believe that that Committee should be chaired by the hon Member for Macclesfield.

Q107 Chairman: I have more a point than a question. I am struck by the contrast between the amount of briefing which Members of select committees receive from the House, and the support they receive, and not so much the absence of briefing that people receive on standing committees, but the fact that it is not specific to them and I think that is one of the issues we have to consider both for standing committee—and there is a very useful paper from Rob Thanets in the library about this—and indeed if we are going to make the process of secondary legislative scrutiny more effective. or can

John Bercow: I entirely agree. Sometimes there is a measure which the Government know there is some cross-party support for and they do an advance briefing. I may be wrong but I think there was an
advance briefing for colleagues on one of the equality pieces of legislation, either the Civil Partnership Bill or the Equality Bill, which I and a number of my colleagues very much appreciated. I think it is very much an afterthought. I think that half the time it probably does not occur to government departments, but I think that colleagues would really appreciate it. So, yes, I think it is an excellent idea and there is this very, very marked disparity between, as you say, a brief being available in select committee capacity and the capacity as a Member of standing committee.

Q108 Chairman: We set ourselves 10.15 as a target. Thank you very much for your excellent co-operation and very good evidence.

John Bercow: Chairman and colleagues, thank you very much.

Chairman: It has been very helpful. We will try and flatter you by ensuring that some of it is echoed in the recommendations.
Wednesday 21 June 2006

Members present:

Mr Jack Straw, in the Chair

Mr Paul Burstow
Ann Coffey
Mr George Howarth
Mark Lazarowicz
Mrs Theresa May

Mr Adrian Sanders
Graham Stringer
Paddy Tipping
Lynda Waltho
Sir Nicholas Winterton

Witnesses: Mr John Stewart, Bill Principal, and Ms Joanna Warner, Bill Team Member, Health Bill Team, Department of Health, gave evidence.

Q109 Chairman: Good morning, Mr Stewart and Ms Warner. Thank you very much for coming. As you know, we are conducting an inquiry into the legislative process to look at how it can be improved. Our starting point is that, whatever its merits, it certainly can and ought to be improved. Without pre-empting the conclusions of the Committee, it would be fair to say that the Committee is interested in ideas of making the committee stage more forensic. If you are familiar with the procedure for special standing committees, for example, for the first three or four sessions the standing committee forms itself into a select committee and holds an inquiry into key issues, and then reverts to a clause-by-clause examination. That is one of the issues that we are looking at. We are also looking at the way the whole process fits together, from pre-legislative scrutiny; debates at the time of publication; the general debate at second reading; the detailed examination in standing committee and on Report stage; what the purpose is of the third reading; how outside bodies link into this; and crucial to all this is how it feels from your position, in the eye, sometimes, of the storm. It would be helpful to us to hear from you—certainly for the benefit of Members who have not been involved directly in the legislative process—what are the processes leading up to the presentation of a bill, and then some general comments from either or both of you about what, from your experience, you think are the strengths of the current system and what ought to be improved.

Mr Stewart: First I should thank you very much for inviting us. I am sure that there are bill teams across Whitehall who would be keen to give evidence. While our views and observations will obviously be based on the Health Bill, hopefully they will also reflect the experiences of other bill teams. Perhaps I could start by explaining the role of a departmental bill team. First, I should explain that there are often two types of bill teams. When you have single-issue, small bills, the bill team within a department is normally formed within the actual lead policy team. They not only lead on policy, therefore, but also on all the roles that a bill team would normally lead on. However, for larger, portmanteau bills that cover a number of different issues, it is generally the rule that departments will establish a dedicated bill team to manage the whole process. The Health Bill was the latter of those two. You can divide up the role of the bill team into two distinct phases. You have one, which is the pre-introduction phase, where the bill team’s role is very much to project/programme-manage the bill up to introduction. That involves making sure all instructions reach parliamentary counsel by appropriate deadlines to meet the introduction deadline; that any necessary public consultations have taken place; that explanatory notes have been drafted to the bill; that a regulatory impact assessment has been prepared. All of that needs to take place before a bill can be introduced. Our role there is in getting the bill ready. In terms of things like public consultations, the bill team may or may not be involved; it depends on at what point in the process the bill team is established. Often departments will have consulted widely a year or so before they actually introduce the legislation. In terms of the Health Bill, however, I think that nearly every aspect of the bill went through public consultation in some shape or form before introduction. You then have the second phase, which is after introduction, where our role is then intimately bound up with the processes and procedures of the House. Unfortunately, our project/programme management approach goes slightly out of the window, because the timescale is no longer in our hands. It is all much more reactive, and obviously we are responding to amendments as and when they come in—certainly for committee stage. I do not know if you want me to go on, or if you want to pick up any of the points?

Q110 Chairman: I have two more questions. One is this. When you receive amendments from the Table Office or whoever, are you sometimes perplexed about what the amendment means?

Ms Warner: Yes.

Q111 Chairman: Would it be helpful if the Member had to submit a short explanatory statement. “The purpose of this is ‘x’ or ‘y’”? Ms Warner: Yes, I think that would be very helpful. It would make our processes more efficient. When we receive amendments we have to look at them, and we consult the policy experts and also, importantly, lawyers; first of all, to try to work out what the intention behind the amendment is—which sometimes we can do from looking at previous speeches that have been made on the subject. The intention is one thing; sometimes the legal effect can be something quite different, which we need our
legal colleagues to advise us on. This can all take a bit of time and, when the timescales are short between receiving amendments and debating them, it just adds another part to the process. I think that it would make it much more transparent for everyone involved if there was some kind of explanation. It would ensure that, when we are briefing our ministers and advising them how to respond, the issues the Member really wants debated are covered and we really are responding to the queries or concerns that are being raised. I think that would be a very helpful process.

Mr Stewart: Often it is very difficult to work out what the intention behind the amendment is. It is easier to work out what the effect is, because that is definite; but the intention is not always as clear. I think it is important to understand, from a bill team’s point of view, how little time we have to go through this process. If we look at the Health Bill, for example, we had the second reading on Tuesday 24 October and we had our first day in committee the following Tuesday: so just a week between. It meant that there were only three days for Members to table amendments for the deadline for consideration on that first day. We received 76 amendments in those three days. The deadline is the afternoon of the Friday, which effectively left us one day, on the Monday, to go through 76 amendments; work out what the intention, the policy effect, was; write draft speaking notes for the minister on all 76 amendments—because also we obviously do not know how far we will get on a particular day—as well as worrying about how all those amendments should be grouped, which cannot be done until you are clear on what the effect is. I would say that it is an advantage to have the first day on a Tuesday, because you have the weekend to do this; but, let us say the first day was on a Thursday, then you really do have just that one working day to do all of it. That can be quite a challenge, and probably means that speaking notes to amendments are not always quite as good as they could be. It is less of a problem after that first committee session, where things tend to slow down a bit; the amendments drip through and it is a bit more manageable. However, that first session is certainly quite a stressful time. I know that, similarly, my colleagues in the department working on the NHS Redress Bill, while they were in the Lords, had over 70 amendments where again they had only one day—and, of course, in the Lords it is much more complicated.

Chairman: I will leave my second question, which was going to be about the formatting of amendments. Let us take other questions now.

Q112 Ann Coffey: During the Health Bill there was a lot of talk about partial exemptions; for example, areas in pubs that could be designated smoking areas. It was clear during the progress of that bill in committee that the definition of it would be done through secondary legislation. Part of the difficulty, when you were deciding how you would vote, was that how those exemptions would be defined was very important; but, at the time of voting for either of three options, those exemptions were not available for you to see in draft form. Is there any particular reason why, when a bill goes through a committee, committee members cannot see what is going to go into the secondary legislation in draft form, so that when they discuss the bill they can make up their mind what they should or should not be accepting?

Ms Warner: One thing we found as we went through the process, particularly of standing committee, was that what would go into the draft regulations was very much informed by the debates that were had there and the processes that we went through. I think that it depends on the subject. In certain circumstances, where the policy is already very clearly decided or there is very little detail on the face of the bill, I could see a case for how it would be helpful to publish draft regulations right at the start. However, I know that in our case certain ideas have crystallised or been brought to us during the parliamentary process, which has actually informed what will go into those regulations. In that case, therefore, publishing them right at the start would perhaps not have been so helpful.

Q113 Ann Coffey: You must have known—I am not saying you personally—but it must have been known whether, in a pub, you would allow a room to be a designated smoking area in which food was not going to be sold, or you would allow a space a certain distance from the bar. Those were quite serious issues, because people might have been inclined to vote for an exemption if they thought that it was an entirely separate room. There must have been some understanding of what that exemption in a pub meant. That would not be informed by the debate, because the debate would follow how that exemption would be defined.

Mr Stewart: I can see how that would help, but I would like to think that we try to be fairly clear. While the detail was going into the regulations, when the bill was introduced we made clear that pubs which did not serve food would be exempt. I am not sure the policy lead on any of this, but I am fairly certain that at the time we made clear that any pub that did not serve food would be exempt; any pub that did serve food would not have an exemption—so there would be no smoking room. Perhaps we did not make that as clear as we could have done, but I am not entirely convinced whether you actually need to go through the process of publishing draft regulations to get some of these points across.

Q114 Ann Coffey: Do you think that the draft regulations would have made it clearer?

Mr Stewart: If we had published draft regulations back when the bill was introduced in October, the draft regulations would have talked about pubs not serving food, whether they should be exempt, and other issues. As you know, the bill has changed because of debate in the House, because of the free vote that was offered by the Government. As a result, those draft regulations, which would have taken quite a lot of time for lawyers to produce,
Q115 Ann Coffey: I just wanted to make the point that this is a continuing issue about giving information, particularly in the form of what is going to go into secondary legislation; and I simply do not accept the argument that because it is time-consuming it is something that should not happen.

Mr Stewart: Could I make one final point on that, and we may come on to it in due course? The explanatory notes to the bill, which I think are often under-utilised by many people—did go to quite a lot of trouble to explain, in quite a lot of detail, how particular clauses would work and how we plan to use regulation-making powers. Similarly—and when we get to the Lords we have to do this—we have to produce a memorandum to the Delegated Powers and Regulatory Reform Committee, setting out every delegated power in the bill and why we have delegated that. Whilst they are more interested in the appropriateness of the delegation, we also, at great length, went through each regulation-making power and set out the detail that we were able to about how those regulations would look. Maybe we should be producing that memorandum, not for introduction in the Lords but at an earlier stage, whichever House the bill is introduced in, because it does provide quite useful detail.

Q116 Mr Burstow: Just on this little exchange, one of the issues was not so much whether it was places which did or did not serve food: it was what was “food” for the purposes of the regulation. It would have been useful to have had a draft regulation to have illuminated that debate! I think that was why it was one of the things which vexed a number of Members at the time. I want to pick up on a couple of things. You were talking earlier about the benefit of having Members who are tabling their own amendments supplying some form of explanatory note. If 76 amendments are tabled, that will probably be a longer set of explanatory notes than the explanatory notes to many bills. Have you ever on occasion, in your experience as a bill team or in the experience of other bill teams, picked up the phone to ring up a Member who has tabled an amendment, in order to make sure that you understand the thrust of the amendments so that you can provide the necessary brief? Why is that not considered an acceptable practice?

Mr Stewart: I do not think that it never happens. It may be fairly uncommon. I think that it is partly the time taken to try to get in touch with Members, given that we have so little time to prepare the notes. It is a slightly different process. The whole nature of the process in the Lords is slightly different, where we do have a different relationship, certainly with the Opposition frontbench researchers and we are encouraged to speak to them. In the Lords, therefore, yes, it possibly happens more often. Why it does not happen so much when we are in the Commons, I do not know; but, yes, it certainly would be a sensible way forward.

Q117 Mr Burstow: You mention the time pressure and you describe the difficulty that arose from the relatively short period of time between second reading and the first day of the standing committee. Also, in your exposition at the beginning you described how there is a great deal of control you exercise over the process until it comes here, and then your control over the process ceases to some extent. You are responding to things as they go along. Do you see any benefit in some clarity around the timetabling of legislation, not just individual bits but more to do with business management overall? This is a rather opaque area in our process at the moment. Would there be anything that would help, in terms of managing and dealing with the business, to have greater clarity about when things were coming and when they were not?

Ms Warner: Greater clarity would of course be helpful. As John described, we do enter a slightly reactive phase once the bill comes into Parliament, and we have to wait for the dates for certain stages to come up—just as I am sure everyone else does. Apart from the situation John has described, we did not find a problem with the length of time between certain stages as they are now. I think we found that to be very reasonable; but if there was a bit more certainty about precise dates from the very start, that could only be helpful in managing the process.

Mr Stewart: From our point of view, the key thing is the deadlines for tabling amendments: not so much the gaps between the various stages, which I think are reasonably acceptable to most bill teams. It is this issue of having potentially 70 or 100 amendments to deal with in a day; it is whether there should be a longer lead-in time, an earlier deadline for tabling amendments, certainly for that first session of committee, so that we have a bit more time to prepare.

Q118 Mrs May: Following on from that last point, the alternative solution is to have a longer period set as the accepted norm between a second reading and the first committee stage.

Mr Stewart: Apart from the fact that people could still table amendments right up until the last minute, which they sometimes do.

Q119 Mrs May: Yes, but you could change the timetable so that you had a longer period.

Ms Warner: Yes, if you also shifted the deadline.

Q120 Mrs May: And you had an entire week and it was midway through the week, or something?

Mr Stewart: Absolutely. That would be a huge help to the departments, yes.

Q121 Mrs May: Can I come back to the issue about secondary legislation and the draft regulations, to understand a process point about where and at what point a decision is taken as to what will be in...
Mr Stewart: It will vary from bill to bill, I am sure. From our point of view, the process was that we had a clear policy objective—if we look at the smoke-free provisions as an example—on which we instructed parliamentary counsel and asked him to provide for draft clauses which would bring that about. It is always the case that we try to avoid unnecessary detail and technical issues on the face of the bill. For example, something like the definition of what might include “enclosed” and “substantially enclosed” is quite a technical definition, which we were advised that we should not put on the face of the bill—mainly because it allows no flexibility to change it if we do not get it quite right. That said, we have made clear that the definition we plan to use, in terms of the smoke-free provisions, is to follow the Scottish definition. We have therefore been clear about what our definition is, yet we do not want to put it on the face of the bill because it provides no flexibility to change it, should it not work in the future.

Ms Warner: On the point of issues moving from primary to secondary legislation or secondary to primary, it is more likely to happen that something would move from what we intend to be in regulations to the face of the bill; because the Government might come under pressure to make certain things clear on the face of the bill and not leave it to secondary legislation. I think that things are therefore more likely to move that way during the debate.

Q122 Mrs May: There is a lot more secondary legislation now. There are a lot more bills where the detail is left to the secondary legislation than there used to be. That is what I am trying to get at, namely what is the process that has started it down this route. The definitions were pretty crucial to this particular bill, so I am interested that they are described as technical. Who was it who said, “These definitions are technical and should be in secondary legislation rather than on the face of the bill”? Was it the lawyers? The policy team?

Mr Stewart: The department policy team, in conjunction with ministers, will have decided. We had obviously seen the definitions that Scotland had put forward for their smoke-free legislation, which were in regulations. It was a technical issue. Putting it on the face of a bill does not allow any flexibility, other than to come back and change the primary legislation again. Something like that you may well not get right, or absolutely right, first time. We were fairly clear about what definitions we were going to use. We had previously consulted on definitions when we consulted over the summer. It is not that we were trying to hide what our definitions were. The other important thing which you perhaps do not see the benefit of is that, as I mentioned earlier, the Delegated Powers and Regulatory Reform Committee of the House of Lords goes through every regulation and order-making power within a bill with a fine toothcomb, and comments on its appropriateness and whether it should be for secondary legislation or not and, 99% of the time, departments accept the recommendations of the Delegated Powers Committee. In the case of the Health Bill they made maybe two or three fairly small recommendations. So they were content that we delegated appropriately.

Q123 Mr Howarth: I can remember one occasion with the Stalking Bill in about 1996, when we succeeded in getting an amendment through. When we found out the effect that it would have had, we had a hell of a job getting rid of it the next day! I make that point because, to be fair, it is difficult for any Opposition to get that process exactly right and to get the wording of an amendment right. I was interested that you felt that the procedures in the House of Lords made that easier to deal with, rather than in the House of Commons. Do you think it would be helpful if there was a member of the bill team designated to liaise with the opposition parties, so that they could have a way in to amendments, which gave them advice about the actual meaning of it?

Ms Warner: I think what we were saying about the House of Lords was that perhaps we have more discussions about explaining the Government’s position. We would not draft an amendment or advise on drafting. We of course appreciate that Members who are not part of the Government do not have access to legal draftsmen and it is very difficult. I wonder whether another way to do it is more about having debates over principles or ideas and then, if those are accepted, it being the Government’s job to go away and draft something.

Q124 Mr Howarth: I was not so much thinking of that. What I thought was that, for argument’s sake, there would be an Opposition spokesman who might have 50 amendments. I am not saying that you should draft them, but if you could sit down and go through those 50 amendments and say, “I think this one might not actually achieve what you want it to”, I think that would be a helpful process.

Mr Stewart: I see absolutely no objection to maybe having a relationship between the bill team and other Members, if it will help us understand what the intention behind an amendment is. What we have to do at the moment is try to strike the right balance between addressing what we think the intention is, but also making clear that the effect is not the desired one; but, when we are clear what the intention is, maybe we can perhaps have a more constructive debate on what the amendment is intending to do. I think that there is also potentially a role for the Public Bill Office in advising Members on how they might be able to draft—
Q125 Chairman: They do at the moment.

Mr Stewart: I am sure that is true. I do not think that the bill team can advise on drafting. That is why we have parliamentary counsel who draft our clauses for us. So I would be slightly nervous about saying that we could help and assist you in getting the effect right. We might be able to help you get it closer, but I am not sure that really should be a role for the bill team—but we are happy to discuss what the intention behind amendments is.

Ms Warner: The only other point to make on that is that we have talked about the time pressures and having a day to turn round amendments. Although in principle we would be very happy to talk through with Members, it has implications for time and resource.

Q126 Mark Lazarowicz: As you will have heard from the Chair’s introduction, one of the things we are looking at is a possible move towards the use of special standing committees on a regular basis. I wonder if you have any thoughts about how that might affect the process and the timetabling for dealing with bills, particularly at committee stage. For example, it occurs to me that if a committee starts off with a quasi-select committee procedure, where evidence is taken from witnesses and the rest of it, then it is quite likely that members of the committee—Opposition members, even the Government itself—hopefully will want to take account of what those people say when they then proceed with their consideration of a bill. Presumably you would not want to be in a situation where you hear the witnesses on a Thursday and then you move to the standing committee stage on the next Tuesday. Would there be consequences there for some timetabling, to allow consideration of the evidence stage of a special standing committee, and how might that affect the process?

Mr Stewart: I am slightly nervous about us, as a bill team, commenting on the merits of a different kind of procedure, but obviously—

Q127 Chairman: Please do not be nervous. If you say something out of line with your minister, I will talk to her. We want to know from you, as officials—we are all grown-ups, we know that there are ministers running departments and their officials behind them—and you are in the engine room of the bill process. What it would be helpful to know from you guys, who obviously think about the bill process as well as what you are doing day by day, is how it would feel if there were the equivalent of special standing committees.

Mr Stewart: From a process point of view I do not think we have any serious objections to that. It would lengthen the process of standing committee, I am sure. We should not forget that our bill has gone through quite a lot of scrutiny through the full public consultations we have conducted before; so we have to be sure that it will add more value, and not just add length to the proceedings without coming up with anything new. It is also worth noting that the Health Select Committee, during the passage of the bill, did publish a very helpful report on the smoke-free provisions. You could argue that maybe it would have been more sensible to have had that report earlier, before the bill was introduced—that is difficult, because I know the timetables are uncertain—and whether that might be a more efficient way of scrutinising the bill in more detail than tagging on some kind of select committee procedure to the standing committee session.

Ms Warner: For my part, I quite agree. The only two points of possible concern would be, first, whether it could duplicate the public consultation that goes on to begin with, and there would need to be some careful thinking about what issues it would cover in making sure that it is not just repeating a process that has already happened. Secondly, being aware that it would clearly lengthen the process, if it is to have value and if the Government is to consider what comes out of that select committee phase.

Q128 Mark Lazarowicz: What kind of consequences? You might then just have the timetabling. Take the example of the committee taking evidence on a Thursday: presumably, if you want to think about it seriously, they will not want to put down 100 amendments by Monday and, if they did, you would have difficulty in coping with them. You work under pressure and deadlines, and I understand that, but what kind of time gap—period of reflection, as I think it is called in some places—might be appropriate? A week? Two? How would you cope with that?

Mr Stewart: It is difficult to say. Will the committee, following that evidence session, compile a report as a result? Will it just be a question of Members, in an uncoordinated way, tabling their own amendments, depending on what their views were following the evidence that had been taken? I think that it is difficult to say what an appropriate timescale would be, unless I understood the process slightly more clearly. Yes, obviously, we would not want a situation where there were hundreds of amendments tabled in a very short space of time.

Ms Warner: I do not know if you are taking evidence from parliamentary counsel, but they will be able to advise you on how long they need from receiving instructions to drafting fit-for-purpose amendments.

Q129 Mark Lazarowicz: Perhaps I could briefly follow that up, and it takes up a point that George was making. It seems to me that if you do move towards a special standing committee procedure, there will inevitably be a tendency—it is part of the purpose of it—for the committee to have a greater collective role in the framing of the legislation. Taking on George’s point, I got the impression from what you were saying that, although you could see how there would be an opportunity for more informal discussion with Opposition or back-bench Members, you could not see yourself acting in the role of advisers or helping in the drafting of amendments. I understand that. One possibility might be to increase resources or provide resource support from the Public Bill Office. Would there be
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a case for having support directly for a special standing committee on regulatory impact assessments, and I have to say that I am not entirely familiar with the whole process.

Q133 Graham Stringer: May I ask another, not totally unrelated question. We have just had a debate on the Legislative and Regulatory Reform Bill, which changed the bill quite a lot when it was going through. It seems to me that there are large parts of the bills that come before us—I think it applied to the Licensing Bill, the Gambling Bill, and it may well have applied to the less controversial parts of the Health Bill—which could have been more thoroughly and effectively dealt with by regulatory reform orders. Is there a process at the start of the consideration of a bill by the bill team where you sit down and say, “We don’t need to go through the normal legislative process to achieve these ends. We can do it by an RRO”? Mr Stewart: Again, I am not terribly familiar with the RRO procedure. In terms of the Health Bill, the bill team was established once we had bid for primary legislation, before the bill team came into existence, and I came in saying, “This is the bill. You need to manage this bill and help navigate it through Parliament”. Since starting in the job, though, there have been colleagues in the department who have looked to try and include things, add things to the bill, and certainly we do go through a process with them about whether we really need primary legislation for this at all, and whether things can be done through other routes. Once we had agreement to proceed with the bill, I certainly did not look at whether anything could be done through a different route to that which it had been agreed we were to have.

Q130 Graham Stringer: In your opening remarks you talked about being responsible for regulatory impact assessments. Could you explain to the Committee how you go about getting the information to put in those regulatory impact assessments? They rely on a large amount of external knowledge of the market sometimes, do they not? Ms Warner: In our case, because, as John explained, we call it a portmanteau bill, each separate policy area—and there are up to 13 in our bill—which needed a regulatory impact assessment conducted their own assessment, which we drew together in something that looked at the bill as a whole. Perhaps I could talk in slightly more general terms about the process for putting together an RIA.

Q131 Graham Stringer: Yes. Ms Warner: We have economists, various specialists and experts within the department, and we would call on them as resources to advise on the markets and on the particular issues related to that policy area. So that is where our expertise generally would come from, but also any studies that have been published externally. The whole point of an RIA is to draw together that evidence, put it into options and pros and cons, and to set all of that out for the public.

Mr Stewart: We have of course consulted widely on our draft regulatory impact assessment. It still is a draft because we do not yet have an Act. It is yet to be finalised, therefore. Yes, we take on board comments from—

Q132 Graham Stringer: There is a view that regulatory impact assessments should be either independently monitored or independently produced. Do you think that would be helpful? Mr Stewart: The bill team has not been responsible for producing the individual regulatory impact assessments for the bill. It has been our lead policy teams. Our role has really been to make sure that it is all pulled together, that we do have one, and it meets the requirements that the Government has set out for an RIA. I would not really want to comment on that point, therefore. The Cabinet Office is responsible, and the Better Regulation Executive, for regulatory impact assessments, and I have to say that I am not entirely familiar with the whole process.

Q134 Graham Stringer: I do not want to paraphrase, but you say that, once the oil tanker sets off, it sets off and you do not really assess whether you can achieve the same object by.— Ms Warner: I think that the consideration of whether something should be done through non-legislative means should happen before the oil tanker has set off.

Mr Stewart: Or through other legislative means like an RRO. However, that was before our bill team started in post. So there are other colleagues in the department who will no doubt have considered those options.

Mr Sanders: The only question I would ask, because you have referred to them several times, is about the parliamentary draftsmen, and whether we have asked parliamentary draftsmen to appear before us and to question them.

Chairman: I think that, before I became Chairman, there was a visit to parliamentary counsel.

Ann Coffey: There was a trip out.

Mr Sanders: I have obviously missed that outing.

Chairman: We can talk about that later.

Q135 Mr Sanders: The other question relates to talking about the possibility of interfacing with Members who are submitting amendments. I think that in practice it tends to be a member of staff who
might be drafting amendments under the instruction of a Member. Is there any mechanism whereby there could be some communication there? You referred to the House of Lords, where there appears to be more of an interface. I wonder if you could talk a little more about that. Who exactly, within the Lords’ researchers, are you talking to? What is the *modus operandi* for it?  

**Mr Stewart:** I have to start by saying that I am not quite sure why it is slightly different in the Lords. It may be that we are encouraged by the Government Whips Office—in fact we were encouraged—to speak to the Opposition frontbench researchers and keep them informed of what we were doing. We were very happy to do so. That certainly helped us to know when the amendments the Opposition were perhaps planning to table were going to be tabled.

**Q136 Mr Sanders:** How did that happen in practice?  

**Mr Stewart:** Very simply, it was emails and phone calls. It worked very well. So, no, it was not directly with the peers themselves; it was with their researcher staff—but it could be with either.  

**Ms Warner:** The initial introduction came through the Government Whips Office in the Lords.

**Q137 Chairman:** That is one point that we need to follow up, because I think that ministers are understandably anxious, whatever party they are, to ensure that their officials are working to them and not giving stuff away inadvertently. I personally think that there is no reason why you cannot stick to that rule, while ensuring that there is a grown-up conversation between Opposition researchers, the bill team, and other officials. It has always struck me that relations between officials and peers of all parties are less formal than they are at the other end. It is partly because of the layout of where the officials sit in the Lords, compared to where they sit in the Commons. There is not the same barrier and the chamber is bigger.  

**Ms Warner:** Can I mention one other process we went through in the Lords, which is relevant here? It was between second reading and committee. There was an all-peers briefing, where officials and the policy experts in the different areas came to an open meeting which any peer could turn up to, and we answered questions on details of the policy that perhaps were not clear. Again, that was a very open and useful process.

**Q138 Lynda Waltho:** In my experience as a new Member, the bit that worries me is being in the committee and following what is going on—and I know that we have had debates with the clause stand part part of the committee and bills. Would there be any benefit, do you think, in doing away with the routine clause stand part debates—unless, of course, a Member indicated that they would want to speak? I must admit, that is the bit that I find quite difficult.  

**Mr Stewart:** It is interesting you ask that. Again, I am afraid that I will compare the process in the Commons to the Lords. In the Lords, the standard procedure is that a Member has to indicate that they want a clause stand part debate. If they do not, the general rule is that it does not happen. They can indicate on the day, but that rarely happens. We normally have notification that they want to have a debate on the clause. That certainly limits the number, therefore. Our experience is that often you will have a large grouping of amendments or a number of groups to a clause, which means that you discuss the clause to death; yet there is often just one Member who wants to stand up and still have another go. So, yes, if you had to give notice, that would avoid unnecessary debate and speed up the process. The other process that is more common in the Lords which does not happen very often in the Commons is the grouping of clause stand part debates with other groups of amendments. I had not realised that it could happen in the Commons until I spoke to parliamentary counsel the other day and he said, “It can happen. It is just that it doesn’t happen very often”. I do not know why that is.

**Q139 Paddy Tipping:** I think that the evidence has been really refreshing. My own experience has been that the ministers and advisers tend to see taking amendments as being a sign of weakness, rather than probing and adding to the bill. I wonder how we can change the attitude that the legislative process is about improving the bill. Clearly you are responsible to the minister—the point the Chairman has just made—but getting the policy right is vitally important. It needs to be a co-operative effort rather than one of conflict.  

**Mr Stewart:** Yes, from a departmental point of view we are very happy to co-operate, but it is obviously a matter for our ministers as to whether they want to be more co-operative. We have no objections to working with Members, Opposition Members, anyone, to help them understand the process and help us to understand better the intentions of their amendments, because that will obviously help us provide better briefing for our ministers, so that when in committee they are actually responding to the point that is of concern to the Member.

**Q140 Sir Nicholas Winterton:** May I comment on the remarks that Mr Stewart has made about clause stand part? I am not sure that he is aware that, to an extent, it is very much dependent upon the chairman of the standing committee whether or not there is a clause stand part debate. Whether or not a Member would like to have a clause stand part debate, if the chairman of the standing committee believes that the substance of the clause has been discussed in the group of amendments or in the amendment that has been selected and debated, he or she as chairman of that committee can indicate that he or she does not intend to allow a stand part debate. I myself would be reluctant to do away with a clause stand part debate, because it could well be that an important issue has not been discussed as part of the group of amendments or the groups of amendments that have been debated under that clause. I think that not to permit an important matter to be raised on clause stand part would be regrettable and would reduce the ability of Members of this House in standing committee to scrutinise legislation. In the main,
however, what the Lords does, by a Member giving an indication that he would like a clause stand part debate, might be helpful; albeit that, until all the amendments have been debated, the chairman is not to realise that an important matter might not have been debated in the substance of the amendments that have been called for debate. Would you agree with that?

**Mr Stewart**: I would. I am aware of the chairman's role in that respect and, yes, I would agree.

**Q141 Mr Burstow**: I just want to pick up on two things quickly. One was on the special standing committee procedure. In your earlier answer, you seemed not to be drawing a distinction between the executive consulting about its intention legislatively, and then the role that we have as legislators also to scrutinise. Do you draw a distinction between those two roles? If there were a special standing committee where there was a select committee role being fulfilled, who were examining the draft bill, examining evidence, and then going into standing committee, do you draw a distinction between that role and the role of the executive?

**Mr Stewart**: I am sorry if I did not, but I absolutely do draw a distinction. I think that it is right for the executive to consult and, yes, it is absolutely right that the legislature should also do their own consultation.

**Q142 Mr Burstow**: The other thing was that you mentioned the Health Select Committee, its inquiry into the smoke-free issue, the timing of its publication, and so on. In any material way, did that report have a bearing on the outcome of the consideration of the bill in the Commons, to your knowledge—or in your opinion, rather?

**Mr Stewart**: I think it is fair to say that it was following the publication of that report that the Government decided that they would facilitate a number of options for Members to vote on. I think that decision was informed by not just the report by the Health Select Committee but also changing public mood in support of a ban. I do not have the figures at hand, and again I am not the policy lead, but I think I am right in saying that the shift in support of a ban has moved very significantly in support of one over a very short period of time—over the course of a year. So I think that it was a number of factors but, yes, I am sure that the select committee’s report did have a bearing on that decision to have the free vote and facilitate the different options that were presented to Members at Report.

**Q143 Chairman**: I have two questions, one of which I am sure Dawn Butler would be raising were she here. It is about the use of IT in this process. Do you get the amendments in the format in which they are published in the Commons?

**Mr Stewart**: We receive the amendments the day after they are tabled on the formal notification of amendments paper, but it is possible for the bill team to pick up the manuscript copies of the amendments from the Public Bill Office.

**Q144 Chairman**: Within the Clerk's Department, I understand that they are also translated into a comprehensible form using the Microsoft Word format to track changes. We are looking at whether we should do that; because, frankly, it is ridiculous today that you cannot see immediately the effect of a change. I assume, if the answer to this question is yes, that would be helpful for you as well.

**Ms Warner**: It is something that we do for ourselves already. When we get an amendment in and when we are briefing our ministers, we create what we call a “How this would look” section, where literally we reproduce the clause and either strike out the words that are removed or add in words in bold that are added in.

**Mr Stewart**: I have some examples here, if you would be interested to see them.

**Q145 Chairman**: That would be very helpful, because what is frankly crazy here is that parliamentary counsel, the Clerk’s Department, and individual departments are doing it; I am sure that NGOs are doing this, and one or two researchers will be doing it. The only people who are denied this information is Parliament as a whole. I am very clear that we have to change that.

**Ms Warner**: There is no doubt that it is a very quick and easy way of helping people to understand what the amendment is doing.

**Q146 Chairman**: Of course. You would find it easier because you would have fewer Members putting forward amendments, the effect of which they do not comprehend because, if you are amending language in the sentence rather than in “Line 15, word 3, to leave out and insert . . .”, it becomes much more comprehensible.

**Mr Stewart**: I think that you probably would still need to table the amendment in that format, as in “Clause 3, page 2, leave out . . .”, but it might be a good exercise for Members to write out how this would look in the amended form, because they will begin to see it more clearly sometimes. It certainly helps us to do so.

**Q147 Chairman**: The other issue was to pick up a point that Theresa May and others raised. It is this question of how specific primary legislation is. I know, Mr Stewart, you are following your minister’s decisions on this, but I have to say that I am uneasy about an approach which says that principal definitions should be left for the secondary legislation. What that says to me is that there has been insufficient consideration in departments and by ministers about what they mean. I know the other argument, which is that you can change the definition later, but these definitions are the fundamental building blocks of legislation. Either ministers should get them right or they really should be delaying the legislation.

**Mr Stewart**: There is a balance to be struck between the two. I think that this is a political decision whether the detail is given up-front at the start or whether it is held back for regulations. There might be reasons on both sides why that is.
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Ms Warner: And a judgment to be made about what is a principal definition.

Q148 Chairman: I understand that. However, I think that this is a point where it is too easy, both for officials and for ministers, to say, “We will leave that bit. It is too difficult. Put it in the LBW drawer and we will sort it out later”.

Mr Stewart: Apart, of course, from the Delegated Powers Committee’s important role in scrutinising the appropriateness of delegated legislation.

Chairman: That is a fair point.

Q149 Sir Nicholas Winterton: Do our witnesses therefore think that secondary legislation should be subject to amendment? Is that an inappropriate question? Because if more and more legislation is being subject to secondary legislation, for whatever reason, do you think that, when the statutory instrument comes forward, the House of Commons, and for that matter the House of Lords, should have the right to amend that statutory instrument?

Mr Stewart: I do not think that is for the department to take a view on.

Chairman: That is a good answer! You have given us an hour. I hope that it was not too daunting. We are very grateful to you. Thank you very much.
Q150 Chairman: Mr Cridland, thank you very much for coming in. We are grateful to you, not least for the relatively short notice of this request. We have got 25-30 minutes, less if you answer all the questions to total satisfaction. As you will be aware the Modernisation Committee is conducting an investigation into the legislative process. What we are looking at is those parts of the process which we statutory interventions which a investigation into the legislative process. What we that for the business community at least 50% of the questions to total satisfaction. As you will be aware, we are open to suggestions, and those, including the committee stage, where there is a developing consensus that there needs to be a change. The CBI plays an important part in the legislative process and intervenes a great deal. What I would like to ask you first of is your overall view about what works, being as brief as you like on that. As one of the participants in this process, indirectly—I think you would be called stakeholders in the current jargon—what do you think needs to be changed about it?

Mr Cridland: Thank you for the opportunity, Chairman, to make some remarks. From the CBI's point of view I think I should put on record that we get a very good hearing and we are privileged to have that opportunity and have no real complaints about the opportunity we have. I think it is almost a statement of the obvious that the earlier this House can meet with stakeholders to discuss legislation and potential legislation, the better. Sometimes it is frustrating for us, and I would think frustrating for other interest groups, that we can have a very legitimate debate but the message from the other side of the table is, “Well, it is too late”. Clearly a lot of the representations we make are before matters reach the House at all and, frankly, we probably expect to make greater progress on fundamental questions with ministers and departments of state before legislation has been drafted, particularly if we are making a case, as is sometimes but not always the case, where for the CBI regulation is not the right answer. Even when bills have been proposed and drafted there can be quite fundamental questions. I think this would bring me to the merits of draft bills. I think we have seen some very good examples over the years—the Communications Bill, the recent Planning Bill, the current proposals on corporate manslaughter—where the publication of draft bills has enabled very frank debate about some fundamental questions. On the other side of the equation, my own view and the CBI’s view would be that the Company Law Reform Bill would have merited from being published as a draft bill. There is a point about early intervention. The second point is slightly tangential, but is of such importance to us that forgive me if I stress it rather strongly, which is that for the business community at least 50% of the statutory interventions which affect business now derive from European legislation, and we have had a separate debate on that, but that is the area that is most urgent for attention because we simply do not feel that this House has the opportunity currently to intervene at an early stage to scrutinise major proposals that affect UK citizens and UK businesses that derive from Brussels.

Q151 Chairman: You are talking when legislation is in draft, and I also assume you are talking about when a directive has been agreed and an issue then arises as to how it is transposed into British law. Mr Cridland: Yes, and both are equally important. As was debated at the time of the Constitutional Treaty deliberations, I think it is vitally important that national parliaments are involved in the initiation, the deliberation on the need for European legislation but, equally, when European legislation is being finalised it seems to me that this House plays only a limited scrutiny role and there are often occasions when business has huge concerns and can only take those to Brussels and Strasbourg because there is not an opportunity here to have that debate in more than a token form, frankly.

Q152 Chairman: We are trying to deal with that, as you may know, and I am very keen, not least in my previous incarnation, to reduce so-called gold-plating or transposition in any form other than coping out. It is rare that it serves any purpose because if there is an issue of interpretation the courts do not bother about the British version, they bother about the original text. Before asking colleagues to come in, can I ask you something about the standing committee process. We have not yet reached our final conclusions but it is fair to say there is quite a lot of interest in the special standing committee process. When you say that you are frustrated sometimes when people say it is too late, would you find the special standing committee process helpful in providing you, as a very important
national organisation, with an opportunity to put your concerns before a committee in advance of them going through the bill line by line?

Mr Cridland: Yes, I think we would. It would make the process from a business point of view more straightforward. Without wishing to sound pompous about it, I think the CBI has a certain expertise in dealing with committees but individual members of the CBI who feel they have points they would want to bring before a committee, or small interest groups, do not find the process straightforward. To me, that would be a key advantage. Somewhat more systematising the issue would be of great benefit.

Q153 Sir Nicholas Winterton: Could I ask Mr Cridland, you have indicated certain areas that you would like to see improvements in. You have talked about draft bills, pre-legislative scrutiny and earlier involvement. Our Chairman has ranged on to standing committees and special standing committees. If you had the opportunity to dictate to Parliament two particular changes which you believe would be hugely advantageous, not just to you as the CBI representing British industry, particularly big industry, what two changes would you recommend in the legislative process?

Mr Cridland: The first would be the opportunity to give formal evidence when appropriate.

Q154 Chairman: Oral evidence?

Mr Cridland: Formal and oral evidence, to a standing committee in the way that we currently can to a select committee, the point the Chairman just made.

Q155 Sir Nicholas Winterton: So you are here referring particularly to the special standing committee. We have, as it were, tried it a very few times but that does give, as you know, the opportunity of a standing committee to take evidence from witnesses such as yourself. That might be one, would it?

Mr Cridland: That would be one. My second, if you will allow me, would come back to my European point. It is our view that select committees should take responsibility for the scrutiny of European legislation as well as legislation from this Parliament because we think it is no longer sensible to have a twin system of select committees primarily concerning themselves with UK legislation and the European Scrutiny Committee and its sub-architecture concerned with European legislation. If you take something of particular concern to myself, like trade and industry, like the environment, frankly those two streams need to be brought together with a structure which is within the select committee, not without the select committee.

Q156 Sir Nicholas Winterton: That is rather interesting, but how would you suggest that is done? At the moment we have European Standing Committees A, B and C and yesterday, quite by chance, I happened to be chairing one of those committees on a motion relating to energy and sustainable energy. There was not a vote. There are not very often votes in these committees, and even if votes take place they are almost irrelevant. Therefore, how would you see the UK Parliament more effectively dealing with EU legislation and regulation which, as you have said, accounts for over 50% of regulation introduced in Parliament here in the United Kingdom?

Mr Cridland: There is clearly a role for the Scrutiny Committee as a sifting exercise but our own view, given the significance in the way you describe it of these proposals, is we need long-term scrutiny, I would suggest through the select committees with members, with a period of time monitoring particular issues and bringing expertise to bear. If I may just give an example: if you take something like energy policy, my point about bringing the European and the domestic together, there is currently a UK Government Energy Review of great importance to business, which may or may not ultimately lead to matters of legislation, but we have also had a significant change through intergovernmental co-operation in the formulation of a European energy policy. Those are two sides of the same coin and to me one select committee should be looking at the early stages at the merits of fundamental changes of principle to both UK and European energy policy so that it is well-positioned further down the road to look at the legislative consequences of that, whether they be proposals to Parliament from the UK Government or whether they be proposals in the European Council.

Q157 Sir Nicholas Winterton: You mentioned a sifting committee. You are aware of the committee in the Lords that particularly looks at secondary legislation. Certainly my committee when I was Chairman of Procedure, and now we have a new Chairman of Procedure on my right, Greg Knight, we very much hoped to have a joint committee between the Lords and the Commons on this matter. Do you think that that would be advantageous?

Mr Cridland: Yes, I think it would be advantageous. Often we are able to raise points of considerable importance often of a quite technical nature on behalf of British business with the relevant committees in the House of Lords. For the reasons I have suggested, that could benefit this House, namely that they have a long-term interest in a subject and build up some consistent expertise.

Sir Nicholas Winterton: Thank you.

Q158 Paddy Tipping: Mr Cridland, I have found the Regulatory Impact Assessments very valuable and they are a relatively new device. Clearly in many cases they will have implications for you and your members. How robust do you think they are and what consultation is there prior to the publication with interested parties?

Mr Cridland: I think they have got a lot, lot better in the last two to three years and the effort by government to insist that they are up to standard and the checks and balances that are now in place have encouraged departments to take them far more seriously. Clearly there are occasions on which they
only have partial information and it is important that Regulatory Impact Assessments are initiated as early as possible so that they can, in a sense, be a policy impact assessment. Sometimes a Regulatory Impact Assessment only is initiated once ministers have made a decision to propose legislation when interest groups, such as my own, may well be arguing that a more cost-effective approach to deal with a public policy challenge could be a code of practice, some voluntary initiative, some economic instrument or market measure. They need initiating as early as possible in order that they can contrast and compare different ways of achieving the objective, one of which may well be a statutory instrument. Secondly, I think it is also vital, and this does not always happen, that Regulatory Impact Assessments are updated as legislation, if we do end up with legislative proposals, changes. If during the course of deliberations in this House there are quite significant changes to the nature of the proposal, and we have seen that, for example of interest to me, in the last few weeks on the Company Law Reform Bill, then the Regulatory Impact Assessment dates very quickly. I am not suggesting that they should be changed after every amendment but I do think at the moment they are slightly static and they need to be a dynamic tool.

Q159 Paddy Tipping: Coming back to the Company Law Reform Bill, and you have mentioned it twice, was there ever any discussion with you whether it should be a draft bill? Did you make representations on that point?

Mr Cridland: We did argue it should be a draft bill. The view of the department concerned was given it had resulted from a five year company law reform exercise all stakeholders were entirely bought into this, I do not dissent from that view that there was a lot of stakeholder building prior to the bill being published, but the bill contained some significant deviations from what had been previously agreed, some new and important clauses, for which there were perfectly legitimate reasons why they arose late, that would have benefited greatly from being in draft form and the fact they were not in draft form is why I think the bill has needed such close scrutiny. It has also, in a sense, created a relationship issue because by accepting the principles of the Bill, which the CBI did, and still does, but then needing to make representations to both Houses on the detail of the Bill, it raised the question whether we were changing our position. We were not changing our position, we were arguing that some very important clauses did not live up to the intentions of the bill which we were bought into because they were late additions that had not received previous scrutiny, and all of that means a draft bill would still have been a good idea notwithstanding the relationship of stakeholder building which had been very effective previously.

Q160 Paddy Tipping: Finally, the Company Law Reform Bill is in committee at the moment. Can you give us an insight, if you want to make changes in company law, how are you doing that? Who are you asking to put amendments down? How are you lobbying for changes through the standing committee process?

Mr Cridland: Given the current standing committee process, we rely upon making our position apparent to all members of the committee through written representations. We help interested members of any political party propose amendments, we give assistance with that if they wish it. We seek to circulate amendments that we think have particular merit and associate ourselves with them. Inevitably, we work particularly with the front bench spokesmen of all the major parties. The CBI quite clearly is a non-party political organisation, so we always seek to be open, transparent and equal in the attention we give to the different parties represented on the committee.

Q161 Ms Butler: I am just wondering, obviously if we had a special standing committee then we would not see the need for more post-legislative work, which we do not use currently to its greatest effect, I do not think. How do you think it works at the very quickly. I am... to be information that accompanies bills and how bills are presented, you have already mentioned the RIA as seeming quite static, where do you see the role of technology? How do you see technology playing a part? The information that is available has improved greatly over the years, and on the internet, but where would you see any further improvements?

Mr Cridland: On the first question, inevitably we all have to be more concerned with what is happening than what has happened when the major decisions have been taken. That is the law of human nature, I guess. However, it is important that we review how things have progressed, the impact. I think there are merits in the case for sunset clauses in some cases so that we build into the process a chance to stop and see whether something has achieved the public policy objective or whether it needs amending. We have not yet touched on the issue of statutory instruments and secondary legislation but, inevitably, given the volume of statutory instruments it becomes much more difficult even for an organisation with the CBI's modest resources to follow everything that is going on and there is a much patchier performance—I am not being critical—by departments of state in consulting with stakeholders, in involving the CBI with secondary legislation than with primary legislation. On the second point, looking at the Coroners Bill—I had not seen it before—the bill was presented on one side of the page and the guidance on the other side of the page. I felt that was a very helpful innovation because often for those who are not as expert in the deliberations of this House the bill itself is quite inscrutable and the guidance appears quite disconnected I think that is an attractive proposition. Having read the deliberations of this Committee thus far, I know that there has been discussion of updating bills with amendments so that they are presented together so people can see what amendments have been made and I think that
would be very helpful. When you have a complex piece of legislation with government amendments and opposition amendments and discussions as to which of those amendments will be accepted it is very difficult for outside bodies such as ours to make sure we are working on the most up-to-date text. I think in those ways things could be much advanced. On technology, clearly we would want to take full advantage of the opportunities of modern technology but, forgive me, I do not have any specific ideas that I would want to put to you.

Chairman: Sorry, time is sadly passing so if colleagues could be reasonably brief and responses ditto.

Q162 Mr Sanders: Do you think there are enough opportunities to question whether, in fact, a piece of legislation is needed at all? If there are not, can you think of any mechanism that ought to be available in order that an outside body could seriously question the need for the proposal?

Mr Cridland: We undertake that process prior to legislation being proposed. In our representational work our view would be if there is a challenge on whether something is necessary we need to conduct that with ministers during the Green Paper stage, sometimes even at the White Paper stage. When matters come to this House we are dealing with the implications and the technical detail and I think it will always be thus. I would revert to my comment about Regulatory Impact Assessments. I think at the time when ministers are commissioning civil servants to look at options, that is the stage when we will encourage government to be clearer in demonstrating that it has looked at alternatives to regulation if they can achieve the legitimate public policy purpose. If that is not resolved at the beginning, the further we move down the process it becomes too late to completely go into reverse gear.

Q163 Sir Nicholas Winterton: Could I just ask one very quick question relating to the last question. We have raised the concerns that many people have about the fact that so much primary legislation includes secondary legislation powers and, of course, that means at the primary stage there are important areas that are not open to debate because ultimately they are subject to secondary legislation statutory instruments. Statutory instruments cannot be amended. To all intents and purposes statutory instruments cannot be rejected. What is your view, therefore, on the increasing use by successive governments of secondary legislation and how would you amend the current procedure? Should secondary legislation be subject to amendment?

Mr Cridland: That is a very complex area and, forgive me, probably at the limits of the CBI’s competence given we would not claim to be experts on parliamentary procedure. Let me say this: the business community does like clarity on the face of the bill. Frequently in our representations during the course of legislation we are saying that companies want the government of the day to make clear its intent. We are uncomfortable when powers are taken without government having made clear how those powers would be used. Our problem is at the beginning because, as you say, it is too late when the secondary legislation comes through and if it is then addressing a matter of quite fundamental substance our ability to influence that is very, very limited. Our objective, therefore, is to avoid situations where government ministers are given powers without it being explicit how those powers would be used. On the second question, yes, I think there are merits in the House being able to amend the current procedure but I come back to my comment that I am at the limits of my expertise and I would not want to go further.

Chairman: Mr Cridland, thank you. You have shown great expertise and we are extremely grateful to you. Thank you very much indeed.

Witness: Mr Nigel Stanley, Head of Campaigns and Communications, Trades Union Congress, gave evidence.

Q164 Chairman: Mr Stanley, you have had the benefit of hearing our line of questions to Mr Cridland from the CBI. The questions are the same basically because what we are looking at is whether, and in what way, the legislative process should be improved, in this case from the perspective of the TUC.

Mr Stanley: I think it is quite hard for outsiders to answer all the lines of question to date. To some extent our job is to understand the system as it is and then work out the best ways of influencing it. The more the system changes, the more we will look for different ways to influence it. The answers to all of your questions are we are going to want more points of access, more opportunities to influence the decisions that we do not like and we do not want to see the people who disagree with us having points of access to decisions we do like. To some extent, we judge the legislative process by its outcome rather than by the procedures it goes through. In general, I associate the TUC with the views of the CBI that the more pre-legislative scrutiny there is, the more debate, the more opportunity there is to put our point of view, the better we like it.

Q165 Chairman: I understand the point you are making but the issue is, is the current system a wholly rational one, has it reached a state of grace that does not require any further amendment, and I think the answer to both those questions is no, in which case how do we improve it so Parliament can do its job better, and the Commons can, so we are scrutinising legislation more effectively. As part of that, what opportunity is there for members of the public and for important national organisations, in this case the TUC, to make an input which has better effect than it does at the moment. On issues like
special standing committee Mr Cridland was pretty clear that he would like something approaching that process. Is that also your view?

Mr Stanley: Yes, on the kind of bills where it is suitable. One has to talk about the politics of different bills. There are some bills where there is really a lot of debate about the technical detail, they are very, very complicated, and others where there are much more flagship political decisions where I suspect that all will be reverting to some of the political arguments about it. Bills like the Company Law Reform Bill, which is hugely complicated, hugely technical, lots of room for debate about how best to do things, are an ideal opportunity to do things, but if you take something like the minimum wage, which was highly controversial but of great interest to the TUC, it may not have been quite so appropriate, it was a relatively simple procedure, a debate about whether it was a good thing or not. There have to be some horses for courses. The more complicated, the more technical, the more there is a desire by everyone to get some degree of stakeholder consensus about the legislation, the more appropriate those kinds of procedures become.

Q166 Sir Nicholas Winterton: Can I ask you, Mr Stanley, the same question I asked Mr Cridland, the first question. If you had the opportunity of dictating changes to our legislative process, and I know you have associated yourself very much with a great deal of what Mr Cridland said on behalf of the CBI, what would those two changes be to our legislative process to make it more relevant, to make it more transparent, to make it easier—to use the Chairman’s word—for stakeholders to influence legislation?

Mr Stanley: I think the first change would be exactly the same as Mr Cridland’s: more pre-legislative scrutiny, more special standing committees, more opportunities to present evidence to parliamentarians before they start getting into the detail of the Bill. The second change is almost more of a cultural change. The impression we get is that very many standing committees on bills are very ritualised, there is not very much in the way of real debate or real change. We do not put a lot of resources into influencing things at the standing committee stage because it is very much the government wants to get its business through, and I understand that, and I have seen it operate in governments of different parties.

Sir Nicholas Winterton: Can I just interrupt for a moment. One of the sadnesses, and I witness it because I chair standing committees, is that the government of the day, and I am not levelling any greater accusation against the present government than I would a previous Conservative and Unionist government—

Chairman: You can if you want!

Q167 Sir Nicholas Winterton: Do you feel it is unfortunate that governments seem to believe that the bill is presented to the House as a virility symbol and that it must not be changed and, therefore, even if excellent amendments are tabled, sometimes by their own members let alone opposition parties, they are reluctant to accept them?

Mr Stanley: I would agree with that but I would also add the caveat that perhaps oppositions need to resist the temptation to shout “u-turn” every time such a change gets made in standing committee.

Chairman: That is a very good answer.

Sir Nicholas Winterton: One which I did not expect! Thank you.

Q168 Mr Burstow: Can I just pick up on the point you were making about standing committees not being an area where you would invest a great deal of your effort in terms of trying to influence the outcome of the process. Could you talk us through, from your perspective, where you generally regard the best points of influence to be, where the best points of leverage are from your point of view in experiencing the process.

Mr Stanley: I would say they tend to be directly with government because it is government that draws up the bills, it is government that wants to get them through. We are a big national organisation but we have limited resources and the sheer quantity of legislation, and that is not a criticism, it is just an observation, means that we cannot follow every bill through every process. It is easier to have a structured conversation with government and with ministers about what they want to get through the bill so, on the whole, that is where we put our efforts and where we hope to make the most difference. There are some issues which become live issues amongst MPs where you sense that there is some point in doing that. To give an example from recent deliberations, I would say in the debate about smoking in the workplace, where we had a very clear point of view, there was clearly disagreement amongst MPs, it was not much of a party issue. We argued all along it should be a free vote, and eventually it became one, so we did put quite a lot of effort into that, but that was not so much in the formal processes, it was more raising it as an issue and getting the sense that something must be done which is usually the prerequisite before there being any legislation.

Q169 Mr Burstow: Just to follow that up one step further, I assume your remarks are primarily addressed to procedures in the Commons and the process in the Commons?

Mr Stanley: Yes.

Q170 Mr Burstow: Obviously that is what we are focusing on. But do you take any different view about attempting to take part in and influence the process when it reaches the Lords’ stages?

Mr Stanley: The Lords has a different atmosphere, there is less strength of party whipping. It is sometimes easier for the Executive to change things in the Lords because it does not get into this macho, u-turn type stuff. I do not want to give the impression that I buy into the idea that everything in the Lords is superior to the Commons and everyone is a great expert, there are many debates that do not
always bear out that view in the Lords, but sometimes there is definite expertise and you can get a real debate amongst people who have a lot to say about something with some deep personal knowledge and that can make some difference at the margin. Again, they tend to be about the more technical aspects of bills rather than the more political ideological elements of bills. There is something that can be learned from that. The Moses Room procedure is rather interesting where you have perhaps got time on less controversial issues with people with real expertise to spend quite a bit of time looking at something in a rather constructive way than the ritualistic way you get sometimes in standing committees.

Q171 Mr Knight: Is what you are saying this, in effect, that the publication of a draft bill and the pre-legislative scrutiny process should become the norm rather than the exception because ministers are willing to be more flexible and there can be no accusations of a u-turn because nothing is set in stone?

Mr Stanley: I am not sure I am going to say the majority. I am going to say that I think there are bills where it is particularly appropriate and it is useful when the government does that because they are almost signalling, “This is a bill over which perhaps we are prepared to make adjustments, we do not necessarily have fixed ways of doing it. Perhaps the objectives are clear and rather consensual but there is a lot of room to debate about mechanisms”. There are some bills, short ones, highly controversial ones, where that would be less appropriate. There has to be some judgment. My worry would be that if it was a rule that applied to all of them that the rather ritualistic nature of standing committees might then start to apply to some of those other procedures as well and there would not be the signal there is at the moment which organisations like the TUC find really useful, that this is somewhere we can make a difference, this is somewhere it is really worth putting some of our resources into.

Q172 Mark Lazarowicz: It strikes me that if we were to end up with a much more open system where organisations like your own could get involved in the consultative processes and put a lot of their views to us, there would be a panic amongst your organisation and others as to how they would respond to those offers of consultation and involvement. Presumably you would have to prioritise how you got involved and you would have to make changes. To do that you would require good information about what is going on. I would be interested in knowing first of all what kind of information you would find particularly useful, if there should be more than we provide at the moment there are records to be kept, it is really rather complicated, it is quite difficult for unions to understand and for managers to understand because it is not a straightforward, simple rule. Differentiating between those two costs, the cost of actually implementing and the cost of administering, is often a missed opportunity in RIAs.

Mr Stanley: I think there are a number of questions bundled up there. First of all, you are right, it is very hard even for organisations like the TUC, and I would guess the CBI, to really understand everything that is going on that might have some implications for our concerns. To some extent, asking for more information to be published is possibly not the right thing. It is making it useful, making it easy to find, easy to search. The ability to search is so much more powerful than the ability to just order an enormous number of documents and have to go through them. In general, we find Explanatory Notes helpful. Legislation can be very hard to follow, particularly when it refers to changes in previous legislation and you have to try and find that, and that is not always easy to do. The more things that are in plain English, the better. The easier it is to trace the changes in bills as they go through the parliamentary procedure, the better that is. All of these things are very helpful to us.

Q173 Paddy Tipping: Could I ask about RIAs. Clearly they have got implications for your membership. I find them helpful. Do you think they are evidence-based and are you involved in the formulation of the RIAs?

Mr Stanley: We are. I think we would agree they are getting better but we have had some severe problems with them in the past. The classic one that we always cite is the original Regulatory Impact Assessment around the European Working Time Directive and the limitation to 48 hours as the average working week. The Regulatory Impact Assessment worked out the cost of this by assuming that employers would continue to have exactly the same numbers of hours of labour and would employ extra people and pay them exactly the same, which we thought was an extremely pessimistic view of the ingenuity of British management that they could not think of some way of increasing their productivity. That figure is out there, it is regularly quoted as a “This is the cost of red tape in Britain” figure when actually the evidence base for that was very bad. A lot of these things are very hard to assess. Clearly there are some cost implications in a measure like that but what they will be and how ingenious people will be in responding to them is very hard to capture. We are not against RIAs but we are sometimes a bit sceptical about them. Often it is much harder to quantify benefits that regulations have as well and to put a monetary figure on those, so they do not tend to get put into the equation. Sometimes there is also confusion between the cost of implementation and the cost of the policy. If we take the minimum wage, there is clearly a cost in paying people more money but the actual cost of implementing it is not very bureaucratic, it is just a simple wage you have to pay, compared with, say, the working time rules where there are records to be kept, it is really rather complicated, it is quite difficult for unions to understand and for managers to understand because it is not a straightforward, simple rule.

Ev 48  Select Committee on Modernisation of the House of Commons: Evidence

38 June 2006  Mr Nigel Stanley
Q174 Paddy Tipping: But you think they are improving?
Mr Stanley: We think they are getting better. We are not certain they have got it yet.
Chairman: Mr Stanley, I am one of the people who quoted the cost of implementing the Working Time Directive in that form so I think it is a pretty pukka figure but, anyway, we will not go down that route.

Q175 Sir Nicholas Winterton: Could I just ask Mr Stanley whether he would support the CBI—I am not sure he has indicated—in their view that secondary legislation could and should be subject to amendment because increasingly secondary legislation forms part of primary legislation and when secondary legislation is introduced it can add considerable burdens and regulation to existing legislation. Do you think it should be subject to amendment?
Mr Stanley: I think we have some strong sympathy with the idea that a lot of secondary legislation, as I think you said in your earlier question, is becoming a bigger feature of bills and has been for some time, it is not associated with this government in particular, and it does not often get enough scrutiny. I would be a bit worried about having a simple amendment stage because you could end up with some political dissatisfaction being expressed through an amendment to a set of regulations which then become very hard to implement because they would be technically unsound in some way. I think we should have a simple, let us have a debate where we can have amendments to it without getting a surprise, but if you have a full parliamentary procedure with further chances to scrutinise then you may end up with simply having the legislation again and bottlenecks and all kinds of things. I am not sure there is a simple solution to this problem but there is a problem. It may be that you should borrow something from the trade union movement which is to refer things back sometimes if you think the government has got it wrong and say to the government, “You need to redraft this, it does not meet our desires”.

Q176 Sir Nicholas Winterton: That could be achieved by a sunset clause which, again, the CBI did mention. That means that after, say, two years, three years, five years, a particular aspect of a piece of legislation could automatically end and be reviewed.
Mr Stanley: Again, the general support for this is from those who are generally opposed to regulations in the first place, which I am not sure I want to associate the TUC with. I think it is a horses for courses issue. There may well be a case for some regulations to have reviews, just as in the way there is a case often for putting positive agreement so there has to be a formal vote on regulatory changes as well. I would not want to generalise too much. If you had a sunset clause on everything, after a few years there would be so many reviews of, frankly, very uncontroversial sunset clauses you would end up with another bottleneck, another huge amount of monitoring for people trying to follow parliamentary business and you may end up clogging your arteries with sunset clauses after a while.
Chairman: Just on this point about reference back. The problem with reference back is at the moment you have got a procedure which is either yes or no, and if it is no then the thing has to start again. Just to tease out what you are saying, Mr Stanley, it might be possible to have a halfway house where it is not that the Commons has rejected a piece of legislation but it could, for example, delay it and that may be something we need to look at. Personally, I think there are some quite serious problems in the way of amending regulations just in practice, being responsible for volumes of these things. That is a matter to be discussed.

Q177 Sir Nicholas Winterton: 1,500 statutory instruments in the course of a year. We are already faced with that.
Mr Stanley: Yes.

Q178 Paddy Tipping: Could I ask about European legislation. How do you think we can deal with that? How can that be improved?
Mr Stanley: In general I think we take the view if it is European legislation we expect it to be implemented and on very much of it, in some sense, having a long debate is something I can see the point of but it is not something that we would choose to deploy our resources or be involved in because the outcome of it is still going to be whether it follows the European requirements or not. The idea of having the same MPs gaining expertise on the domestic and the European implications of things, which was discussed earlier, is one that inherently makes sense to me. Giving MPs a chance to build up expertise so that any measures are going to people who do know something about what they are scrutinising must be a good thing. We do not put very much effort into following the path of European legislation. Again, we might talk to government about how they intend to do it but it is not somewhere where there is much opportunity for people who are not parliamentarians to have much of an impact on what will happen, so it is not something where we put much of our resources.

Q179 Mr Sanders: At the European level do you not try and influence questioning, either the need or desirability for a certain course of action or, indeed, to propose a certain set of regulations given the amount of European legislation that relates to employment issues that would impact on your members?
Mr Stanley: Absolutely, yes. We do put a lot of resources into work in Brussels, and to a lesser extent in Strasbourg. That is where the key decisions are taken about European legislation, so that is where we put our limited resources. I would agree with your evaluation that we are quite good at it and we have made some significant differences to people at work from the kind of work we have done at the European level.

Chairman: Thank you very much indeed. We are very grateful to you.

Law Society (M 61)

THE COMMITTEE STAGE OF PUBLIC BILLS:
CONSULTATION ON ALTERNATIVE OPTIONS

A. PREFACE

The Law Society

The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the profession and in its public interest role works for reform of the law and improving access to justice.

The Better Law-making Programme

Through its Better Law-making Programme, the Law Society is seeking improvements in the way the law is made and in its accessibility, from preliminary and consultation stages to publication and implementation of a new measure. The Society is calling on and encouraging Government, and the political parties, to build on the changes to Parliamentary procedure already instituted and to continue to make reforms to the law-making process.

B. CONSIDERATION OF OPTIONS FOR CHANGE

The current position

In its helpful consultation paper, the Committee sets out a range of options for the current standing committee stage.

This stage has been heavily criticised and change is clearly needed if, as the paper indicates, the aim is to improve scrutiny of public Bills, ideally with more input from the public.

Who makes decisions?

We agree with the Committee that a variety of approaches may be useful, depending on the task to be undertaken. For example, if a Bill has been published in draft and received careful attention within and outside Parliament at that stage, less time may be needed for scrutiny when its normal Parliamentary passage starts. The question is, of course, who will make that decision, and other decisions about the way a Bill is handled in any new structure?1

Priorities for the new structure

The consultation paper acknowledges the advantages of using Members’ knowledge and experience and this should, we think, be taken into account in choosing committee members.

It is also important that MPs and committees considering Bills remain accessible to the public, and that making representations is as straightforward as possible.

Given the pressure on Parliamentary time, and the difficulty of obtaining an opportunity to correct a measure which is not working well, the priority for governments, oppositions and Parliament should be producing effective legislation. Effective legislation would include provisions which are carefully and thoroughly scrutinised, having been laid before Parliament in their entirety at the outset, and which will get things right first time.

1 For example, which amendments to select in debate.
A Bill’s Parliamentary passage

At present, a Bill introduced in the House of Commons in theory goes into Committee for detailed scrutiny after Second Reading. However the Bill may be dramatically changed or added to by huge numbers of government amendments introduced much later, often in the final stages of consideration by the House of Lords. Because of the rigours of the Parliamentary timetable, these may receive virtually no scrutiny at all.

Further, draft regulations—which, for users, often contain the meat of the changes—may not be published until an equally late stage. Because these are not usually amendable, but stand or fall as a whole, there is likely to be great reluctance to vote them down (thereby making operation of the new Act in some cases virtually impossible) however unsatisfactory they may be. The non-statutory guidance which amplifies these measures and explains to users what the changes mean for them is rarely scrutinised by Parliament and may not be published until even later.

We think this is undesirable. Much of the problem arises from trying to fit too much work into too little time. Thus we think it may be worth considering whether the pre-legislative stages of a new measure could be considerably extended. As much as possible could be resolved before a Bill starts its timetabled legislative stages, so that if subsequent changes are necessary, as they will almost inevitably be, they need not be dealt with in a rushed or skimmed manner.

Ideally, therefore, after a careful public consultation process, a draft Bill would be published, accompanied by draft regulations and as far as possible draft soft law (ie the relevant non-statutory guidance which would amplify the new Act) or at least, as has been suggested by the Modernisation Committee, “a detailed statement of policy”2. There would be further opportunities for public comment and the Bill would only start its passage towards enactment once as many issues as possible had been resolved.

The way forward

We feel reluctant to suggest in detail to the Committee which structures would best meet these objectives. However we would like to comment on the proposals put forward in the consultation paper and recommend that further public consultation takes place later on preferred options.

Special Select Committees

We think there is a strong argument for greater use of special select committees, with their enhanced evidence-taking powers. This would be particularly helpful where thinking on a proposal changed after consultation or White Paper stage, as was the case for instance with the Legislative and Regulatory Reform Bill 2006. Respondents to the consultation would value a second chance to comment in the light of the new proposals.

Joint Committees

If a joint committee were substituted for the present standing committee, and could also take evidence, this could assist those putting forward views, as they would only need to do so once. (The current system may give an unfair advantage to those with the ability to lobby over long periods of time.) However there would be considerable implications for subsequent consideration of the measure by the House of Lords and issues such as timetabling and programming, which do not normally arise for the House of Lords.

Departmental Select Committees

Much legislation crosses several departmental boundaries (although one department will be in the lead as far as piloting the measure through Parliament is concerned). It is important that pre-legislative scrutiny covers all the ground fully, regardless of departmental responsibilities.

This difficulty is exacerbated when two provisions touch on related matters. In such cases it becomes all the more important that pre-legislative scrutiny is especially thorough and in particular that the resultant measures neither overlap nor leave a gap in provision. For example, the Mental Health Bill was a proposal put forward by the Department of Health, with involvement of the Home Office on certain aspects. The Mental Incapacity Act is a measure from the Department for Constitutional Affairs. Although the Mental Health Bill has now been withdrawn, changes are likely to existing legislation and the Society is concerned that, when implemented, the two statutes will dovetail. The risk of problems if this is not resolved will be borne by a particularly vulnerable group of people and those involved in their care.

There is accordingly a risk that if a departmental select committee is charged with scrutinising a Bill, it may give more attention to areas with which it is familiar, and possibly fail to deal fully with important issues which another Committee would be aware of. We would therefore prefer a new ad hoc committee consisting of perhaps some members from each of the relevant departmental select committees if this proposal is pursued.

Re-committal

We think a Bill should be recommitted for early-stage scrutiny if it is substantially changed at a later stage. Of course it will be a matter for debate what constitutes “substantial change” but unless re-committal is available, late amendments may still escape detailed attention.

Split committal

In line with the suggestion above, the advantages of split committal might be attained without the disadvantages discussed in the consultation paper, by creating a new committee consisting of representatives of the relevant bodies. If necessary, a number of sub-committees could report back to a plenary session.

External evidence

Restrictions on the consideration of external evidence should be removed. However, bodies within the new structure should be able to decide how to proceed, subject to being required to justify decisions to refuse to consider outside evidence, for example, that new points were not being made.

March 2006

Law Society further submission (M 61(a))

THE LEGISLATIVE PROCESS

A. PREFACE

The Law Society

The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the profession and in its public interest role works for reform of the law and improving access to justice.

The Better Law-making Programme

Through its Better Law-making Programme, the Law Society is seeking improvements in the way the law is made and in its accessibility, from preliminary and consultation stages to publication and implementation of a new measure. The Society is calling on and encouraging Government, and the political parties, to build on the changes to Parliamentary procedure already instituted and to continue to make reforms to the law-making process.

Given its significance for both individuals and for business, it is vital that legislation is understandable, accessible and effective. Too often it is hard to use, find, understand and apply. Welcome changes, such as publishing some Bills in draft, have already been introduced. More however needs to be done. The Society argues that improving the process could improve the product.

B. PRELIMINARY POINTS

Solicitors' role

The Law Society warmly welcomes the Modernisation Committee’s examination of the legislative process. Solicitors of course deal with the “output” of this process every day, explaining the issues and problems to clients, and are well placed to consider the effect of the various stages on the end product.

Problems of legislation

Problems with legislation, both primary and secondary, and indeed with soft law, which may be needed to amplify a measure, are varied. But for individuals and organisations, working out what the law is, and its impact on them, can drain time, energy and money. Such problems can cause distress and anxiety to those caught up in them.

The difficulties posed by legislation can be roughly grouped into three (although there is considerable overlap):

— problems of content, such as unclear wording;
— problems of structure and form, for instance a complicated organisational approach; and
— problems of access: finding what and where the law on a topic is.
(a) Problems of content

This covers obstacles such as the uncertain meaning of a word or phrase. This type of problem can arise for example when an EU directive is transposed into domestic provision, if the original wording is not sufficiently precise. Another range of problems centres on the way in which the EU provision is transposed. Problems can arise of course in purely domestic legislation as well.

Alternatively, old and new legislation may not work well together or may be incompatible or require reconciliation.

Whatever the source of the problem, court action may be necessary (possibly after many years of difficulty for those concerned). Such litigation, whether supported by private or public funds (through bodies such as the equality commissions as well as by legal aid), is expensive, stressful and time consuming.

An alternative to litigation is provided in some cases by a regulator, for example the Financial Services Authority, empowered to issue guidance or soft law on the meaning and interpretation of the statutes within their ambit. However soft law is not without its own problems (discussed briefly below), and in any event it may be challenged in court and possibly overturned.

(b) Problems of form and structure

The Identity Cards Bill contains a number of examples of both textual and structural complexity, a failing not unique to this measure. Another recent provision regarded as particularly difficult is the draft Mental Health Bill 2004.

On a practical level, much legislation is simply difficult to use. There is usually, for instance, no index in paper versions of Bills, Acts or Statutory Instruments (SIs), and no typological indication, such as bold print, that a word is defined in the measure (or in another).

(c) Problems of access

Finding what and where the law is poses problems of a different order and of many different kinds. We return to this topic in more detail in section 9 below and make some preliminary comments here.

Parliament’s approval of a Bill and Royal Assent are rarely the last stages in the matter. Much EU legislation for instance comes in the form of a framework Directive, implemented domestically by a series of regulations. Soft law, such as departmental guidance and circulars, is often needed to make an Act of Parliament and regulations ultimately workable on the ground. This will be issued by the Department and other bodies, such as a local authority, and may be extensive.

Further, primary legislation may not come into force until long after Royal Assent. The fact that a section or sub-section is not in force is not clear on the face of the original Act. Some provisions may have been amended repeatedly, creating a chain of primary and secondary legislative texts, and case law, that even well-resourced legal specialists find hard to unravel. (While it is important that such material remains available on paper of course, using the internet could help bring it together in one place, thus greatly improving its accessibility.)

Another hazard is delay in publication of regulations and soft law. Users and their advisers need time to prepare for new legislation and late publication of the relevant material may make this very difficult. Poor anticipation of how provisions will work in practice, or fit in with existing requirements, may lead to other problems.

More rarely, provisions are found in unexpected places. For instance, repeal of a requirement to notify local authorities about storage of celluloid film can be found in an employment measure. For those with internet access, the availability online of statutory and other material now makes tracing such material much easier, but even so, there may apparently be no need to make extensive searches and so such scattered provision may not be found.

Amended legislation and legislation in force

Once amended, legislation is not officially republished by the Office of Public Sector Information (OPSI) unless it is consolidated. As the OPSI website puts it, “[a]ll Public General Acts appear as originally passed by the UK Parliament”. Thus there is little to warn the unsuspecting user that a measure may have been substantially amended or even repealed. The amending measure itself may simply be a series of opaque statements such as to “delete from section x to section y”. Commercial publications are available which set the law out as it now stands, but these can be costly and are usually only easily available to professional advisers. Again, the internet could make a vast difference in showing the law as it currently stands, and which measures have been brought into effect.

Some solutions

Clearly existing ways of producing legislation can present many problems. However, a good proportion of these can be resolved or ameliorated by relatively simple steps. In answering some of the questions posed by the Committee, we set some of these out.
C. ANSWERS TO QUESTIONS

(For convenience the questions posed are included in italics and headings have been added.)

Parliament and Public

1. How we can improve on communicating the content of bills to a wider public. How Parliament informs the public of the legislation it is considering. What measures we need to put in place to encourage the public to contribute to procedures such as pre-legislative scrutiny.

Recent research

1.1 Many of these issues have been thoroughly researched by the recent Hansard Society Commission on the Communication of Parliamentary Democracy, chaired by Lord Puttnam. The report of the Parliament First group, Parliament’s Last Chance, also considered this matter. Our comments in this connection are based on the presumption that the widest possible and highest quality participation and communication between the public and their Parliamentary representatives can only benefit both democracy and the rule of law, and so result in improved law-making.

1.2 In our recently published Better Law-making Charter we made suggestions about making it easier to find out what is happening in Parliament and on a particular measure—for instance: the Parliamentary website should be designed to help users understand and follow the progress of current and forthcoming legislation. Hansard, long Bills and SIs should be printed with an index; after each parliamentary stage, Bills should be reprinted on paper of a different colour, and made available online, showing the deletions and additions made to the text in debate. A shorter version of Hansard should be published, to show the effect of votes on the Bill.

1.3 It can be extremely difficult to follow in detail the progress of a Bill, even using the Parliamentary website. Giving each significant Bill its own web pages would help. These could show how proposed and actual amendments agreed in debate would affect the text, rather than using the formal but opaque “in line x delete from and to but. . .” model, which leaves the average user little wiser.

The Internet and digital TV

1.4 The internet, while being the obvious medium for improving communication, has the major drawback of not yet being available to everyone. Without equal attention to conventional means of communication, greater use of the internet risks widening the digital divide, and excluding those whose work or daily life does not make them familiar with computers, those who left work before their use became widespread and those who cannot afford them or cannot easily get access to or use them. While all the varied opportunities the internet offers should be used to the full, it cannot yet be relied on as the only or main means of contact with the public. Of course, even those with access may not think of checking the Parliament website, however improved it may be or become (as the Puttnam Commission recommends).

1.5 Similar considerations apply to digital television, but perhaps the familiarity and ubiquity of TV suggests that the digital Parliament channel may be slightly more accessible.

Constituency activity

1.6 MPs may still be better able to bring current issues to public attention, and thus obtain the public’s views, on a constituency basis. There, local networks, regional newspapers and meetings may help show how national issues will have immediate impact.

1.7 Despite the comments above about the dangers of over-reliance on the internet, MPs should be encouraged to make use of it—a check on the Parliamentary website shows that not all MPs have their own site and others do not even have email.

Pre-Legislative Scrutiny

2. Has pre-legislative scrutiny resulted in better legislation? Could its use be extended and, if so, what consequences would there be for the legislative process?

Desirability of pre-legislative scrutiny

2.1 It would probably be difficult to prove scientifically that more pre-legislative scrutiny has improved legislation, but it would seem unarguable in practice that it has. Both the Hansard Society and Parliament First support it, as did the Modernisation Committee in its First Report in 1997. Effective consultation procedures and processes such as publication and consideration of Bills in draft would appear to have greatly improved the text which is presented to Parliament or to have identified drawbacks in the draft text which require its rethinking.
2.2 An excellent example of the process working well is the draft Corruption Bill 2003. This Bill, as the Joint Committee on it reported, was a long time in the making. “Its provenance” started with the Salmon Commission on Standards in Public Life in 1975. Further developments led to a Law Commission Consultation Paper in 1997 followed by its report, Legislating the Criminal Code: Corruption, in 1998 which included a draft Bill “in essentially similar terms” to the Bill before the Committee in 2003. Even so, the Committee said, “The written and oral evidence we have received has been highly critical of the Bill from a wide range of different viewpoints. While no one has challenged the need for new legislation, there have been many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility”. 

2.3 The evidence the Joint Committee was given was interesting, in that it highlighted the need for outside contributions from those with real experience of coping with the problem. For example, one contributor said, “I do not believe that the drafters of the Bill understand the workings of corruption”. 

2.4 The Committee thought “the Bill [did] not proceed on the right basis” and concluded that the underlying conceptual approach of the Bill needed wholesale change, not mere modification: “In the light of the criticisms which have been made of it, we do not consider that the draft Bill should be left as it stands on the essential issue. The choice is between modifying the Bill by trying to improve it marginally. . . the Bill would still be obscure and unsatisfactory... On the other hand we can adopt a completely different approach... This alternative course is, we believe, the right one”. 

2.5 The Committee asked for a revised Bill taking its comments into account. Their comments were heeded, the Bill was duly scrapped and in December 2005 the Home Office issued a further consultation paper on bribery.

2.6 As the history of the Corruption Bill shows, the improvements may be in both conceptual structure, content and drafting. Occasionally a proposal will be regarded as so misconceived that the only way out is to start again—and perhaps engaging the expertise and experience of outsiders is the best and quickest way of finding this out before too late in the Parliamentary process. Almost inevitably outsiders will bring to the discussion practical ideas and suggestions, based on direct knowledge, that would not otherwise have been available to Parliament.

2.7 Thus these crucial pre-legislative stages should allow fundamental matters to be raised and addressed in time for them to be resolved before a Bill formally enters the relatively inflexible law-making timetable. If necessary this would involve withdrawal of the proposals and re-drafting or re-structuring.

RIAs and Legal Aid Impact Tests

2.8 In addition, new pre-legislative steps such as regulatory and other impact assessments (for instance the Department for Constitutional Affairs’ new Legal Aid Impact Test (LAIT)) also help identify and tease out issues which might otherwise be overlooked.

2.9 Examples of factors which the LAIT should identify for attention include the cost of a new measure in terms of legal aid funding for more cases (both advice and representation), similar calls on the resources of bodies such as the Equality Commissions and ACAS, and the cost to the court and tribunal system of additional hearings, as well as whether the projected number of new cases will create longer delays for existing users.

2.10 In addition at RIA stage the arrangements for any cross-departmental working, prior to implementation as well as afterwards, could be set out. For example, a new offence punishable by fines, created by a Home Office measure, may mean implications for the work level of court bailiffs, the responsibility of the Department for Constitutional Affairs. Responsibilities for operation should be clear, as should liabilities for costs.

2.11 Finally, the utility of RIAs could be improved if they included indicators by which the success of the measure could be assessed in any post-legislative scrutiny.

Dovetailing of new and existing legislation

The example of the Criminal Justice Act 2003

2.12 One other aspect which needs to be attended to far more than it has been is the inter-relationship of the new measure with existing ones. Special attention should be given to this, otherwise very severe and costly difficulties can result. An instance is the Criminal Justice Act 2003.

2.13 It is important that all legislation is clear, but this is particularly so where criminal offences are concerned, as the liberty and reputation of the individual may be at stake. Unfortunately the Criminal Justice Act 2003 has caused numerous problems in this respect (and was a measure subject to many late amendments during its passage). The comments of Lord Justice Rose, Vice President of the Court of Appeal (Criminal Division), in a recent case graphically illustrate some of the problems which can arise if careful attention is not paid to the dovetailing of new and old legislation.
2.14. Quoting the Court of Appeal’s reference to parts of the 2003 Act as “labyrinthine”, Lord Justice Rose said that in the present case, 
“the provisions are not merely labyrinthine, they are manifestly inconsistent with each other and we have every sympathy with lay Justices, their clerks and District Judges who are having to grapple with them” (para 3).

2.15 He referred to the “legislative morass” (para 5) with which the Court had to deal, and 
“other anomalies . . . For example, section 24(1A) of the Magistrates’ Courts Act 1980, as currently in force, refers to subsection 91(2) of the Powers of Criminal Courts (Sentencing) Act 2000, albeit that that has now been repealed . . . And the sending for trial provisions of section 51A(3) of the Crime and Disorder Act do not yet apply to offences concerning firearms and homicide or offences concerning serious or complex fraud” (para 13).

2.16 He continued, 
“The most inviting course for this Court to follow, would be for its members, having shaken their heads in despair to hold up their hands and say: “the Holy Grail of rational interpretation is impossible to find”. But it is not for us to desert our judicial duty, however lamentably others have legislated. But, we find little comfort or assistance in the historic canons of construction for determining the will of Parliament which were fashioned in a more leisurely age and at a time when elegance and clarity of thought and language were to be found in legislation as a matter of course rather than exception” (para 14).

Guidance

2.17 The court noted that guidance had been drawn up informally by local justices’ clerks because of the problem of the “conflict between section 51A(3)(d) and section 24 of the Magistrates’ Courts Act 1980”. The guidance offered “an interpretation of the provisions [which] provides a compromise solution. It has received fairly wide support amongst CJS practitioners including the Judicial Studies Board and some parts of the Justices Clerks Society” (para 7). The court then went on to give guidance to justices on the operation of “these two inconsistent sections in a particular case” (para 17) and “pending the implementation of paragraph 9 of Schedule 3 of the 2003 Act, which we understand is not contemplated for many months” (para 17).

2.18 A more satisfactory, formal, and national means of dealing with such problems is surely urgently needed.

2.19 This difficulty is exacerbated when two provisions touch on related matters. In such cases it becomes all the more important that pre-legislative scrutiny is especially thorough and in particular that the resultant measures neither overlap nor leave a gap in provision. For example, the Mental Health Bill was a proposal put forward by the Department of Health, with involvement of the Home Office on certain aspects. The Mental Incapacity Act was a measure from the Department for Constitutional Affairs. Although the Mental Health Bill has now been withdrawn, changes are likely to existing legislation and the Society is concerned that, when implemented, the two statutes will dovetail. The risk of problems if this is not resolved will be borne by a particularly vulnerable group of people and those involved in their care.

The Need for Improved Pre-legislative Stages

2.20 In the light of problems like these, therefore, we recommend increasing and improving pre-legislative scrutiny. Ideally, the text of the Bill which is presented to Parliament would consist of matters which are as broadly agreed as possible and where the outstanding and contentious issues are clear. The extensive preparatory work in relation to the Sexual Offences Act appears to be a useful model for the consultative stages. In addition there should be no doubt about the inter-relationship of the new measure with existing provision clear. More time may need to be allowed for these stages to be completed—in this connection the carry-over provisions may be helpful.

Standing Committees

3. Is there scope for modernising the work of standing committees, making them more effective in scrutinising the detail of bills and more accessible to the wider public (including organisations with an interest in the legislation)? Would alternative models of scrutiny be more effective in some cases?

3.1 Again, the Hansard Society has recently considered this topic, and briefly reviewed the “widespread, and often trenchant criticism” Standing Committees have received in the past. The Modernisation Committee itself, in its first report, also noted that “large sections of the Bill [may not be] considered” in certain Standing Committees.
3.2 This is a major concern. The Hansard Society has noted that, “Scrutiny is often patchy and haphazard; many clauses can pass through a [Committee] without any scrutiny at all, even when the provisions are of major importance and might have direct effect on the financial well-being or the liberties of the public.”

3.3 The basic questions which “should always be asked”, says the Hansard Society, are:
- Is the proposed law as clear and unambiguous as possible?
- Are the measures practical and likely to be administratively sound?
- What will be the law’s consequences?

3.4 However a Standing Committee in its present form may not be the best way to answer such questions. At a minimum, evidence from potential users is likely to be necessary. Unless the Bill has been changed from earlier stages, there is a risk of asking respondents to repeat comments given already (which may be a burden for individuals and smaller organisations, thus perhaps increasing the influence of larger and better-resourced bodies).

3.5 It may therefore be worth considering a substantial change to the pre-legislative stages of Bills, to ensure that stakeholders’ views are properly taken into account at the right point in the process. Some pre-legislative stages might be combined, for instance, using special standing committees (as the Hansard Society recommend) so that evidence may be taken from interested outsiders. Joint Committees of the Commons and the Lords may also be a useful model. Further, changing the way the Bill is approached might be possible, for example dividing consideration of the underlying policy from the expression of that policy in the written text once the policy is clear.

**Report Stage and Lords’ Amendments**

4. **How could proceedings at report stage and consideration of Lords Amendments be improved?**

4.1 Substantive amendments introduced by government at a late stage should not escape detailed scrutiny. For example, if a substantial amendment is introduced by government at Report Stage there could be a requirement to reconvene the Standing Committee to consider it, and in appropriate cases to receive evidence from outside bodies. This could encourage the promoters of Bills to introduce them only when thinking on all aspects is as complete as possible before they start their passage through Parliament.

**Programming and Carry-Over**

5. **What has been the impact of programming and carry-over on the Government’s legislative timetable? Could carry-over be used to establish a more regular, less cyclical annual pattern of legislative business in the Commons? Could programming be used more effectively to target scrutiny on the parts of a bill which most require it?**

5.1 Carry over, while negating end of session effects, has undoubtedly been useful in allowing greater and more considered attention to be given to Bills. We think that workable effective legislation, which gets things right the first time as far as possible, should be the priority of both sides of the House at this and other stages.

**Post-Legislative Scrutiny**

6. **How could more systematic use of post-legislative scrutiny contribute to improving existing legislation?**

6.1 We have submitted two papers to the current Law Commission study and strongly support the concept of systematic post-legislative scrutiny. However, a number of difficult issues need to be resolved before this can be generally effective.

Post-legislative scrutiny now

6.2 Of course, post-legislative scrutiny already takes place in an informal way. Individuals and organisations affected by a measure will know whether new legislation is working effectively—or not, resulting in problems which are all too familiar: uncertainty, delays, cumbersome procedures, badly thought out forms, additional costs, information which is difficult to find and unhelpful when you do and so on. When this happens, Parliament and government may become aware of the difficulty, through complaints from users such as constituents, or representative bodies and similar groups. But they may remain unaware of many others, for example if users do not know how, or to whom, to report problems. In any event, individual MPs may find it impossible to do anything to put the matter right.

6.3 Another kind of review is litigation. This may be necessary to clarify the law (usually at considerable public or private expense and often taking some years to conclude). Legislation may even be passed by Parliament with the clear intention that judicial decisions will be necessary to enable it to work. For example
a case may need to be brought to clarify the meaning of “reasonableness” in the context of an employment provision. (Whether this is still desirable or necessary, given the availability of soft law measures such as codes of practice, is another matter.)

6.4 Compliance and conviction rates in criminal cases are also rough and ready tests of whether a new law works as expected.

6.5 Sunset clauses may be regarded as a means of post-legislative scrutiny. (These set dates on which provisions will cease to have effect, and so bring measures back to Parliament if governments seek their renewal.) While sunset clauses do offer Parliament an opportunity to review and reconsider, they can give a false sense of security: they are not a real alternative to systematic post-legislative scrutiny. Generally we think that a sunset clause should bring a complete end to the provision and if Government wishes to continue with it, the matter should be reintroduced through further primary legislation and not merely renewed by a simple vote.

6.6 More generally academics, campaigners, commentators, lobbyists, pressure groups, research units and “think tanks”, as well as voluntary, representative and professional bodies, critique the law and propose change and thus provide further informal post-legislative scrutiny. The Law Society for example produces an annual review of Tax Law, which covers, amongst other topics, “correction of anomalies and remedies for practical problems” experienced by practitioners.

6.7 However this huge amount of experience and information is not collated and marshalled, nor are all the issues always addressed. Concerns are scattered and may be only vaguely articulated. They may not even be identified as problems with a particular piece of legislation. A systematic process of post-legislative scrutiny would have to capture as much of this experience of the operation of a measure as possible as well as conducting more rigorous, formal, standardised analyses and assessments.

Post-legislative scrutiny, time and policy differences

6.8 Time and policy differences pose major difficulties for a new system of post-legislative review by Parliament. The Hansard Society refers to the probable and “understandable” reluctance of governments “to revisit an area, to which it has devoted time and political capital, only to find that its actions have not worked out as hoped or promised”. Some measures may fail to work well because they are simply under-financed and under-resourced, as a result of budgetary constraints (or simply poor planning). In these cases, the basic legislation may be perfectly satisfactory and there may be a general appreciation of the nature of the problem. It may be thought by business managers that little would be gained by repeating complaints which would already have been aired, if further resources will not be made available: but the difficulty created may be genuine and acute.

6.9 Review of politically difficult measures is also likely to be problematic, especially when a change of government takes place between enactment of a controversial measure and the time for its review. Governments would need to reach an accord about not using a “review” to, in effect, repeal or undermine measures to which they have policy objections. Further, governments are unlikely to agree to delay their own future programmes in order to put right the errors or omissions of a politically opposed predecessor. However it may be that from time to time this nettle will have to be grasped: some measures may simply have failed to work and need to be scrapped and redone.

Which measures would be reviewed?

6.10 Time and resources will be limited. So which measures should be chosen?

6.11 One initial question is whether there would be any point in undertaking a review of measures which were working well. In principle the answer must be yes, because lessons could be learnt and applied elsewhere. However this approach increases the number of candidates for review, rather than reducing it.

6.12 Could measures be selected on an annual (or departmental) or sessional basis? This would help address a concern raised by Professor the Lord Norton of Louth, former Chairman of the House of Lords Constitution Committee, that single measures, if reviewed, are reviewed in isolation, while the aggregate output and impact of a Parliament is not assessed.

6.13 Post-legislative scrutiny would need input from all users of the measure. With this additional call on their time, would stakeholders and consultees suffer “consultation fatigue”, meaning that only the largest and most persistent (but not necessarily the most representative) of lobbyists would have the necessary resources?

6.14 Is “he who shouts loudest” the most likely to be heard? The criteria for selecting which issues to review should ensure that those whose voices are most likely to be drowned out—the socially excluded, the old, the poor, the non-organised, the unglamorous and the unrepresented—are not disregarded. While
many significant problems for individuals and organisations reach the attention of MPs and peers, others may not, nor will they receive significant media coverage. The adage “absence of evidence is not evidence of absence” should be borne in mind.

6.15 The first issue therefore is to ensure that measures which genuinely need attention, and not just those which attract the most, are identified and brought within the scope of potential review.

When?

6.16 We would argue against a fixed period generally applying. Some time between two to five years after implementation would seem reasonable, allowing for shorter or longer periods as appropriate. The timetable for review would need to be agreed during the passage of the Bill.

Scope of post-legislative scrutiny

6.17 We first touched on this topic in the preliminary points at the start of this paper. Given the extent to which operational detail is dealt with not by primary but through secondary legislation, post legislative scrutiny should logically extend beyond the Act to encompass any regulations and soft law made under it. Both the regulations made and the appropriateness of the extent of the power (as things have turned out) might be addressed, along with any need for Ministerial assurances and explanations given in debate to be formally incorporated into statute and factors affecting the accessibility and usability of the relevant soft law.

6.18 These issues arise particularly in relation to framework bills, which are increasingly common. They introduce often very significant changes through a relatively straightforward piece of primary legislation and leave much of the detail about day-to-day operation to regulations (and regulators) and soft law. We return briefly to this issue in paras 9.5 below.

What action would follow?

6.19 Governments should at least be required to respond to formal post-legislative scrutiny reports and, if not acting on the recommendations, to say why not.

6.20 It may also be possible to obtain a commitment that some recommendations, perhaps concerning human rights and civil liberties, or other key issues such as matters relating to payment of welfare benefits, would at least be debated in Parliament. Nor presumably there would be anything to stop an MP or peer using existing procedures, such as adjournment debates and questions, to bring a report to the attention of the House.

6.21 Some of the recommendations made might not require government action. Recommendations about the adequacy of impact assessments, for example, could be acted on directly by departments. This would be particularly so if a measure was found to be working well and lessons could be learnt elsewhere as a result.

Ping-Pong

7. The impact of the procedures for waiting for, receiving, printing and distributing Lords Messages and related Motions and Amendments (ie “ping-pong”) have on the House. Is the fact that the House towards the end of a session has to suspend to wait for Lords messages the best use of Parliamentary time?

End of session ping-pong may be regarded as one of the areas where the political and legislative processes most noticeably collide, with government and opposition perhaps negotiating outcomes on the basis of a somewhat different set of considerations than at other times. At the end of the session, governments seek to salvage as much of their incomplete legislation as they can; opposition parties value the leverage the lack of time offers them. Such factors give this stage of the legislative continuum more prominence and constitutional significance than many others. The changes to legislation which result should be made with the main aim of putting effective, workable provisions on the statute book.

While a more measured resolution of matters outstanding at the end of the session may be desirable, as long as the Parliamentary timetable works in the way it does, problems will inevitably arise. Given the importance of this stage for the balance of power between government and opposition parties, we are reluctant to propose changes to this stage alone. We would suggest issues such as this might be the subject of separate consideration. Indeed, we suggest that there should be further detailed, public consultation on the Committee’s preferred options and proposals.
Deferred Divisions

8. The House has already adopted the use of deferred divisions in some areas, in response to previous recommendations from the Modernisation Committee. Divisions are not deferred during proceedings on bills (or on certain other types of Motion). Could the use of deferred divisions be extended? Are there ways in which the timing and organisation of divisions could be made more predictable, reducing disruption to other aspects of Parliamentary work?

We understand that in some circumstances this is already possible and that the practice in the Scottish Parliament is to deal with all votes at the end of the day. This would certainly prevent Select Committee (and in particular Joint Committee) and other proceedings being interrupted by divisions and would be advantageous to witnesses whose evidence is interrupted, and those who are waiting to speak, for example. A change would almost certainly save time. Essentially this is a matter for Members.

First Report of the Modernisation Committee


9.1 The First Report of the Modernisation Committee48 set out

“. . . the essential criteria which must be met in making any reforms. These may be summarised as follows:

(a) The Government of the day must be assured of getting its legislation through in reasonable time (provided that it obtains the approval of the House).
(b) The Opposition in particular and Members in general must have a full opportunity to discuss and seek to change provisions to which they attach importance.
(c) All parts of a Bill must be properly considered.
(d) The time and expertise of Members must be used to better effect.
(e) The House as a whole, and its legislative Committees in particular, must be given full and direct information on the meaning and effect of the proposed legislation from those most directly concerned, and full published explanations from the Government on the detailed provisions of its Bill.
(f) Throughout the legislative process there must be greater accessibility to the public, and legislation should, so far as possible, be readily understandable and in plain English.
(g) The legislative programme needs to be spread as evenly as possible throughout the session in both Houses.
(h) There must be sufficient flexibility in any procedures to cope with, for example, emergency legislation.
(i) Monitoring and, if necessary, amending legislation which has come into force should become a vital part of the role of Parliament”.49

9.2 We will not comment on all of these criteria, but have contributions to make on some, as follows:

9.3 (c) All parts of a Bill must be properly considered and

(e) The House as a whole, and its legislative Committees in particular, must be given full and direct information on the meaning and effect of the proposed legislation from those most directly concerned, and full published explanations from the Government on the detailed provisions of its Bill.

9.4 It would seem that these have not wholly been achieved. Time and procedural constraints continue to limit consideration of Bills (and secondary legislation, which was also discussed elsewhere50). Notes on clauses and the regulatory impact assessments now available have greatly improved the background information available about proposals, but if time does not permit the issues identified to be explored, their effect is limited.

Beyond primary legislation

9.5 While the Modernisation Committee's inquiry is mainly concerned with primary legislation, we consider that the next point is so important it must nonetheless be raised. The effect of developments such as notes on clauses is limited if they cannot bring to the attention of both Houses (and others) the detail of the operation of the measure, which may be crucial for users. Such detail is often included in regulations, which receive far less scrutiny than primary legislation. Further requirements about good practice etc may also be included in guidance (soft law), with which users are also expected to comply.
9.6 As far as regulations are concerned, these are rarely published along with a draft Bill. More often they are published in final form late in a Bill's passage through Parliament, or even after Royal Assent, so that there may be little or no opportunity for users to make submissions about the measure's future day-to-day operation while the Bill is before Parliament. This is a major concern in the case of framework bills in particular, where much of the substance of the measure will be introduced through statutory instruments and probably much soft law. Even when regulations are published in time for comments to be made on them, in the ordinary course statutory instruments are not amendable and a change may not be possible within the time available. Soft law is rarely published in draft or scrutinised by Parliament. Similar concerns arise when European measures are introduced via regulations under the European Communities Act 1972.

9.7 While a certain amount of late revision work, based on government or opposition amendments, is inevitable, we think a more comprehensive approach to a major new measure from the outset would be welcome, with an indication (if not drafts) at an early stage of the likely content of both statutory instruments and soft law, as the Modernisation Committee suggests. This would maximise the information available to future users and is thus likely to make their contributions to the debate fuller and more helpful.

9.8 (f) Throughout the legislative process there must be greater accessibility to the public, and legislation should, so far as possible, be readily understandable and in plain English.

9.9 Part of this topic—information for the public about what is happening in Parliament—is dealt with in our response to the first question raised by the Committee. However much could be done to improve the accessibility of legislation, in passage through Parliament and once passed.

9.10 The Society's Better Law-making Charter called for:

Each main measure [to] have a site or page of its own, with Acts and SIs in both "as passed" and "as amended" forms. This should include essential information such as dates of implementation and links to relevant regulations, amendments, departmental guidance and caselaw, other relevant primary legislation and the lead Department.部 Departmental websites should alert regular users to news and include all current guidance and circulars, archiving outdated material but keeping it available free of charge.

9.11 A further issue of concern to solicitors, legal researchers and other practitioners is the ease or otherwise with which legislative history can be traced, to advise clients on the meaning of a word or phrase, or for litigation or other purposes. This has become more significant since, as a note from the House of Commons Library points out, the 1993 decision in Pepper v Hart. This permits the courts to consider "statements made in Parliament by Ministers or other promoters of a Bill in construing" ambiguous legislation. Subsequently the note goes on to show that Notes on Clauses are also admissible, whether or not the legislation is ambiguous.

9.12 Researchers therefore need to be able to access all the relevant references to the particular provision in question. This has proved to be time consuming and costly. The experience of the Law Society’s Library is that researching the history of a single clause can take six hours or more.

9.13 For instance, a clause may be debated, amended, divided, rephrased and, often causing the greatest difficulty, renumbered or removed in the course of the various legislative stages it will pass through. There may or may not be a reprint of the Bill (for example, there is no reprint at Commons/Lords consideration of Lords/Commons amendments stages so reference needs to be made to the lists of amendments tabled). Not all law libraries (let alone solicitors' firms) will have access to all the necessary material in which the clause is mentioned. While some material is available on the internet, statutes before 1988 for instance are not available online through the Office of Public Sector Information. In any event, because of the way it is made available online, paper versions may be quicker and easier to use.

9.14 Much could be done using information technology to remove these difficulties. Clauses and their destinations could be trackable online, for example, with a history of their derivation (as is done in consolidation measures).

9.15 Improving trackability also applies to amendments to Acts and Statutory Instruments. In the document accompanying the Better Law-making Charter we said:

The internet could be an excellent means of making the law more accessible. For instance, many statutes have been amended or added to several times so that a chain of separate measures has to be marshalled to establish the current law. This can be a difficult task, even for the expert familiar with the material. Instead, each main measure could have a site or page of its own, with hyperlinks to related legislation, guidance, court decisions and other material. Acts and SIs could be available on these sites in their "as passed" form, and "as amended", showing the latest, revised current text of the Act and any related SIs. Dates of implementation and sections not in force should be clearly shown.

9.16 As to "readily understandable" legislation and the use of "plain English" there is still a long way to go. We commented above (see note 7) on the "impenetrable lack of clarity" the Society's Mental Health and Disability Committee found in the draft Mental Health Bill 2004. Other jurisdictions such as Australia, the US and Canada have done a great deal of work on plain language in legislation and we recommend following their example. Even simple measures such as design, layout, structure and signposting (such as emboldening defined words) would assist.
D. OTHER ISSUES

Administrative Burden Reduction and other initiatives

10.1 While this topic may be outside the scope of the enquiry, we think this is another issue of sufficient significance to raise briefly.

10.2 At present a wide-ranging exercise is being undertaken throughout departments to identify areas where administrative burdens could be removed or have been unnecessarily imposed. Members of the public and businesses are being asked to help identify such measures and departments are working with consultants to simplify existing regulation. While this is not a formal process of post-legislative review as discussed above, it has some of the same characteristics.

10.3 In addition to this review, Neil Davidson QC is undertaking a Review of the Implementation of EU Legislation. This Review is considering “goldplating”—or “going beyond the minimum necessary to comply with an EU Directive” as the Davidson Review puts it. An example is the Operating and Financial Review (OFR) regulations which the Chancellor announced in November 2005 would be withdrawn on these grounds. Further consultations are now taking place.

10.4 The Review is also considering measures which have been “double banked” (ie “EU legislation covers the same ground as domestic legislation and the two regimes have not been made fully consistent or merged into one”) or subject to “regulatory creep” (“where rules are unclear and where there is confusion between standards, guidance and regulation . . . [so that] stakeholders are not clear whether the requirements in a piece of guidance produced are statutory or best practice”. It is also seeking “instances where the benefits of over-implementation and higher regulatory standards justify the extra costs”.

10.5 In the light of these developments, we are inclined to argue that:

(1) if Parliament had had a greater overview of the whole of the legislative process, from Green Paper to regulation, soft law and implementation;

(2) if the legislative process made it clear from the outset what regulatory and soft law measures were likely to be imposed at the end;

(3) if, at every stage, individuals and organisations had been able to have their views and reasoning fully considered; and

(4) if there had been a structured process of review, with a commitment to act promptly on problems such an elaborate—and no doubt costly—unravelling process would be unnecessary, or, at least, much reduced in scale.

10.6 While lifting administrative burdens may be desirable, it should not be forgotten that even beneficial change is rarely without cost. The new provisions must be clear and helpful and in future processes must be put in place to ensure that difficulties can be promptly resolved. In addition, there must be a process of public discussion to consider and if possible agree principles for the ways in which EU measures will be implemented domestically in future.

E CONCLUSION

1. Much good work has been done by MPs and others over many years in looking critically at the legislative process and at Parliamentary procedures. The Modernisation Committee’s current initiative is an excellent example.

2. Clearly there is a wide consensus that, to meet modern conditions, changes to the way legislation is brought into existence are necessary. While many of the problems of the legislative process—for example political factors which affect legislative proposals—are inherent, and desirable, in a democratic system, some relatively straightforward, simple steps could be taken to achieve significant improvements in the short term, pending further reaching change. The most important factor is a positive commitment to bring such alterations about.

3. As we indicated at the start of this evidence, much legislation is vitally important. Long after the dust of Parliamentary battle has settled, legislation goes on to bring about real, substantial changes, impacting on the everyday lives of individuals and businesses. It requires people to do things, or to refrain from doing things, and can result in people losing their liberty, or pursuing new opportunities they had not previously imagined. It means that the need to get legislation right first time—even if it requires considerable change to the way it is made—is imperative.

F ISSUES FOR FURTHER CONSIDERATION

(a) To make speedier progress in reforming the legislative process, it may for instance be worth separating the work currently within the remit of the Modernisation Committee vis-à-vis internal matters (such as sitting hours), from more outward-facing work (such as that on streamlining the legislative process). The two work-streams could then progress concurrently.
(b) The Committee may be able to identify issues from its own experience and from the evidence submitted to this inquiry which indicate where progress might most easily be made. Effort and further detailed work might be concentrated on those matters in the shorter term while longer term plans for more substantial change are considered.

(c) Parliament and its Committees could consider whether, in the light of the extension and complication of the legislative process, they should take a more active role in its preparation, implementation and review. For example, at an early stage in the process Members and Committees could ask for information which would allow systematic consideration to be given not only to the primary legislation but to the nature and content of the regulations (and perhaps soft law) which will also be introduced. These aspects are often crucial to workability and should not be left until the final stages, nor should they escape scrutiny.

(d) Another potential new area of work could involve reviews of issues which cross more than one Department. For example, issues arising from provision for children and mental health, mentioned above, may involve several departments. Problems in the way these departments work together on such matters are unlikely to be in evidence if enquiries are channelled through departmental select committees only.

(e) We value the opportunity to respond to this important inquiry, and look forward to responding later to more detailed proposals.

March 2006

Notes


2 The implementation of the 2nd EU Money Laundering Directive, through the Proceeds of Crime Act 2002 (POCA) and the Money Laundering Regulations 2003, illustrates a number of these problems. The EU Directive sets out minimum standards, leaving to the discretion of Member States the imposition of stricter provisions. Many argue that the UK's domestic provision has gone far beyond the requirements of the EU legislation, a process known as "goldplating".

Some of the areas where the UK legislation has taken a much stricter line are:

(a) The application of criminal sanctions to the reporting obligations for professionals and financial entities. There are no criminal sanctions attached to any of the offences in the Directive;

(b) The UK legislation attaches a "negligence test" to the "failure to report" offence;

(c) All crimes are potentially within the ambit of the legislation, as opposed to the limitation in the Directive to drug trafficking and serious organised crime;

(d) The scope of legal professional privilege is interpreted more narrowly than in the EU Directive;

(e) POCA has an extra-territorial application based on a single criminality test which is not in the Directive.

A number of problems identified at the consultation stage have arisen in cases already brought to clarify the legislation.

Another question is whether the ability to put limitations on concepts such as legal professional privilege should be restricted. While the scope of privilege may vary from State to State, should EU measures contain safeguards to protect the concept?

3 As Lord Nicholls of Birkenhead commented in a 2004 House of Lords case on compulsory purchase:

"... Unhappily the law in this country on this important subject is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision. Some of the more recent statutory provisions defy ready comprehension."


4 The Law Society's Tax Law Committee say, at para D1 p25 of their 2004/5 Tax Law Reform Memorandum, of the law on stamp duties:

"The multiplicity of sources of legislation, conflict between them, problems defining the intention behind primary legislation, and access to secondary sources are causing uncertainty and thus delays, and increased costs for practitioners and clients."

The Committee goes on (p26):

"... there are examples where the legislation is plainly "wrong". Paragraph 33 of Schedule 15 FA 2003 effectively imposes a charge to Stamp Duty where there is a transfer of a partnership interest in circumstances where the partnership owns stock and marketable securities ... However, the
formula is back to front. This means that if someone transfers 90% of his interest in a partnership which owns stock and multiple securities, he would be subject to Stamp Duty as if he had only transferred 10% and vice versa.

“The Inland Revenue has said this is not what is intended. However, they have also apparently said that there is no intention to change the legislation. They will simply monitor the position, and if people are taking advantage of it, will apply the legislation as if it had been properly drafted.

“This is a most bizarre way of proceeding, and evidences a somewhat cavalier approach towards legislation. It is symptomatic of their view that the wording of the legislation is less important than the intention behind it. This goes beyond a purposive approach and leads to more practical difficulties.”

The memorandum is at:
http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=%218249

5 For instance, the House of Lords recently had to decide, to quote Baroness Hale of Richmond:

“whether the new scheme providing for how child witnesses are to give their evidence in criminal cases is compatible with the right of the defendant to a fair trial under article 6 of the European Convention on Human Rights, in particular when that defendant is also a child”

in R v Camberwell Green Youth Court ex parte D (a minor) and R v Camberwell Green Youth Court (Respondents) ex parte Director of Public Prosecutions, [2005] UKHL 4, para 18. The judgment is at http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050127/camb-1.htm

6 An instance of textual complexity can be taken from clause 3 of the current Identity Cards Bill (the Bill is at:
http://www.publications.parliament.uk/pa/cm200405/cmbills/008/2005008.pdf

“3. Information recorded in Register

... (2) Information about an individual must be recorded in his entry in the Register (whether or not it is authorised by Schedule 1) if—

... the information is of a description identified in regulations made by the Secretary of State as a description of information that may be made the subject of such a request . . .”

The Identity Cards Bill is complex both in text and structure (for an example of structural complexity in another measure see note 7 below) and it allows the Secretary of State to create further regulations, which have not yet been published, on a number of topics. This is a matter of concern as this Bill, when in force, will affect almost every individual in the country. “Civil penalties” (ie monetary fines) may be imposed for non-compliance. It should be a priority therefore that the provisions are as simple and easy to follow as they can be, and that as much as possible should be included in the primary legislation and not in regulations. Arguments which are sometimes put forward in defence of difficult statutory drafting, for example that difficult language and construction are acceptable because the matter is technical and directed to those who would automatically seek, and are well able to afford, extensive legal advice, clearly do not apply in this case.

7 In its response to the Draft Mental Health Bill (now withdrawn) at p7, para 4, the Law Society said, “As to whether the proposals are clear, the Law Society refers the Committee to Schedule 5 of the Bill as just one of many examples of impenetrable lack of clarity.”

To bear this out, the first few lines of Schedule 5 are as follows:

SCHEDULE 5
RELATIONSHIP BETWEEN PARTS 2 AND 3 ETC
PART 1

Disapplication of this Part

1 (1) None of the provisions of this Part applies to a person to whom any provision of Part 3 applies, except as expressly applied by a provision of Part 3.

(2) A patient or person who is subject to any of the provisions of this Part ceases to be so subject if he becomes a person to whom any provision of Part 3 applies; and, accordingly, none of the provisions of this Part applies to him, except as expressly applied by a provision of Part 3.

Cases in which this Part re-applies

2 (1) None of the provisions of this Part applies to a patient or person falling within paragraph 1(2) on the provisions of Part 3 ceasing to apply to him, except as provided by any of paragraphs 3 to 5.
(2) References in sub-paragraph (3) and paragraphs 3 to 5 to a patient are to a patient falling within paragraph 1(2) to whom the provisions of Part 3 cease to apply . . .

The Society’s response to the draft Bill is available at: http://www.lawsociety.org.uk/influencinglaw/currentbillactivity/briefingsandupdates/view=briefingdetails.law?DOCUMENTID=208167

8 For example, the Water Framework Directive 2000/60/EC and regulations made under it—see http://www.defra.gov.uk/environment/water/wfd/

9 For example, child care and adoption law is frequently implemented via regulations and often in a piecemeal fashion. The Care Standards Act 2000 has been subject to at least 15 sets of amending regulations in two years. These and other measures are often supported by departmental guidance, much directed to local authorities. These documents need to remain accessible and be archived when overtaken, remaining free of charge.

10 Section 46 of and Schedule 13 to the Companies Act 1989 came into force on 1 January 2005.

11 For example the law on transfers of business has been frequently amended (and there have been numerous court cases). New regulations come into force on 6 April 2006—see http://www.opsi.gov.uk/si/si2006/20060246.htm and guidance at http://www.dti.gov.uk/er/individual/tupeguide2006regs.pdf. Until then the existing guidance on the DTI website (http://www.dti.gov.uk/er/individual/tupe-pl699a.htm) is valid. This introduces the background and states:


12 An example is the Licensing Act 2003. This was due to come into force on 7 February 2005, but regulations were only available at the end of January 2005 and then only in draft.

13 For example, measures in compliance with the EU Money Laundering Directive 2001/97/EC have resulted in numerous practical difficulties including many more reports to the National Criminal Intelligence Service (NCIS) than anticipated and consequential delays. A report in the Law Society’s Gazette of 6 January 2005 stated:

“Solicitors are likely to account for 8.8%—or 13,200—of all reports made [to NCIS] . . . The number of reports made by UK lawyers stands in contrast to those made by their European counterparts. Research by the Gazette has found that in Denmark only between 10 and 15 reports were passed on to the police last year by the Danish National Bar . . . only eight reports have been made by lawyers to the German Federal Bar—the country’s competent authority for money laundering reporting—while in France, the national bar estimates that less than 50 have been made.”

The full report is at:
http://www.lawgazette.co.uk/news/breaking/view=newsarticle.law?GAZETTENEWSID=213374

14 s21 of the Employment Act 1989. The Act otherwise implemented the EU Equal Treatment Directive (No.76/207/EEC) and made various other changes to employment law. Some of its provisions have now been consolidated in the Employment Rights Act 1996.

http://www.opsi.gov.uk/acts.htm


18 recommendations 15-17.


20 Parliament’s Last Chance, p11.

21 Modernisation Committee, First Report: The Legislative Process, HC 190, Session 1997-98, para 20; see http://www.publications.parliament.uk/pa/cm199798/cmselect/cmmodern/190i/md0102.htm


23 Royal Commission on Standards in Public Life 1976 Cmnd 6524.

27 Summary Joint Committee Report.
28 Summary Joint Committee Report.
29 Mr Bob McKittrick, President, Institute of Structural Engineers (Ev 31 McKittrick DCB 4 para 4.1).
30 Conclusions and Recommendations, para 4, p59 Joint Committee Report.
31 para 98 HL Joint Committee Report.
33 http://www.dca.gov.uk/laid/impact-test.htm
34 The Crown Prosecution Service (Claimant) -V- South East Surrey Youth Court (Defendant) And X (Interested Party) [2005] EWHC 2929 (Admin), brought to our attention by Andrew Keogh, editor of CrimeLine.
35 in R v Lang & Ors [2005] EWCA Crim 2864.
36 following the model of preliminary stages in litigation, which are designed to see that only genuinely contentious issues remain for considering at the hearing.
37 Further consideration of these dovetailing issues should of course take place if the Bill is changed during debate.
39 Modernisation Committee, First Report: *The Legislative Process*, HC 190, Session 1997–98, para 8; see http://www.publications.parliament.uk/pa/cm199798/cmselect/cmmmodern/190i/md0102.htm
40 The Hansard Society also refer to the Criminal Justice Bill in this connection, mentioning the “almost 500 [late] amendments and 28 new clauses”40 introduced before Report Stage. These were not considered by the Standing Committee and the provision of more time for Report “did not appear to satisfy the critics” (p16).
42 p20.
43 p18.
44 Indeed, Ruth Kelly, when Minister of State at the Cabinet Office, pointed out that sunset clauses are suitable precisely for situations in which there is no Parliamentary scrutiny of the exercise of powers. She said:

> “Sunsetting legislation is appropriate when the powers it contains . . . should be reviewed by Parliament . . . [this] may be appropriate where the exercise of powers is of legitimate parliamentary interest but their exercise is not subject to parliamentary scrutiny”.

(Debate on the Civil Contingencies Bill, Clause 34, 17 November 2004 at http://www.theyworkforyou.com/debates/?id=2004-11-17.1364.2)
48 Available at http://www.publications.parliament.uk/pa/cm199798/cmselect/cmmmodern/190i/md0102.htm
49 First Report, para 14.
51 Late publication also makes compliance with guidance on implementation periods for measures affecting in particular small businesses difficult. The guidance states: “Business and particularly small firms should be allowed sufficient time to prepare for the implementation of new legislation. You should issue guidance on new legislation at least 12 weeks before the legislation comes into force”—see http://www.sbs.gov.uk/SBS—Gov—files/regulations/REG—implementationguidelines.pdf (p3).
52 For instance, the NHS Redress Bill 2005.
53 Although this is not invariably the case. For instance, under section 182 of the Licensing Act 2003, guidance had to be approved by both Houses. In addition the Annual Report of the Liaison Committee for 2004 states that the Home Affairs Committee undertook “formal scrutiny of draft sentencing

56 Pepper (Inspector of Taxes) v Hart [1993] AC 593.
57 Standard Note: SN/PC/392 p1.
58 The Standard Note says at p4,

“In his ruling on R (Westminster City Council) v National AsylumSupport Service, 2002] UKHL 38 [2002] 1 WLR 2956 Lord Steyn [said]: “... Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible as aids to construction... Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like... What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted”.”

59 http://www.opsi.gov.uk/legislation/about—legislation.htm
60 http://www.cabinetoffice.gov.uk/regulation/reducing—admin—burdens/index.asp
61 http://www.cabinetoffice.gov.uk/regulation/davidson—review/
64 ibid.
65 ibid.

Witnesses: Mr Richard Schofield, Policy Manager, Business & Property Law, Law Reform Team, and Ms Patricia Barratt, Solicitor, Clifford Chance, and Member of Law Reform Board, Law Society, gave evidence.

Q180 Chairman: Mr Schofield, Ms Barratt, thank you very much for coming. My notes say that you are the Policy Manager, Business & Property Law for the Law Reform Team at the Law Society.

Mr Schofield: Yes.

Q181 Chairman: Ms Barratt, you are a solicitor at Clifford Chance and a member of the Law Reform Board of the Law Society.

Ms Barratt: That is right.

Q182 Chairman: You are both very welcome. We are very grateful to you for coming here. You have been listening to the line of questions. In the written evidence you put before this Committee back in March, at paragraph 3.4 you set out the basic questions which have always been asked and quote the Hansard Society questions which should always be asked and say: “However a standing committee in its present form may not be the best way to answer such questions. At a minimum, evidence from potential users is likely to be necessary”. As I said to earlier respondents, we are interested in making special standing committees the norm, and calling them something different by the way, they will be called bill committees, because it is completely non-descriptive, they are not standing committees, they are temporary committees. Personally, at the Home Office I had experience of a special standing committee on a very controversial bill, the Immigration and Asylum Bill 1999, and the process worked well and it did give the government, it gave me, an opportunity to change the legislation, and in one case to get off the hook without it being too embarrassing, it made it a more rational process. Can I ask you first whether you think that is a sensible way forward.

Mr Schofield: Yes, absolutely. We are quite happy to stand behind the Hansard Society’s quite detailed critique of current standing committee processes in certain situations and to advocate the greater use of special standing committees as being the norm. There are a number of advantages to that. First of all, the wider evidence gathering powers and the ability also, to tie into some of the comments made by other commentators this morning, to use the information evidence contained in RIAs to the very best effect because they can then get a critique of that information evidence from experts. It also perhaps facilitates the division between what we might call political differences within a committee and technical areas which need improvement. With the greater ability to call on expert advice, and perhaps even with some very complex bills to consider secondment of expert advisers to advise a committee on an ongoing basis throughout their deliberations,
it might take some of the heat out of the battle so that you can differentiate the political from the technical to greater effect and end up even with legislation which the business and professional community would see as robust and workable whether or not they agree with it in principle.

Q183 Chairman: Could I ask you each generally the key question. You have talked there but generally how do you think in other ways we should improve the legislative process?  
Mr Schofield: Leaving aside special standing committees for a moment, from our perspective there have been a number of improvements in the last few years: greater use of draft bills, greater willingness to use carry-over, although we think that could be extended for certain types of bill but we would not see it as a panacea that it should be seen as the norm necessarily, it should be used for certain types of bill. A running theme from this morning seems to be the Company Law Reform Bill and my organisation has been working on it for about nine years and already it is an extremely complex bill, very long. It is a generational bill, once every 20 or 25 years we do it, and everybody thinks it is a good idea. It would be a shame if that bill turned into a less good act than it might otherwise have been for the sake of an extra period of deliberation on the technical issues. That would seem to me to be the kind of bill which you could say almost as a norm should be subject to carry-over but other bills we would be less convinced about. There are a number of other areas, and I am just trying to pick up on some of the points that have already been debated to save some time. For instance, in relation to secondary legislation, again we would see distinctions between types of bill and different types of secondary legislation. There are some bills which give governments the power to do things but it is clear that the government would only do that thing in response to some contingency which has not yet arisen, in which case it would seem perfectly legitimate to defer the publication of the secondary legislation. However, there are other types of bill where the government definitely intends to do something and the means by which it is going to do it will be contained in some later secondary legislation but that is imminent. An example, for instance, that is currently being debated in terms of secondary legislation would be something like the implementation of Home Information Packs contained in a Housing Bill that was passed in November 2004 and the regulations have just been tabled. It seems to us that the bill cannot work without the regulation. It was always intending to do it within a fairly strict timetable. To have the draft regulations available at the time of the bill, or at least a fairly detailed outline of what those regulations were likely to contain in terms of the content of the pack, the legal status of the pack and the training of inspectors, it seemed to us would not have been beyond government and should have been envisaged at the time and would have allowed better scrutiny of the bill itself in terms of its desirability, but also allowed at least some scrutiny of the kinds of regulations which are going to be needed to implement that bill. The point about secondary legislation is more use of either draft or detailed outline at the time of publication of the bill would be very useful for everybody. We do take the point that for regulations which do need to be published in the future then some mechanism by which they can be more adequately scrutinised and amended is needed.

Q184 Sir Nicholas Winterton: And amended?  
Mr Schofield: Yes, if necessary. That would probably be desirable from both sides in certain situations. Just to touch on sunset clauses, where legislation has been passed on the basis that government might wish to do so if certain contingencies arise, and that is implicit in the bill, if those contingencies have not arisen within a certain period of time then it is right and proper to review whether or not that legislation is still needed and that power is still needed. To that limited extent I think sunset clauses could then be fairly useful.  
Ms Barratt: I would agree with Richard and previous speakers that more emphasis on the draft bill and pre-legislative scrutiny is very useful and very beneficial for the development of the bill itself. Obviously it enables people who are going to be affected by the bill to give their input, not just on the policy, et cetera, but on the actual wording of the bill, which is much more difficult for them to do at a later stage. Again, it is not such a great political issue at that stage. I have also got a couple of practical points which I think with very minimal action could have quite a good effect. A small point is about notice of amendments. Notice of amendments are published in the Order Paper but that is only available to us in written form, it is not really very—

Q185 Chairman: Friendly?  
Ms Barratt: Yes. It is difficult to obtain. They are not put on the internet until the day before. They are very late in being put on. It is very difficult if you do not know what amendments are going to be discussed. Yes, they are not presented in a very user-friendly way. It would not be very difficult to do a comparator which would show “This is what it would look like if these changes were brought in”. It is the click of a button really.

Q186 Chairman: Can I just say to you, Ms Barratt, we absolutely agree with you, which is the reason why everybody around the table is nodding vigorously. We are very pleased to hear that because we will quote your evidence in support of what we believe in any event. You are right, everybody is very frustrated by this and it is doubly frustrating because internally, both within government departments and in the Clerk’s Department here, the amendments are in electronic and intelligible form but they are then transcribed into archaic and unintelligible form to ensure that members of the public do not get too excited. We agree with you about that. Thank you for raising that.
Ms Barratt: Also, secondary legislation, it would be really good if it could be published on the date when it was laid before Parliament. We have had some instances where it has been available to the public after it comes into effect.

Q187 Chairman: Could you give us an example of that? Not now, but if you write to us.

Ms Barratt: The Public Sector Regulations, which implemented some EU Public Procurement Directives, and have quite major effects on all business, they kept saying were going to be published on the OGC website and they were not being published.

Q188 Chairman: What was the reason offered for that?

Ms Barratt: I do not know. They just kept saying they were going to be published and then they were not.

Q189 Chairman: This was after the Directives had come into force?

Ms Barratt: They had to be brought into force by 31 January. I think they were laid before Parliament, as I remember, on something like 6 January. I cannot remember exactly when but we did not get to see them until certainly weeks and weeks after they had been laid before Parliament.

Q190 Chairman: Could you let us have some supplementary evidence on that in written form and I will ensure that we ask the OGC about that.

Ms Barratt: It is not an isolated incident.

Chairman: No, but it is a good example. We will ask them what happened and why because it seems to me to be unacceptable.

Q191 Sir Nicholas Winterton: This is directed to Richard Schofield. In your evidence in 4.1 under “Report Stage and Lords’ Amendments”, you say: “For example, if a substantial amendment” or I presume a substantial number of amendments, “are introduced by government at Report stage there could be a requirement to reconvene the standing committee to consider that important amendment or series of amendments and in appropriate cases to receive evidence from outside bodies.” Is that something you feel very strongly about because, of course, it would have quite an impact upon the way we legislate? I believe there has been one occasion when a bill has been referred back to a standing committee, is that not right, but it certainly is not a very common practice. Do you feel strongly about it? I personally believe it would make the government in producing legislation think more deeply about that legislation before they publish it if they then need to introduce very important amendments or tranches of amendments. Would you like to explain your position on that?

Mr Schofield: Yes. The point we are trying to get to there is if governments are going to substantially amend a bill to the point where the effect of the bill would be very considerably different from the effect that it would have had had it remained as it had been seen by the standing committee in the first place then it seems to us that there is a strong case to refer it back for detailed scrutiny, including the taking of further expert evidence from people outside Parliament who are going to be affected by that legislation, because in effect the initial scrutiny of the legislation has taken place on a completely different basis from what the legislation is going to look like if enacted. In terms of the legitimacy of the scrutiny process as perceived by people outside Parliament, to go through a lot of time and effort and deploying quite significant resources often to giving detailed evidence to a committee, for the legislation to then change its very basis without the opportunity for further input from outside bodies does question the legitimacy of the scrutiny process.

Q192 Sir Nicholas Winterton: Earlier in your paper although you are somewhat critical of the standing committee stage, you still believe that there is a good purpose in the standing committee stage of a bill?

Mr Schofield: This goes back to the point I made a little bit earlier. We would prefer to see something more like the special standing committee process become routine. There are deficiencies in the current standing committee process. We do make detailed representations often but it is seldom with the expectation that it is going to generate significant amendment even on very technical points for all the reasons outlined by the TUC. It is very difficult, or certainly governments feel it very difficult, to give ground at the standing committee stage even on very technical points. For the reasons I described earlier, perhaps introducing new mechanisms through special standing committee, which might make that a little bit easier for governments to bear, is probably a reasonable way.

Q193 Sir Nicholas Winterton: Mr Schofield, while I accept what you have just said, that a special standing committee can play a very important role and there is a less political macho stance at that particular stage, I put again to you is there not also good reason to continue to have the line by line, almost word by word, scrutiny of legislation to ensure that it is actually going to achieve precisely what it says it is going to achieve? Sometimes in standing committee these debates can reveal that the actual current text is not going to achieve what the government is seeking to achieve?

Mr Schofield: I completely accept that. The work done by standing committees in detailed debate and analysis line by line is extremely valuable. If it has the outcome of actually changing the bill for the better as a technical piece of legislation, which our experience is that it does not even after you have had a robust debate of the issue in committee, it already is a good element of the process, and it could be an exceptionally useful element of the process, but there is a gap and that gap is created by the political stand-off in the committee.

Q194 Mark Lazarowicz: Your paper is very helpful indeed. I was interested particularly in some of your comments in your preliminary points in relation to
the reform of legislation, the difficulty accessing legislation and the various stages in the process. If your organisation and your members cannot find their way round then it does strike me that this is a problem to a much greater extent for other organisations and the general public. How important do you think tackling some of these issues is before we start opening up some of our other procedures in the way that has been suggested?

**Mr Schofield:** In some senses I think they are parallel projects rather than things that you need to do one before the other. Some of the debate we are having here about how do you improve processes through do you continue standing committees, do you have more select committees, in the short to medium-term are going to be issues more for parliamentarians themselves and, if I might use the phrase, fairly sophisticated organisations like our own. Those changes could be made now to very good effect for all concerned. In terms of the presentation of information and material with the ambition of increasing participation by people who are not normally participants in the parliamentary process and to remove some of those barriers is a complementary project but not one which needs to take place before the other changes. It is important that those two issues are not conflated as being exactly the same issue. The increasing participation of people not normally involved is an important separate project, but in the short-term there are very simple things, some of which Patricia has already described, that could be done which would assist our deliberations very quickly and very easily, and those actions should be taken straight away.

**Ms Barratt:** I was just going to say about accessing legislation. It is relatively easy for lawyers to access amended legislation because we have databases which factor in all the changes and keep it nicely up-to-date, but for the general public that is much more difficult so they do not have an access to up-to-date legislation.

**Q197 Mr Knight:** I have one other question which is unrelated to that last question. On deferred divisions you appear to be in favour of deferred divisions in committees saying it would be advantageous to witnesses and “a change would almost certainly save time”. Is there not a big downside though in that if committees use the deferred division procedure what might happen is the government of the day would merely seek to have a quorum during the whole of the proceedings and then members would turn up en masse at the end of the day to vote, therefore leading to a situation where we have less scrutiny?

**Mr Schofield:** Yes. In practice that might well be the effect of it and that would be regrettable. The comments that we made about how the process could be improved are all predicated on the assumption that parliamentarians are committed to participating in scrutiny at a high level and a detailed level.

**Q198 Mr Burstow:** I just wanted to pick up on your comments about departmental select committees and their contribution to this process. You refer in the paperwork to the example of the inter-relationship between the draft Mental Health legislation and the Mental Incapacity Act and concerns about how those two pieces of legislation might interact one with the other, which certainly I know during the passage of the Mental Incapacity legislation was an issue, particularly during the draft stage of the bill. In process terms what do you think could be done differently to allow those sorts of concerns to be addressed or is it something that has to be dealt with outside of the parliamentary process before we even get to this stage?

**Mr Schofield:** If there is a fault in the process the chances are that the fault is going to have occurred right at the very beginning of the deliberative process within government and within departments. It would be quite difficult to remedy that fault purely by change to the parliamentary process. I have no particular solution in mind. To some extent, any change in the parliamentary process would need to reflect a change in practice within government departments as to how they create adequate liaison channels where there are proposals for change which cross over departments. I have no particular recommendation.

**Chairman:** There is a big problem about Law Commission Bills.

**Q199 Ms Butler:** I want to thank you for your paper, it is very informative, and the post-legislative overview is very good as well. I want to concentrate on the “Parliament and Public” section. You have already mentioned access to the internet and so on, which we all agree with, as the Chairman has stated, but you mention digital television and I wonder if you could talk us through your thoughts around the use of digital TV and how you think Parliament can make better use of that. Also, you briefly mentioned something about your lawyers’ database that you keep up-to-date with regard to legislation and I am just wondering how exactly you do that.
28 June 2006 Mr Richard Schofield and Ms Patricia Barratt

Ms Barratt: The database is a commercial product which is run by external providers and many lawyers sign up to. They track all changes and put them into the legislation, so as soon as it is passed they physically put it into the legislative database.

Q200 Ms Butler: What product is that?
Ms Barratt: It is a Butterworths’ run one, Lexis-Nexis.
Mr Schofield: If you want more information on that I am sure we can provide you with information and a demonstration of how it works.
Ms Butler: That would be great.

Q201 Chairman: Our clerk is saying we should get the Library, who run our website, or lead on the website—it is a Byzantine organisation—to co-operate with you and Ms Butler about that.
Mr Schofield: We would be happy to do that.
Mr Burstow: My understanding is that is already available in the Lords and Members of the Lords do have access to the Lexis-Nexis database in respect of the law but it is not generally available to Members of the Commons, I understand.

Q202 Chairman: It is something we need to follow up here. I am sorry, I interrupted you.
Mr Schofield: I was going to refer back to the point about digital TV. What we were looking at there was the expansion of access to different forms of technology amongst different demographic groups. Access to the internet affects certain demographic groups and there is clearly high penetration. There are other demographic groups where there is greater access to digital television than there is to home access to the internet. All we are saying is that there should be some exploration of the use of digital television as a means to proactively communicate with the public at large as well as relying wholly on the use of the internet.

Q203 Sir Nicholas Winterton: I agree with Dawn Butler, your paper is excellent and extremely helpful. You have a tiny section devoted to “Programming and Carry-Over”. You have mentioned carry-over and commented on it but you have made no comment whatsoever about programming. Is it because programming to you is too party political or too political? Do you think the way programming is currently implemented in the House is beneficial to the proper scrutiny of legislation? Do you have any comment on that?
Mr Schofield: Can I break my answer down into two parts. The first is do I think programming to be beneficial to scrutiny investigation? Yes, I do. Do I think the way it is currently done creates as beneficial effect as it might do? There are question marks over that. Perhaps it is possible that the programming process can be affected to the advantage of certain parties in certain situations and that might happen in certain circumstances. Yes, the programming process can be manipulated to the advantage of one party or another. Because the process of programming is largely done through the usual channels rather than through some more transparent process it is very difficult for organisations like ours on the outside to judge whether or not the programming has been done purely in the interests of the best scrutiny of as much legislation as possible within a given session or whether it has been done for other reasons.

Q204 Sir Nicholas Winterton: To be specific, do you think it is right that a programming motion is tabled at the same time that the second reading is tabled and that it should take place without debate immediately after the second reading prior to the House as a whole, with members in all parts of the House expressing views on that legislation which might well affect ultimately the terms of the programming motion? Would it not be better to have it 48 or 72 hours after the second reading debate?
Mr Schofield: I think probably the answer to that is yes. Whenever the House votes on any motion it should do that on the basis of having as much information and the time to evaluate information before it makes such a decision.
Ms Butler: Did you get the answer you wanted?
Chairman: I think you are probably leading the witness. You are entitled to.

Q205 Sir Nicholas Winterton: Patricia Barratt, would you like to comment?
Ms Barratt: It would depend on what kind of committee you were talking about. If you were talking about a committee that was taking evidence from external users then you might want a longer time than if you were talking about a committee that was just focusing on line by line scrutiny. I wonder whether the programming motion could have a little bit more leeway built into it so that it says “We will have six to 10 sittings” as opposed to six sittings.

Q206 Mr Knight: Mr Schofield, a few minutes ago you said that programming as we presently do it can be manipulated for the benefit of one party or the other. I am trying to think of any occasion when the present system of programming could be used by an opposition party for their benefit. It is always in the government’s favour, is it not, always?
Mr Schofield: I cannot think of an example when it could be used otherwise.
Chairman: He is right about that. Any other questions? Could I thank you both very much indeed for that.
Ev 72  Select Committee on Modernisation of the House of Commons: Evidence

Wednesday 5 July 2006

Members present:

Mr Jack Straw, in the Chair
Ms Dawn Butler                Mrs Theresa May
Ann Coffey                    Mr Richard Shepherd
Mr George Howarth            Paddy Tipping
Mr Greg Knight               Mr Edward Vaizey
Mark Lazarowicz              Sir Nicholas Winterton

Clerk of the House of Commons (M 28)

INTRODUCTION

1. Scrutinising, amending and passing Bills, is a primary function of Parliament. Most legislation which is successfully passed into law originates from the Government of the day; but the procedures for its consideration have to be applicable also to the limited number of Private Members’ Bills which make progress. By its nature legislation tends to be complex in both content and form. The procedures of the House aim at giving Members of the House maximum flexibility in carrying out their duty to scrutinise it; but if the legislative propositions under consideration are complex (and they have tended to become more so in recent years as the size of the statute book has grown), procedures alone can do little to reduce the complexity.

2. Legislative procedure has been exhaustively reviewed by bodies inside and outside the House both before and since the report of the Modernisation Committee of 1997–98. As a result it is difficult to come up with ideas which are significantly novel; this memorandum does not attempt to do so, nor to provide an exhaustive summary of previous inquiries and reports. The three innovations which have successfully established themselves in the mainstream of the House’s procedures as a result of the work of the Modernisation Committee in the 1997–2001 Parliament are:

— the routine use of programming (Standing Orders Nos. 83 A-I) to timetable proceedings on Government Bills;
— the publication of Explanatory Notes for Government bills, published by the House but prepared by the responsible Department;
— the regular publication of draft bills for pre-legislative scrutiny by Select or ad hoc Joint Committees.

3. Other innovations from earlier Parliaments, which were intended to enable more thorough scrutiny at different stages of the consideration of a bill, remain in the Standing Orders but languish largely unused. They highlight the principal difficulty which faces many proposals which have been or might be made for the reform of the legislative process, namely that they would tend to result in Bills taking longer to get through Parliament. In principle that might not be a bad thing: there is frequent criticism that Bills are produced too quickly to get the policy and drafting right and (by the courts) that the law enacted shows signs of hasty passage through Parliament. But there is no point in recommending or introducing new procedures which are not in practice likely to be operated by Government business managers faced with the task of handling an ever-growing volume of legislation. (The extent of this growth is shown in the attached figures).

COMMUNICATING WITH THE PUBLIC

4. Communicating with the public is an important task, now much in the focus of Parliament corporately. The Committee will be aware that the House is investing increased effort and resources in what has been a neglected part of parliamentary activity in the past.

5. So far as Bills are concerned, there are two principal sources of information for the public. The first is that of Explanatory Notes, already mentioned above, which provide a clause by clause explanation of each Government Bill. These notes tend to be quite full and technical in nature. Although they usually contain a summary of the Bill and an indication of the relevant policy background, they seldom set out clearly and concisely in their introductory sections what the purposes or objectives of legislation are intended to be. In addition, the House of Commons Library produces research notes on individual Bills, explaining their policy background, for general use.

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1 This paper deals only with Public Bills which is the subject of the Committee’s press release, though Private Bills, promoted by outside parties, are also part of Parliament’s legislative work.
3 See Appendix I: Volume of Legislation.
6. So there is already a good deal of information, of an explanatory nature about legislation, in the public domain and available on the internet. Nevertheless, it is detailed, sometimes dense stuff. The Library’s Research Notes on the current Work and Families Bill, for instance, run to 64 pages and the Explanatory Notes to 19. There may be a case for the production of a simpler description of Bills for the use both of Parliament itself and of the general public. Such a description might set out a Bill’s main provisions in as non-technical language as possible, linking them to its intended purposes and objectives. The Committee will appreciate that this task is complicated by the increasing tendency to legislate by reference to Acts already on the statute book. Explaining in simple terms what a Bill does when it is amending a web of complex legislation already enacted would not be an easy task; the example of almost any recent Finance Bill would illustrate that point graphically.

7. However, if the Committee considers that summaries would be useful, the next question would be: who should produce them? The view taken by your predecessor Committee in 1997 and in the more recent report from the Lords Select Committee on the Constitution was that this was best done by the Government Department which is, in the end, responsible for the Bill. An alternative might be for this to be done by the House administration as part of its information service for the public. There would of course be resource implications if such a course were to be decided on. Another potential problem is that it might be difficult for a politically impartial House service to provide a short and accessible summary of a Bill’s intended objectives without risking cutting across the messages being put out by the responsible Minister or Department.

8. Pre-legislative scrutiny is generally acknowledged to have been a successful innovation: much has happened since the Modernisation Committee first drew attention to the need for systematic consideration of draft Bills in its first report on the Legislative Process. Over the past few years scrutiny of Bills in draft, which is usually but not invariably a joint exercise of both Houses, has been widely considered as a valuable addition to Parliament’s overall scrutiny of legislation. That is particularly the case because it occurs at a formative stage in the development of what will become the law.

9. Some draft bills have been scrutinized by joint committees and others by departmental select committees in the Commons. The allocation to committees has been determined through the usual channels. The Commons staffing of joint committees has been from the Scrutiny Unit of the Committee Office, which has also assisted departmental select committees considering draft bills.

10. The most obvious measure of the impact of pre-legislative scrutiny is the number or proportion of recommendations accepted; but recommendations vary in their significance, and they may be accepted only in part or give rise to other changes to the Bill or to regulations or guidance intended to meet the same aim in a different way. One of the influences on the Government’s response is the extent to which the scrutinising committee examined policy as well as implementation.

11. The impact of pre-legislative scrutiny is not confined to the scrutiny stage, since Members may use the knowledge gained or evidence gathered during pre-legislative scrutiny after the bill is published. Recommendations made during pre-legislative scrutiny have sometimes been pursued at later stages and given rise to amendments to the bill itself, as in the case of the Civil Contingencies Bill and the Disability Discrimination Bill. In one case, the draft Corruption Bill of 2002–03, an adverse report from a Joint Committee appears to have persuaded the Government to reconsider the whole basis of the proposed legislation.

12. Some aspects which the Committee might find it worthwhile to examine in more detail could include the selection of Bills for publication in draft, the allocation to Committees, the time allowed for pre-legislative scrutiny, the different ways in which committees have approached the task of scrutinising a draft bill (e.g. by considering policy as well as implementation), the effectiveness of committees in engaging public interest (including the use of e-consultation), and variations in the Government’s response to committees’ recommendations. My colleagues in charge of pre-legislative scrutiny will be pleased to supply evidence on these topics if it is required.

13. An important fact to be borne in mind, however, is that the Government inevitably controls the process because it alone is in the position to decide which Bills should be considered in draft and to instruct Parliamentary Counsel accordingly. It is unlikely that any Government would subject a large part of its programme to the delay entailed in putting major manifesto commitments through the pre-legislative scrutiny process. The figures show that the number of draft Bills referred by Government has dropped off significantly since its peak in sessions 2002–03 and 2003–04.

7 HL 157, HC 705 (2002–03).
8 See Appendix 2: Number of draft Bills.
COMMITTEE STAGE: STANDING COMMITTEES

14. The principal function of Committees on Bills after a Bill has had its Second Reading is to go through the text of a Bill, clause by clause, considering it in detail and, if agreed, amending it. In most cases this is done in Standing Committees, away from the Floor of the House, but Bills deemed of particular importance are kept on the Floor of the House, enabling all Members to participate without having to be appointed to a Committee to do so. Standing Order No 63 provides for the possibility of taking part of a Bill in Standing Committee and part on the Floor of the House. This procedure is regularly used in the case of Finance Bills.

15. The criticism often levelled at Standing Committees is that their procedure is overly formal and they do not have the opportunity to scrutinize Government policy in depth so as to inform Members’ consideration of the substance and intent of the legislation rather than merely its wording. I shall return to a mechanism whereby this can already be done (in Special Standing Committees) but, for the moment, I should like to consider ways in which regular Standing Committees’ scrutiny might be improved.

16. One of the difficulties which now makes the Committee stage less effective than it might be arises from timing. Although two weekends are still customarily left between publication of a Bill when first introduced and second reading, the Committee stage is often programmed to begin barely a week after second reading and to proceed immediately to a pattern of four sittings a week. That interval is often insufficient for outside interests groups to get to grips with the text of a Bill and make representations to the Members appointed to serve on Standing Committee. The result is that Members are not as well briefed as they could be if the interval between second reading and the beginning of committee proceedings were to be longer. It also means that Parliament is failing in what is an important aspect of communicating with the public, which needs to be a two-way process.

17. The process of going through a Bill offering amendments to any part of the text is never going to be a simple matter and it is hardly surprising that new Members, as well as members of the public, find proceedings difficult to follow. The basic rule is that amendments are taken in the order they appear in the text of the Bill. Only one question is before the Committee at any one time but, to facilitate discussion, amendments are grouped by subject for debate. In the past, on the Chairman’s selection list these groups of amendments have just appeared as a row of numbers without any indication of subject. It might make the selection list easier to understand if each group were topped by a brief heading, as it is on Report Stage, making clear what the subject of debate is intended to be. I attach a selection list showing the existing format and the proposed format. Further refinements identifying Members tabling amendments could be devised but they would add to the complexity of the appearance of selection lists. There would also need to be more time for their preparation. But my suggestion that there should be a subject heading for groups should at least make clearer to Members the principle on which groups of amendments are being linked for debate in Committee.

18. Some of the public who attend Standing Committees are of course experienced members of interest groups, quite used to following proceedings; others are individuals who may not have much knowledge of the way business is done. To help the general public follow proceedings better, the Public Bill Office has produced a series of explanatory leaflets on the various types of standing committees. Copies are placed in the public gallery at meetings.

COMMITTEE STAGE: SPECIAL STANDING COMMITTEES

19. There already exists, under Standing Order No 91, provision for a less formalised style of committee stage, in Special Standing Committees. Such a Committee has the power to take written and oral evidence, in Select Committee mode, during a period of 28 days after a Bill has been committed. Up to three 3 hour sittings may be devoted to hearing oral evidence which is customarily taken in public. Oral and written evidence is printed with the Committee debates.

20. So Special Standing Committees have the capacity to improve scrutiny and to open up the legislative process more effectively to the public, somewhat in the same way as pre-legislative scrutiny. However the procedure has been used only nine times since its introduction in 1980–81, most recently for the Adoption and Children Bill in 2001–02. The perception has always been that the procedure has not been used more often because it builds in delay; it has also been thought to be less suitable for Bills which are controversial in a “party” sense than for more specialist and technical Bills which are nonetheless of public importance and interest. There has been some suggestion, in the past, that if there were greater flexibility in the proceedings of Special Standing Committees (ie a variance in the 28 days provision or the number of evidence sessions) it might be used more by Government. There is no procedural reason why these provisions could not be varied.

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9 Historically all Bills were committed to a Committee of the whole House. The first reference is in 1571. J Redlich The Procedure of the House of Commons 2 vols (London, 1908) 2: p204. Standing Committees were first nominated in 1882.
10 See Appendix 4.
REPORT STAGE IN COMMITTEE

21. The principal problem at Report stage is lack of time to consider all the amendments that are tabled, particularly in the case of a controversial Bill. Programme motions governing Report stage are quite often framed so as to protect the most important parts of a Bill for debate. This is based on agreement between the usual channels. But given that most Report stage and Third Readings are confined to one day’s debate up to the moment of interruption, the process still leads to cutting out discussion on many amendments, as the figures for Session 2004–05 clearly show. Programming also tends to encourage the selection of amendments for debate in fewer but larger groups, which some Members argue weakens detailed line by line scrutiny. Complaints were made on both these grounds by a number of Members, on all sides of the House, in the recent debate on the Terrorism Bill.

22. Turning Report stage into a further Committee stage—for example by sending a Bill back to the Standing Committee that had already considered it—would deprive Members not on the Committee from taking part in any detailed proceedings on a Bill. Although the procedure could work for non-controversial Bills, it would not be acceptable to opponents in the case of a controversial Bill, so some mechanism for distinguishing which Bills were suitable for a Report stage Committee would need to be devised.

23. In the case of uncontroversial Bills, Standing Order No 92 already provides for Bills which have been debated in Second Reading committees (rather than on the Floor of the House) to be taken in Committee at Report stage. The Committee reports that it has considered the Bill, with or without amendment, and the Bill then proceeds to Third Reading on the Floor of the House. This procedure has only been used once and Second Reading Committees themselves are now very rare.

LORDS MESSAGES

24. Exchanges between the Houses on Amendments to Bills (commonly known as “ping-pong”) can continue until one House backs off by accepting the amendments of the other House. Until the past few years it was an exceptional practice for Lords Amendments to be considered at the same sitting as they were received from the House of Lords. This was conditioned partly by technical considerations—an overnight delay used to be necessary to enable the requisite papers to be prepared for the House’s consideration; and partly by considerations of principle—Members and the Government needed time to reflect on their response to the Lords propositions and (sometimes) to undertake informal discussions about possible compromises. Technical advances in recent years have largely overcome the former obstacles, but they have not eliminated the risks inherent in taking crucial decisions on the detail of important legislation without proper time for reflection and consultation. Furthermore, the speed with which the Houses can handle these matters may contribute to serious political decisions being put off rather than being taken at an earlier stage in the exchanges. An example of a series of exchanges on the Prevention of Terrorism Bill in March 2005 is set out in Appendix 5 Part I. Although it proved to be a long day for both Houses, Members will see that the Bill went back and forth between the Houses eight times in the space of thirty hours or so. Each of the sittings involved the preparation of new sets of business papers, both the propositions (Amendments and reasons for disagreement or insistence) which one House was sending to another and also the propositions which the Government was putting to the House (agreeing, disagreeing, insisting or amending propositions sent from the other House).

25. It must also be borne in mind that the decision-making—which is principally a matter for Government but also involves opposition parties or groups—will sometimes be conducted in a highly charged political atmosphere in the case of controversial Bills. Government will be tempted to try a few times to get its way by alternatives and compromises before wanting to insist. Parties or groups of Members opposing the Government will employ the same tactic.

26. The process by which the Amendments are brought before each House is complicated because what the Houses are doing is complicated. What the description of the process set out in the second part of Appendix 5 shows, is that the production and distribution of papers is in fact an efficient and speedy process. It is fully electronic apart from the physical making up of House Bills, which is an important check on the textual validity of what may shortly be enshrined in the law of the land. The two principal factors in delay arise from the volume of new material being considered and the need for Government and their advisers to consider how to respond to proposals and alternatives as the exchanges go on. The actual physical transfer of the Bills between the Houses is normally a minor aspect of the whole process.

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13 See Appendix 3: Operation of Programme Orders.
14 In the case of reference of Bills to Second Reading Committees, motions to refer can be blocked if twenty Members indicate objection. See Standing Order No 90 (1).
15 This is still reflected in the text of Erskine May’s Parliamentary Practice (23rd edition, pp 630–1), which states that the procedure of consideration forthwith under Standing Order No. 78(1) “is generally reserved for amendments which are not material”.
16 Appendix 5 Part I.
LORDS AMENDMENTS IN COMMITTEE

27. I understand that the Committee has considered the possibility that some Lords Amendments might be dealt with in Standing Committee so as to minimise the time taken up on the floor of the House. This proposal would be likely, in practice, to give rise to the same sort of problems as have led to report stage standing committees falling into disuse (see paragraphs 22 and 23 above); and there is the further complication that decisions at the final stage of the legislative process ought to be endorsed by the House itself. There is the additional difficulty, as the illustration in Appendix 5 shows, that Lords Amendments are now routinely considered forthwith which a Standing Committee could hardly do. The result could therefore be to make “ping-pong” a more extended process than it is now.

SEPARATING DIVISIONS FROM DEBATE

28. Programming has gone a long way towards making the timing of divisions more predictable and, under the deferred divisions procedure, votes are taken at a particular time on certain business. But I would argue against decoupling divisions on legislation from the debate, since the result of one division sometimes colours subsequent debate (eg the effect of the Government majority of one on the Terrorism Bill debate in Committee). There are also potential technical procedural problems if, in a run of divisions taken separately at a fixed point, one division produces an unexpected result.

29. It should be noted that in the Scottish Parliament there is some separation of the vote on a motion from the debate on it (in what they call “Time for Decision”), but because of the technical difficulty I have mentioned in the previous paragraph, Bills themselves are treated differently, votes taking place immediately at the conclusion of debate.17

CARRY-OVER OF BILLS

30. As I mentioned in the introductory section of this memorandum, proposals to increase the effectiveness and thoroughness of the House’s examination of Bills have tended to founder because they generally (and unsurprisingly) entail some overall extension in the time required for consideration by the House and so prove unacceptable to Government business managers who have the responsibility for securing the passage of each year’s legislative programme before the close of the parliamentary session. One piece of machinery which has been introduced with a view to easing this difficulty, and incidentally enabling the burden of legislation to be spread more evenly over a session and indeed over the lifetime of a Parliament, is that of “carry-over”. This is a procedure which enables a bill which has not completed its passage through Parliament when a session is prorogued to be resumed in the next session at the stage it had previously reached. It was first operated, on an ad hoc basis, in the case of the Financial Services and Markets Bill in 1998–99, was introduced as a temporary standing order in 2002, and was made a permanent standing order (No 80A) in October 2004.

31. Following the House’s adoption of the permanent standing order, three bills were carried over from session 2003–04 to session 2004–0518. One bill, the Constitutional Reform Bill [Lords], was similarly carried over in the House of Lords, on an ad hoc basis. In general, however, there has been some resistance in the House of Lords to the development of this procedure; and it is not yet clear whether it will become a routine feature of Parliament’s proceedings, enabling the Government’s legislative programme to be planned in new and more flexible ways. If this were to be the case, the range of options which it would be worthwhile for the Modernisation Committee to consider during its review of legislative process would increase.

POST-LEGISLATIVE SCRUTINY

32. I am aware that the Law Commission is conducting an enquiry into post-legislative scrutiny, following recommendations made by the Lords Select Committee on the Constitution.19 In principle reviewing how effective something has worked out sometime later is a good idea, and is practised in all business contexts, public and private, after the completion of projects. How far Parliament itself should, or could, review the effectiveness of all the Bills it passes, is another matter. Bills vary in importance and type; some are of a highly technical nature. It is unlikely that one body would be able to review all types of bills effectively or that a single form of procedure would be suitable for all circumstances. As the Lords Select Committee recognised, Departmental Select Committees in the Commons already have the power to enquire into existing legislation within their remit of monitoring Government departments.20 The Committee on the Lord Chancellor’s Department and its successor, the Constitutional Affairs Committee, for example, have published reports critical of the entire mechanism of the Children’s and Family Court Advisory and Support Service brought in by the Criminal Justice and Court Services Act 2000.21 But at what point reviews should take place, given the fast-changing pace of legislation in, for example, areas of criminal law or anti-social behaviour, is not easy to determine. Whereas pre-legislative scrutiny can properly be

18 Mental Capacity Bill, Gambling Bill and School Transport Bill.
20 Ibid para 167.
regarded as an integral part of the legislative process, because the presentation of a draft bill and the presentation of an actual bill are normally separated by no more than a few months, post-legislative scrutiny is, I would suggest, best regarded as part of Parliament’s wider and ongoing task of scrutinising the activities of the executive. It is sometimes many years before the consequences of a new piece of legislation can be evaluated fully; and often the success or failure of a statute depends on issues of administration, funding and detailed implementation rather than on the drafting of the clauses which Parliament approved.

Conclusion

33. There is no indication that Government business managers are likely to be willing to relax the degree of control which they exert over the legislative process and its scheduling. The tight scheduling which currently tends to apply to the passage of Government legislation through the Commons is a consequence partly of the historically high volume of legislation being introduced (see Appendix 1), and partly to the need to allow adequate time for the somewhat different process of consideration in the House of Lords. The introduction of procedures which might significantly improve the depth and quality of the House’s scrutiny of legislation and increase the amount of public involvement in the legislative process is almost certain to require additional time. More systematic use of carry-over might help, but significant additional time in the Commons is only likely to become available if there is a reduction in the volume of legislation introduced, or a rebalancing of the legislative timetable between the two Houses.

Roger Sands
December 2005

APPENDIX 1

Volume of Legislation
(By pages of legislation per calendar year excluding Consolidation and Tax Law Rewrite Acts)

<table>
<thead>
<tr>
<th>Year</th>
<th>Volume</th>
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<tr>
<td>1992</td>
<td>1,288</td>
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<tr>
<td>1993</td>
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APPENDIX 2

Number of Draft Bills Scrutinized by Session

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<th>Number of draft bills published</th>
<th>Number of government bills published</th>
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<td>2004–05</td>
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Notes:

1 Includes draft clauses of the Police (Northern Ireland) Bill and the Gambling Bill
2 Includes draft clauses of the Company Law Reform Bill

Source:
House of Commons Library
## APPENDIX 3 (PART 1)

**OPERATION OF PROGRAMME ORDERS 2004–05 (AS AT 5 APRIL 2005)**

<table>
<thead>
<tr>
<th>Title of Bill</th>
<th>Date of 1st sitting in House</th>
<th>Number of sitting knives (provided for)</th>
<th>Number of knives which came into play</th>
<th>Number of groups which came into Parts not reached because of knife</th>
<th>Number of knives which reached because of knife</th>
<th>Number of days knives ¹</th>
<th>Number of knives which reached because of knife</th>
<th>Number of groups/3rd reading not reached because of knife</th>
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<td>2 (of 10)</td>
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1 Including knives applying to 3rd reading only
### APPENDIX 3 (PART 1)

#### OPERATION OF PROGRAMME ORDERS 2004-05 (AS AT 5 APRIL 2005)

<table>
<thead>
<tr>
<th>Title of Bill</th>
<th>Date of 1st order in House</th>
<th>Number of:</th>
<th>Number of knives which came into play</th>
<th>Number of groups not reached because of knife</th>
<th>Number of CI/Sch stand parts not reached because of knife</th>
<th>Number of days knives which came into play</th>
<th>Number of groups/3rd reading not reached because of knife</th>
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<tbody>
<tr>
<td>Bills committed to Standing Committee</td>
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<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
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<td>Natural Environment and Rural Communities</td>
<td>6 June</td>
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<td>—</td>
<td>1</td>
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<td>1</td>
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<td>21 July</td>
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<td>25 Oct</td>
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<td>26 Oct</td>
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<td>3</td>
<td>2</td>
<td>5</td>
<td>22</td>
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1 Including knives applying to 3rd reading only.
APPENDIX 3 (PART 2)
OPERATION OF PROGRAMME ORDERS 2005–06 (AS AT 22 NOVEMBER 2005)

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<td>Consumer Credit</td>
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<td>National Lottery</td>
<td>14 June</td>
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<td>0</td>
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<td>—</td>
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<tr>
<td>Transport (Wales)</td>
<td>16 June</td>
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<td>1</td>
<td>0</td>
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<td>25 Oct</td>
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<td>7 Nov</td>
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<tr>
<td>Bills in Committee of whole House</td>
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<td>2</td>
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</table>

1 Including knives applying to 3rd reading only.
APPENDIX 4

CHAIRMAN’S PROVISIONAL SELECTION OF AMENDMENTS

CLAUSE 7 (NATIONAL LOTTERY DISTRIBUTION FUND: APPORTIONMENT)

EXISTING FORMAT:

“Clause 7
24 + 25 + Govt 4 + 55 to 58 + Govt 7 to Govt 9
26 + Clause 19 stand part
27 + 28 + 94 + 95 + 38 + 42 + 61 to 63
29
30 + 77 + 79 + 82 + 84 + 85 + 37 + 60”.

PROPOSED FORMAT:

“Clause 7
Meaning of “prescribed expenditure”, and application to Isle of Man and Channel Islands
24 + 25 + Govt 4 + 55 to 58 + Govt 7 to Govt 9
Meaning of “charitable expenditure”
26 + Clause 19 stand part
“Not for profit’ bodies
27 + 28 + 94 + 95 + 38 + 42 + 61 to 63
Public consultation
29
Consultation with Scottish Parliament
30 + 77 + 79 + 82 + 84 + 85 + 37 + 60”.

APPENDIX 5 (PART 1)

EXCHANGES ON THE PREVENTION OF TERRORISM BILL (10 MARCH 2005)
(SITTINGS OF EACH HOUSE)

Lords 11.30 am–3.10 pm
Commons 6.00 pm–7.50 pm
Lords 10.15 pm–11.26 pm
Commons 1.20 am (Friday)–3.06 am
Lords 5.00 am–5.56 am
Commons 8.00 am–9.37 am
Lords 11.40 am–1.11 pm
Commons 3.30 pm–5.07 pm
Lords 6.30 pm–7.00 pm

APPENDIX 5 (Part 2)

PRODUCTION OF IN-HOUSE DOCUMENTS DURING “PING-PONG”

What follows is a description of the process of production for a bill first introduced in the Commons on occasions when Lords Amendments are considered too quickly to permit the production of documents by The Stationery Office overnight in the normal way for House papers. The Public Bill Offices of the two Houses share a common computer drive to facilitate the electronic transfer of documents between them.

— The process starts when the Lords place the first set of Lords Amendments on the shared drive. If the bill is contentious and the outcome of divisions in the Lords cannot be predicted, the final version of the Lords Amendments cannot be placed on the shared drive until after the Lords have finished considering the bill.

— Once the Lords Amendments are on the shared drive, it takes approximately fifteen minutes to create a House of Commons paper from the document and to e-mail it to the Print Services unit in the Vote Office for production as hard copy; the time taken by Print Services to publish the paper and deliver it to the main building depends on its size.
While the Lords Amendment paper is being printed:

- The Government tables its Propositions as to how the Lords Amendments are to be dealt with (agreed to, disagreed to, amended etc). This usually occurs about 45 minutes after the Public Bill Office has sent the Lords Amendments to Print Services. It takes approximately 15 minutes or less for the Public Bill Office to produce the “Emergency Paper” which is then emailed to Print Services. This paper is usually smaller in size than the Lords Amendment Paper and is usually ready for release at the same time.

- The “House copy” of the bill is22 physically marked up in the Lords with the Amendments prior to its return: the time taken for this will depend on the number and complexity of amendments and whether or not the Lords Public Bill Office has been able to mark up the bill in advance (the Lords are less likely to be able to do this than the Commons because the fate of amendments in the Lords is often unpredictable).

- The marked-up House copy of the bill is brought to the Commons. On receipt, it is compared to the Lords Amendments already sent to Print Services to ensure that the two are identical. Once both papers are ready, the Vote Office releases the papers and the Annunciators show a message that papers are available and give a time for the House to resume.

- The Lords Amendments and the Government Propositions are then debated in the Commons. During this time, the “Paper Back” to the Lords is produced by the Commons Public Bill Office. This is a complicated document, including elements of the Government Propositions, Reasons for disagreeing to Lords Amendments (which are provided by Parliamentary Counsel) and the original Lords Amendment Paper. Once it is completed, the House Bill is marked up and the electronic version of the “Paper Back” is put on the shared drive, with a “health warning” if there is any uncertainty of the outcome of divisions. Finally, the message to accompany the House Bill is drafted.

- A Table Clerk will take the marked-up House copy of the bill to the Lords, together with a hard copy of the “Paper Back” and the Message to the Lords setting out the decisions of the Commons on the Lords Amendments.

- If the Lords return the Bill and Amendments with further Proposals, these are again placed on the shared drive and the process continues as above.

Witnesses: Sir Roger Sands KCB, Clerk of the House, and Dr Malcolm Jack, Clerk of Legislation, House of Commons, gave evidence.

Q207 Chairman: Sir Roger and Dr Jack, you are welcome to the Modernisation Committee and it comes on a day of some moment. As the House is first informed of Sir Roger’s impending retirement, there will be an opportunity for all of us, Sir Roger, to pay tribute to your work as Clerk. May I say to Dr Jack sitting next to you, congratulations on the appointment as Clerk of the House of Commons, which, as the official notice made clear, was an appointment approved by Her Majesty, which is an interesting reflection of the constitutional relationship between the House and the Monarch. Thank you also for the memorandum which you have submitted. As you know, we are conducting an inquiry into the legislative process. Sir Roger, you have given us a helpful memorandum on this. I certainly acknowledge what you say in paragraph 2, that the legislative procedure has been pretty exhaustively reviewed by various bodies since the Modernisation Committee was established in 1997–98 and that as a result it is difficult to come up with ideas which are significantly novel. I accept that. The issue is, which of these proposals for improvement do we run with? You may also have been briefed by Helen Irwin that one of the issues we are looking at in some detail is whether the special standing committee procedure could become the norm with departure from that having to be specifically agreed by the House at the point of referral to the Committee. Could I begin by asking, as you look forward to your retirement and back on your 41 years’ service in the House, if you had a magic wand, what would be the changes in the legislative process which you would introduce, now that you have got the freedom of retirement and total licence to say, “They should have done it this way”?

Sir Roger Sands: I think the House has to process what is put in front of it and one of the major problems is that so much has been put in front of it in recent years. One of the annexes to the memorandum does give the number of pages and it shows that the legislative process has been pretty exhaustively reviewed by various bodies since the Modernisation Committee was established in 1997–98 and that as a result it is difficult to come up with ideas which are significantly novel. I accept that. The issue is, which of these proposals for improvement do we run with? You may also have been briefed by Helen Irwin that one of the issues we are looking at in some detail is whether the special standing committee procedure could become the norm with departure from that having to be specifically agreed by the House at the point of referral to the Committee. Could I begin by asking, as you look forward to your retirement and back on your 41 years’ service in the House, if you had a magic wand, what would be the changes in the legislative process which you would introduce, now that you have got the freedom of retirement and total licence to say, “They should have done it this way”?

Mr Vaizey: 2001 is the lowest.

Chairman: If I could just interrupt you there. To make the customary division, 1997, the average between 92 and 97 of the pages was around 2,000 and post 1997 it was 2,600 and it appears to be rising.

Mr Shepherd: The last three years were well over that average, but carefully constructed, Chairman.

Chairman: It is on the record.

Mr Vaizey: 2001 is the lowest.

Q208 Chairman: Yes. I am sorry, Sir Roger, we interrupted you.

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22 The interleaved copy that is placed on the Table of the House during debate.
Sir Roger Sands: All I can say is that when I was the Clerk of Legislation, the job which Malcolm now occupies, we had our first two-volume Finance Bill. That was the first time it had ever happened and we had to invent a new process for producing the thing. Now that is routine and we have just had our first three-volume bill. It is not the Finance Bill, it is the Company Law Reform Bill, but that has set a new standard, which I hope will not be emulated by too many departments and ministers in the future. Obviously you do have to look at the volume of material which the procedures of the House have to deal with. I think if I had a magic wand, we would get back to the levels which prevailed about 20 years ago.

Q209 Sir Nicholas Winterton: Less legislation, Sir Roger?
Sir Roger Sands: Yes, I think that would make it much easier for the House to do a good job on what is presented to it. I think there is a limit to the capacity of the system to absorb new proposals.

Q210 Mr Howarth: Is that less bills or shorter bills, or both?
Sir Roger Sands: The number of bills has remained reasonably constant, I think I am right in saying.

Dr Jack: Yes, that is right.

Sir Roger Sands: So it is a question of size. I think the Government business managers have this figure of about 35 bills a session in their heads and are very reluctant to be kicked out of it, so what they do instead is wrap what might have been two bills 20 years ago into one and present them to the House as one bill; so the 35 has become pretty elastic.

Q211 Chairman: I remember when I was at the Home Office we used to do that! Could I press you on this issue. You have made the point, which I understand, that if legislation ran to fewer pages and the total volume was less, it would be easier for the House to digest that legislation. That said, it was certainly my experience when there was a very heavy programme, when I was Home Secretary, that there is no necessary connection between the degree of controversy that a bill generates and its length, most certainly not. Could I just press you on whether there are some changes in the process over which you would like to run your magic wand, apart from putting a spell on government ministers so that they are rather less verbose?

Sir Roger Sands: I think if I had a magic wand, the item—which is something I have been attached to for a very long time and actually wrote what was originally the Sessional Order and is now the Standing Order—would be carry-over. I have always been very enthusiastic about that and I have been sorry that since it was introduced and became a Standing Order it has been relatively little used. I think the reason for my enthusiasm about this procedure is that it has the capacity to eliminate the artificial crises which the business managers tend to play on to keep everybody on their toes. More seriously, it should enable a more rational planning of government business over the lifetime of a Parliament so that we are not in the position here in the House for a chunk of the year spending our time doing second readings, and then another chunk of the year everybody vanishes to the Committee Corridor and they are in standing committees, and then everybody is back in the House for Report stages.

Q212 Sir Nicholas Winterton: Yes, but by agreement, Sir Roger, or because of Government diktat, carry-over? It is a diversion, but you can answer that question. Should it be by agreement?
Sir Roger Sands: I am reluctant to get drawn into the argument about how business is managed, but yes, obviously there has to be negotiation already between the usual channels and whether that negotiation was formalised in the way I know you are keen on, Sir Nicholas, or remained as it is now, there would obviously have to be discussion which would cover not just the progress of individual bills but the planning of the session more generally.

Chairman: We are going to suspend. Could I ask colleagues to come back as quickly as possible. We will start as soon as we are quorate.

The Committee suspended from
3.30 pm to 3.39 pm for a division in the House

Q213 Chairman: If I could just say to Dr Jack, if you want to come in, do, please, come in at the same time.

Dr Jack: Shall I start then? I would like to add a comment.

Q214 Chairman: Please do.

Dr Jack: It was really just to confirm what the Clerk was saying about volume from the engine room, as it were, rather than the bridge. I have got three piles of bills in my office, each of which is about six inches high. The first two piles are bills introduced in the Commons since the beginning of this session and the third is a pile of six inches of bills introduced in the Lords, so there are one and a half feet of bills lying on that table. I did just want to add the point that I think we should not lose sight of the Lords in this whole equation because legislation is an activity, obviously, of both Houses of Parliament and the Lords is a significant initiating Chamber for legislation, as well as a revising Chamber.

Q215 Sir Nicholas Winterton: And mainly non-controversial?

Dr Jack: Yes, by and large.

Q216 Ms Butler: My remit is around technology. I agree with you that a lot of the modernisation ideas which have been put forward have been previously discussed, maybe not so much in technology, but what I find hard to cope with is why we have not moved forward on a lot of the modernisation ideas. With regard to technology, I would like to see some kind of electronic voting. That might make you gasp out loud, but I would like to see some kind of electronic voting taking place at some stage. I know we are probably centuries away from that happening, but how about the scope to extend
Deferred divisions? Do you feel there is scope to extend that and maybe rolling up votes at the end of the second reading so that we can vote in block instead of having to vote, then hang around and come back and vote again, yesterday being a classic example?

Sir Roger Sands: On electronic voting, no, I would not gasp out loud at all, and the matter has been examined by the predecessor of this Committee at some length. My understanding is that there was no consensus about its desirability. One of the main problems, of course, is not having the sort of Chamber where every Member can sit at their desk and press a button. I was in one such chamber at the end of last week in Copenhagen and it is so easy there. There are 170-odd members and everybody has got a desk and the buttons are in front. That would make a great difference, but unless this House is willing to cut itself down to 400 or so, then I do not see it being practicable. On deferred divisions, we have in the past—when I say “we” I mean the clerks—advised against extending this any further for the process of legislation, for the principal reason that when you are going through a bill, there is a logic to the process and one decision does, very often, tend to hang on another and you cannot start deciding about supplementary things in a bill until you have decided the big issue of principle. One can get oneself into terrible trouble about this. That said, there are possibly one or two things one could do to extend the scope of deferred divisions. Knowing that this Committee was interested in that, I was discussing it with Malcolm yesterday and we agreed that there is no reason in principle why it should not extend to, let us say, money and ways and means resolutions taken after the second reading; but the fact of the matter is that they are almost never divided on now. I think the practical difference it would make would be very minimal. When you are going through the Report stage of a bill, as we are today, I think deferred divisions become very difficult, not least because the Government tends to want to get the bill up to the Lords, and when are we deferring the votes to? So I would not like to say anything which encouraged this Committee further down that road. I know the method of voting is very time-consuming, but I think the procedural principles which are involved are very difficult to break down.

Mr Vaizey: Thank you very much, Sir Roger, for a very interesting paper. I was one of the members of the Committee who were very interested in the idea of deferred divisions, but I did find your reasoning in your paper very persuasive, as reinforced there, and also on pre-legislative and post-legislative scrutiny as well, and I think I share your concerns about post-legislative scrutiny potentially becoming simply, an exercise rather than a constructive exercise. My particular interest is special standing committees on bills and I am not quite sure whether taking evidence at a standing committee has anything to do with it. Perhaps that would go on in the process. What I would like to see, and would like your views on, is first of all whether you think it is feasible to appoint a departmental special standing committee at the beginning of a Parliament, say, a Home Affairs special standing committee, which would then sit for that Parliament and scrutinise bills coming from that department so that a level of expertise and experience was built up. Also, your views—and this may simply be a matter of resources and, therefore, not something you would have a view on—on whether or not the Opposition in particular should have clerical support in the way that a select committee has clerical support in order to enable them to, I think, scrutinise a bill more effectively. I also would like to know your views on—on the language and the language of bills. I think the recent bill coming from the Department for Constitutional Affairs has been heralded as a new version of plain speaking. I have not had a chance to look at it, but whether or not progress can be made on that. Just as a thought, in terms of the discussion we have had on legislation, in the figures you have given for the volume of legislation, how much of that is delegated legislation and how much of that, do you think, is the result of European legislation being drafted for domestic legislation?

Q217 Chairman: There is a lot of questions there, I am afraid.

Sir Roger Sands: That is quite a list, yes. To deal with the last point first, the figures which are quoted in the memorandum are for primary legislation, what is in bills. It does not cover delegated legislation at all. How much of that primary legislation is derived from European Union obligations, I am afraid I could not say off the top of my head.

Q218 Sir Nicholas Winterton: Why not?

Sir Roger Sands: I simply do not know, but it would be likely to be pretty small because in general under the European Communities Act 1972, one can implement a European Union Directive directly through delegated legislation, so it would not be covered in those figures. On special standing committees, although I have spent large chunks of my career in the Public Bill Office, I have never been a clerk to a special standing committee, partly because there have been so few of them. So I have no direct experience, but my impression is that, with one or possibly two exceptions, the experience of people, both Members and officials who have been involved with them, has been positive. They thought they added something to the mix in being able to test the arguments for the bill with some outside witnesses at the start, to interrogate perhaps a minister with his civil servants who have been engaged for months and months in preparing the bill. I have often been in the situation of seeing a standing committee engaged in a rather artificial exercise where one had Members who were finding difficulty coping with the detail of the bill, and a minister who was possibly finding it difficult too. Behind the minister there are civil servants who understand every detail of it, and in the public gallery there are some interest group people who also understand every detail of it and are passing
notes. So the debate is in some respects being conducted by proxy. You can break through that to a degree with a special standing committee because you can sit down with interest groups and talk to them and you can sit down with civil servants and the minister and talk to them, and then you can have your political debate on the bill. That is the essence of the procedure. I do not know if Malcolm has more direct experience.

**Dr Jack:** I do not have any direct experience either because there have only been nine special standing committees since 1980, I think, so they also happened when I was not in the Public Bill Office.

**Q219 Mr Vaizey:** A special standing committee appointed separately from a select committee.

**Dr Jack:** Yes, but a select committee looking at a bill, I think you were getting on to.

**Q220 Mr Vaizey:** No, it would be a special standing committee appointed separately to look at bills coming out of a specific department.

**Dr Jack:** I see.

**Sir Roger Sands:** I did notice that the example you gave was to deal with all Home Office bills—

**Q221 Mr Vaizey:** You might need about four committees for that part of it, but it is just the principle I am interested in.

**Dr Jack:** The reason I mentioned it is that I was, of course, thinking of the Armed Forces Bill and the exercise on that, which has just recently taken place and the Select Committee there spent four months and produced a voluminous report on the bill, which I have got here. I think that exercise was generally thought to be extremely successful, but this is perhaps sui generis. The Committee did recommend the procedure as a procedure to be followed by the House.

**Sir Roger Sands:** But that is very time-consuming and resource-intensive, a full select committee on a bill, and it is difficult to envisage that one could apply that across the whole of the Government’s legislative programme. I think that the special standing committee format is a better, practical which this Committee in its past has looked at, and legislative programme. I think that the special support some of this by tables and they are tables apply that across the whole of the Government’s legislative timetable between the two Houses.” You and resource-intensive, a full select committee on a become available if there is a reduction in the volume of time. There are some exceptions, of course. I hesitate to mention it in this company, but the Human Rights Act is always held up as a Luther-like exception, one which is very brief and very clear.

**Chairman:** It is very well drafted.

**Mr Shepherd:** Not everyone in the Government seems to want it!

**Q223 Chairman:** It was very elegantly drafted by Edward Caldwell and Christopher Jenkins and the content was good, I too.

**Sir Roger Sands:** Indeed.

**Mr Shepherd:** A declaration of independence by the Chairman! But I do not want to get into declarations of independence. I am grateful for your memorandum. It starts off with scrutinising, amending and passing bills as a primary function of Parliament. This echoes what this Committee and its predecessor have heard from time immemorial, ie construction. It ends up with, going through the points which you do here, things in which we have great interest. Your conclusion: “There is no indication that government business managers are likely to be willing to relax the degree of control which they exert over the legislative process and its scheduling.” Then finally down to “but significant additional time in the Commons is only likely to become available if there is a reduction in the volume of legislation introduced, or a rebalancing of the legislative timetable between the two Houses.” You support some of this by tables and they are tables which this Committee in its past has looked at, and I am thinking particularly of what you, in the language of the House, refer to as the “operation of programme orders” but which, in many aspects, have the features of guillotines. Why I am appreciative of this is because it is like often squeezing a stone for blood to actually see what is happening to our consideration of legislation. You know I have a long-term interest in this and just looking at 2004–05 and 2005–06, as far as we have got, we look at whole rafts of important bills. Identity Cards, the number of group readings not reached because of the guillotine or the knife, or whatever it is, two out of seven. These are major and hugely controversial bills. What conclusion do you draw from this? I draw the conclusion, though you may want to knock it down, that we are not considering bills because of the tightness of these timetables, that important concepts about our liberties and freedoms are not discussed in the Commons and that we are becoming redundant to

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where the power and authority now lies, which is negotiations with their Lordships. I am sorry, that is a highly controversial area for a Clerk of the House.

**Q224 Chairman:** Yes or no, is it true? **Sir Roger Sands:** Let me pin my colours to the mast straight away. I support the concept of programming, but I would find it very hard to support the way in which it is often used. Programming is an enormously powerful tool and it can be used constructively or it can be abused, and one sees examples of both constantly; but the principle, I think, is correct. I do not think that the idea of open-ended debate of everything is sustainable. It has not been for a generation. We recognise it just by the way we do second readings, which is not controversial any longer, by and large. Second readings used to be debated for as long as there were people who wanted to speak on them, but now we accept that they will be taken in one day and the number of speakers is trimmed to the time available.

**Sir Nicholas Winterton:** But is that right?

**Q225 Mr Shepherd:** Sorry, could I finish? You will remember, because it is 41 years, we were reminded today, when John Biffin was addressing this issue as Leader of the House of Commons, where he said that the automatic guillotine or routine programming of bills would undoubtedly act to the advantage of the Executive, the Government. In fact the House rejected it at that stage, which I think was 1986, was it not? What we have seen now is non-consideration of large chunks of important bills, a diminution of the power of the Commons versus the Executive, and furthermore a diminution of the power of the Commons in relation to their Lordships.

**Sir Roger Sands:** I am against an approach to procedure which results in debate being conducted as a process of arm-wrestling rather than real engagement; and I think when we had open-ended debate on legislation that was what tended to happen far too often and guillotining was the way you broke through. You stopped the arm-wrestling and it was almost the only way to do it. I think people began to realise that was not constructive and programming—or as it used to be called, “guillotining from the beginning”—was the answer to that problem. But it does have to be used with sensitivity, and I have to say that the Government business managers do not always do that. There is a sort of one size fits all approach, particularly to Report stages, where we have this standard pattern of a Report stage until an hour before the moment of interruption, a final hour for third reading, and you can have that for a bill *this size* or a bill *this size*, and that is hopeless. So when I see that, I share some of your despair, but I think it is one thing to say that and another thing to say we have got to go back to a so-called “golden age”

**Mr Shepherd:** Sir Roger, I appreciate the Clerk of the House and the great gentleness with which the Clerk forwards his propositions, but your actual operation of programme orders does not support the concept that we are examining under this guillotining or operation of programmes. The huge numbers, certainly in 2004, of numbers of groups at third reading not reached is startling in some instances. To read them out, because a wider world will not know what we are talking about, but we are talking about Identity Cards in one of the instances. We are talking about some very important pieces of legislation and I think your paper is more forceful than the words you are using here. Maybe I have misunderstood the paper, but I do not see how a committee can be looking at the legislative process without acknowledging truthfully to itself that the barriers which you have identified, the Government’s hold over and non-consideration of Opposition through the usual channels, the opportunity to tailor a guillotine motion which comes into immediate action after second reading, and then the Report stage of bills of which huge tranches, again, are not available to Members of the House because of the operation of a very tight scheduling. That is my concern. When we formulate what a report is going to be, we tiptoe around this because by nature we have a Cabinet Minister sitting in the chair. You have got to make the point.

**Q226 Chairman:** This is question and answer, rather than debate. **Sir Roger Sands:** Perhaps I could comment briefly. I got myself in a wee bit of trouble yesterday before the Joint Committee on Conventions of the House of Lords, when a Member of their Lordships’ House was making a similar point about the extent to which the Commons actually considers legislation, and I said that we can measure two things absolutely objectively: we can say how many clauses in a bill have not been debated by the House and we can show, as this schedule does, how many clauses have been put to the House en bloc under the terms of a programme order knife. What we cannot do objectively is to say, “What reasons underlie that?” What I was hinting to their Lordships was that they made a great mistake if they did not just take the bill as it reached them and deal with it on its merits. There can be all sorts of reasons. Sometimes it is because the amount of time which has been allowed under the programme is manifestly inadequate. Sometimes it can be because the time allowed under the programme has been manifestly adequate, but people have set out deliberately to try and demonstrate that it was not. Sometimes it can be—and this happens in committee—that there are a lot of clauses in the bill which are not debated because people have looked at them and thought there was no reason to debate them. So you can only subjectively judge on the reasons underlying these figures.

**Mr Shepherd:** But you will remember the Criminal Justice and Police Bill of 2001, where in point of fact in the committee it did the criminal justice part of it but because of an interruption in the committee it did not do the police bit of it and it fell because of the 2001 Election, but the House of Commons deemed
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Q227 Sir Nicholas Winterton: Absolutely!  
Dr Jack: I was just going to come on to the notion of voluntary programming, which I think is what Roger is getting at, namely the idea that really there are examples of this, quite successful examples. One might be the Finance Bill. The way the Finance Bill is dealt with in standing committee is done more or less on a voluntary basis, but the programme, as Sir Nicholas knows very well, is very clearly agreed and established. That is part of the culture—if I can put it that way—of that committee and it links up to other aspects of the work of that committee. I think that is one example. The other is a historical example, I think, which goes right back to the early nineties when I was in a previous incarnation in the Public Bill Office and the bill—some said the bill was to privatise the electricity industry and others to decouple it from the nationalised status it was in—was taken through the House by the present Prime Minister in fact, who was then Shadow Opposition Spokesman on Energy, and that was done on a massive and very controversial bill with an agreed programme. We did not call it "a programme" because it pre-dates programmes, but that certainly did happen and it was quite a successful operation. I think it depends partly on the sort of culture in which the matter is approached.

Mr Howarth: It is only to support a point against Richard, and I would never accuse Richard of wasting the time of the House, but I can remember the 1988 Housing Act, which was at the Report stage, where we went through the night and I was speaking myself for two hours on an amendment about the Durham Aged Miners’ Housing Association, and I freely confess before this Committee that not everything I said at that time of night and in those circumstances over two hours made a whole lot of sense. There was not this golden age. Oppositions will always use, and who can blame them, the opportunity they have to detain the House and detain the Government and that is not a sad fact, it is part of the function of being in Opposition.

Q228 Mrs May: Chairman, I apologise to everyone for my late arrival at the Committee, so do stop me if the questions I raise have already been discussed. I wanted to raise two areas, if I might. The first is the issue of secondary legislation and the increase in volume of secondary legislation, and the impact that has, both on Parliament’s ability to scrutinise what is happening, but, secondly, any practical issues which that raises for the Clerk’s Department if you are dealing with primary legislation which is increasingly vague in its terminology and reliant upon secondary legislation, where often the content of which is not available when the primary legislation is being discussed. The second issue I wanted to raise was post-legislative scrutiny. There is a very elegant paragraph, Sir Roger, in your memorandum on post-legislative scrutiny. Having read it, I am not sure whether you are in favour of post-legislative scrutiny or not, and I just wondered whether perhaps you could elaborate a little on your views on that.

Sir Roger Sands: I will leave Malcolm, if I may, to deal with secondary legislation as that falls within his current empire. What I was intending to say on post-legislative scrutiny was that I did not see it being what I think this Committee would regard as part of the regular legislative process. Pre-legislative scrutiny has, almost, become part of the legislative process in that it is possible to think of a bill proceeding in a different way if it has had that pre-legislative scrutiny. But post-legislative scrutiny I just regard as part of the general role of the House in scrutinising what Government is up to. The House has passed an Act of Parliament, it has given the relevant department a new instrument to use and it is of course right that in a few years’ time—the length of time will depend upon what the instrument was and what it was intended to achieve—it should go back and see what use has been made of it. But that I would see as part of the normal scrutiny activity carried out, almost certainly, by the departmental select committees. I think it would almost certainly end up being a waste of resources if we were to try to build in a new piece of machinery which always clicked in with every piece of legislation after a set amount of time. I just think that people would not find it a sensible use of time.

Q229 Chairman: Dr Jack, do you have anything to add?  
Dr Jack: I was just going to add on the point of delegated legislation that of course that is separated in the House service from the bill part of the operation, in fact, although there is nominally one legislation service and that part is conducted, as you know, by the select committees. So there is not really a direct link between that work and the bill work.

Sir Roger Sands: This is a case where the fact that we have two Houses of Parliament has been quite useful. The House of Lords has thrown quite a bit of resource at this issue. They have set up a statutory instruments Merits Committee, they have set up a Delegated Powers Scrutiny Committee and the latter certainly has done some very good work.

Sir Nicholas Winterton: But should the House of Commons be involved in that? We are not going to get the questions in which matter, unless we intervene.

Chairman: Theresa has asked the question.

Sir Nicholas Winterton: It is all part of it.

Q230 Mrs May: Perhaps you might want to answer Sir Nicholas’s question as well, because the way you just responded suggests that the secondary legislation issue is nothing to do with the primary legislation, but it is. It has an impact on how we handle primary legislation, and that is what I am trying to get at.

Sir Roger Sands: Yes. The balance between what is set out in the primary legislation and what is delegated to be done subsequently is exactly what the Delegated Powers Scrutiny Committee in the Lords is trying to look at. It is trying to judge in each case, when Parliament is being invited to delegate a
legislative power, is that appropriate or not? I think there have had some success in whittling down the number of what used to be called “framework bills”. I think there are fewer cases of really complete frameworks where you look at the bill and you have no idea how it is going to be used at all, which I agree is destructive of good parliamentary scrutiny.

Chairman: With Mrs May’s permission and Nick’s, could I just ask a supplementary?

Sir Nicholas Winterton: Sir, if you wish!

Q231 Chairman: Thank you. Does the fact that there has been a whittling down of framework bills—

Sir Roger Sands: I think that is true.

Q232 Chairman: Is it that what the Government draftsmen are saying would account for the greater length of bills these days, in other words more is now put in the primary legislation which previously went into regulations?

Dr Jack: I suspect the real reason is the growing complexity of law in almost all areas.

Sir Roger Sands: Yes. The attempt to reduce the number of delegated powers I think would be a relatively minor contribution.

Q233 Sir Nicholas Winterton: Could I just ask the question, and Theresa will come back and, I think, finish this series of questions. Do you think that the Lords and Commons should work together in joint committees rather than separately in dealing with secondary delegated legislation? It seems to me that both Houses together have a huge amount of experience and expertise and that where the Procedure Committee previously has suggested there should be a joint committee and the Government, for whatever reason, rejected that, do you think it would be a good thing to have a joint committee? Do you think that this joint committee should be able to amend secondary legislation, which at the moment they are not able to do?

Sir Roger Sands: No, I think amendment of delegated legislation is a contradiction in terms. If you can amend it, you have not delegated the power, so no, I do not; I have always thought that was a blind alley. But Parliament retains the right to reject a piece of delegated legislation, that is right and proper, and if they do, then the Government has to go back and think again. On joint activity, there is, of course, a Joint Committee on Statutory Instruments which looks at such questions as their technical vire and the other matters set out in the terms of reference of that Joint Committee. We have a small legal team in the Legal Services Office which supports that work, so all these statutory instruments do get read in Parliament and there is a small band of dedicated Members of both Houses who see the results of that reading and can pick up points if necessary.

Q234 Sir Nicholas Winterton: Does Malcolm Jack have any comment on that?

Dr Jack: I do not have anything further to add to that.

Q235 Mrs May: I am sorry to labour the point, but I wonder if I could just come back on this. It is a neat argument that if the legislation is delegated, then by definition you should not be able to amend it because that is the whole point of the delegated power, but when you have an increasing amount of legislation, which is going through in the form of delegated legislation, so you have increasing numbers of incidences where the power is delegated to the Government to bring forward the statutory instrument and what you are seeing is less and less scrutiny of the detail of the legislation by the House of Commons and, indeed, the Lords. That is the issue I am trying to get at, that yes, you are right in absolute terms, in terms of delegated legislation, but it does bring problems because it reduces the ability of the House of Commons to scrutinise legislation if more and more of it is done in this delegated way when there is only an hour and a half debate and an opportunity to say yes or no absolute and no opportunity to fine-tune the particular instrument concerned.

Sir Roger Sands: It is quite a long time since I attended a standing committee on delegated legislation, but my impression of them is that they are not one of the aspects of the activities of the House which engage Members to a tremendously high degree.

Q236 Mr Howarth: Ten or fifteen minutes probably!

Sir Roger Sands: I think we have the machinery there and it can be brought into play. What I do regret very much is that the opportunity for the House as a whole to vote on negative instruments has effectively been removed, and I feel quite strongly that was an abuse.

Q237 Sir Nicholas Winterton: You are absolutely right. Hear, hear!

Sir Roger Sands: I got myself into serious trouble with the Government Chief Whip recently by advising the Speaker that it was proper for the Opposition to put down such a motion for vote on an Opposition Day, but that is the only occasion recently when the House has been able to vote on a negative instrument, and I think that is regrettable.

Q238 Chairman: Do you think we should re-look at that?

Sir Roger Sands: Procedure committees have repeatedly suggested that the present system is not appropriate, and I agree with them.

Sir Nicholas Winterton: Very good.

Chairman: Thank you. I would like to offer my apologies now, but I have got to go. My departure is illustrative of an issue which I am raising with the Chairman of the Liaison Committee, which is the way in which a whole series of committees are now compressed into Tuesdays and Wednesdays and I want to see whether we can expand the working week a little better, or make use of the working week a little better.
Q239 Mr Knight: Do you agree that draconian and inflexible programming is not something we need to suffer, nor should we suffer it? I would like to take issue with George Howarth. I do not think Opposotions always have sought to frustrate government business and Dr Jack gave a very good example. When I was in the Government Whip's Office the one person I could always do business with was the current Prime Minister because my only concern, as Government Whip, was to get an end date for the standing committee, which was then totally un-guillotined. The Prime Minister in his capacity then was always willing to agree an end date provided the Government allowed set debates on the parts of the bill which he regarded as controversial, and that is how it should be. Is not the big problem with the present system that it is very much a lottery at Report stage whether controversial issues get debated, because if they come low down in the pecking order they are hit by the termination of the Report stage, there is no debate and very often no vote on these very controversial parts. Is that not something really which we should not put up with and are there ways of refining it? The Blair example is a good one. Tony Blair was New Labour before he invented the phrase “New Labour”!

Sir Roger Sands: I agree with the underlying point you are making, which is that relationships between the usual channels are crucial in this matter. If they are working constructively, as they have been on quite a number of bills in recent months, problems like the one you mention about controversial and serious issues getting squeezed out by the programme can be resolved because one of the things you can do in a programme motion is re-order the proceedings. You can manipulate it so that the key issues are, as we use the phrase, “protected” and they are almost guaranteed debate; there has been a lot of that recently. The other virtue of programming for the backbench Member who is not involved directly in proceedings is that it does enable the Whips to put in stop points at which divisions are fairly predictable. So you can look at your diary on the day and say, “I am going to be needed at four o’clock and six o’clock,” and so on. So there is a number of incidental virtues to programming which I do not think should be minimised.

Q240 Mr Knight: But the programme could be made more subtle, could it not?

Sir Roger Sands: Yes, I agree.

Q241 Sir Nicholas Winterton: And more responsive not only to the usual channels, Sir Roger, but actually to the genuine interests of backbenchers. Where do they come in? You keep talking about “usual channels” but they are not representative of the backbenchers, they are the Whips. Where does the House as a whole come into this in respect of programming, particularly, as my colleague Greg Knight has said, at the Report stage, which is the only stage of the bill when any Member of Parliament can actually seek to represent matters of interest to them or to their constituents?

Sir Roger Sands: It is quite a number of summers ago since I drafted the Sessional Orders which eventually became the programming Standing Orders, but my recollection is that there is a provision there for a programming committee to sit for the Report stage—not just a programming sub-committee for the standing committee stage, which does still happen, but also a programming committee for Report stage—and that is routinely disappplied.

Mr Shepherd: By the Government.

Q242 Sir Nicholas Winterton: If you drew up these Standing Orders, Sir Roger, seeking to get some input from backbenchers, why is it disappplied on a regular basis for the only stage of a bill when backbenchers can actually have a say?

Sir Roger Sands: I think I am right about this.

Mr Shepherd: You are.

Q243 Sir Nicholas Winterton: 83B, I am advised.

Sir Roger Sands: I think the reason it was found to be difficult to do at Report stage is simply the question of timing, that it is quite difficult to set up the paraphernalia of one of these programming committees, have it meet and very often then simply just agree to something which has already been negotiated behind the scenes by the Whips. But there is sometimes a really genuine problem because occasionally there is a big backbench issue which neither of the front benches want to be involved with. It happens particularly when there is a possibility of a backbench revolt on the Government’s own side and it is possible. I fear, to manipulate programming in such a way that a debate on such an issue can be squeezed out.

Q244 Mr Knight: But at a time when Report stages are routinely cut short, what benefit do you think the hour on third reading brings to our process when it invariably turns out to be 60 minutes of nauseating back-slapping with every Member who takes part thanking someone else?

Dr Jack: I hate to sound like a spoilsport and stop people back-slapping, but I am rather inclined to agree that some of the third reading debates which I have heard recently have not added a great deal to the scrutiny of the bill. The other point I was just going to make, Sir Nicholas, was on the Report stage. I think also, as the Clerk says in his memorandum, there is a general problem about time anyway and I think Mr Knight just referred to that. There is a shortage of time for Report stage, whether programmed or not programmed, in certain cases.

Q245 Mr Knight: Just one final question. Am I right in my belief that we are the only Parliament, certainly in the Western world, where backbench Members do not have an opportunity to raise an issue for debate on a substantive motion?

Sir Roger Sands: I would be very surprised if that were the case because in general parliaments on the continent of Europe are much more heavily
managed than ours is even. You may find that hard to believe, but if you go to the German Bundestag everything is controlled by the parties, absolutely everything, including, may I say, who speaks in the debate.

Q246 Mr Knight: I may write to you further in this regard.

Sir Roger Sands: I suspect that this is not the case.

Sir Nicholas Winterton: Before 1 September you will have to write!

Q247 Ann Coffey: At the end of a sitting on a second reading of a bill, often we are faced with a number of votes which are consequential on the first vote—the amendment of the bill, the programming motion and the money resolutions—which means you could be going through the Lobby up to five times in the worst possible scenario. Do you think it would make a huge amount of difference in terms of scrutiny of legislation or outcome if there was a device found whereby you would go through the Lobby at 10 o’clock and be able to register votes in the same way many parliaments have, it has been known that legislation or outcome if there was a device found.

Sir Roger Sands: I think we partially touched on this earlier when Dawn Butler was asking about this and wanted, the day after we were elected to this case, a reference in terms of scrutiny of the principal debate.

Sir Nicholas Winterton: That was a comment, not a question.

Q248 Mr Shepherd: It used to be debatable, the money resolution, for instance, and it was a genuine opportunity for backbenchers to come in and make their point because they had been squeezed out of the principal debate.

Sir Roger Sands: Yes.

Sir Nicholas Winterton: You will remember, Sir Roger, Mr Cryer who made his reputation by speaking on the money resolution.

Sir Roger Sands: Yes, but on the programme motion—I was not quite certain whether you were suggesting that the programme motion might be wrapped up with the decision on the second reading—I do not think that would be fair on people because they may agree with the bill but object to the programme. They may have no views at all about the programme but object strongly to the bill and want to register that decision. My impression is that recently there has not been a great accumulation of votes after second reading. Occasionally there have been two. If you get a reasoned amendment, which the Speaker selects and people want to vote on that, and then some other people want to vote against the bill, you can get two votes. As to whether those could be deferred, yes, in principle they could because nothing procedurally hangs on it in the way that things hang one on another during a committee or Report stage; but I do not think your Whips would be very enthusiastic about that idea because it would delay the point in time at which the committee could be selected and start to meet.

Q250 Ms Butler: If we had maybe remote electronic voting so that you could vote and you do not all have to be seated at a desk somewhere. You are saying if we reduced the number to 400, but if we had remote electronic voting, a device or on a computer, that might help with that question in rolling up the vote.

Sir Roger Sands: Various possibilities have been considered by previous committees. It is a long time since I read the reports, but one of the obvious problems is how do you guard against people handing their remote devices in a big sack to the Whips and then going home for the week.

Ms Butler: That would just be dishonest!

Q251 Ann Coffey: No Member of Parliament would do that, Sir Roger?

Sir Roger Sands: Even in parliaments with the press button system which I was describing earlier, which many parliaments have, it has been known that people have been seen with walking sticks pressing another button!

Mr Shepherd: We used to joke that the Whips wanted, the day after we were elected to this case, a power of attorney to exercise our votes through the whole Parliament! We almost got there.

Sir Nicholas Winterton: That was a comment, not a question.

Q252 Ann Coffey: The way I was going to see it was that you would go into the Lobby, you would have a piece of paper and you could register you are for the programme motion, you are for the second reading, et cetera. Obviously that would mean that information would have to be collated, so you could not have the result of each of them as you went through the Lobbies, but presumably you could have a system where the vote could be read out at the end of the adjournment debate so that, in fact, it did not delay government business.

Sir Roger Sands: Yes, vote not knowing whether the motion is going to be opposed or not. I must admit that is a variant which I had not thought about.

Ann Coffey: Could I ask you something else just to push it a bit further? In terms of bundling up votes could this also be done on a Report stage? We talk about time, but obviously one of the things which takes time out of the Report stage are the votes themselves. Again, at the end of a sitting or something like that, would there be a way of bundling up votes which had occurred, that needed to be taken during the Report stage?

Q253 Sir Nicholas Winterton: I think we have dealt in part with this earlier, but could I perhaps ask Sir Roger just to summarise what Malcolm’s and Roger’s answers was to the earlier question on this matter.

Sir Roger Sands: It is basically that the process of dealing with the text of a bill at committee stage or Report stage is a logical process where one decision very often hangs on another. That is the argument
we have always put when this issue has been raised. I entirely understand what you are saying, that our method of voting, being relatively cumbersome as it is, does take time out of precious debating time; but that is a technical issue separate, I think, from the idea of bundling votes, which I think is very difficult when it comes to a Report stage in particular.

Q254 Paddy Tipping: Just to support Greg Knight's view that the Prime Minister was New Labour before he was Prime Minister before his time, not only did he know what he wanted to debate, when he wanted to debate it, but he also had the press release drawn up at the time! One of the issues around programming is the Opposition using their time politically and sensibly and taking the opportunity in the programme motion, but just two small points and a slightly larger one. When we take the programme motion, we take it straight after second reading. There has been talk about being more subtle and more sophisticated. A longer period of time before the programme motion would give ostensibly business managers and others more time to reflect on how much time was needed in the standing committee. You acknowledge that in the paper. What are your views on that? Secondly, as somebody who is regularly on standing committees, certainly when you are in Opposition in a sense you are a bit of a hostage of the interest groups. They supply you with lots of amendments and lots of ideas. Dr Jack very helpfully sorted an amendment out for me the other day. Is there a case for offering more support to backbench Members during the standing committee stage? Finally, and this is a wider point, the paper is very good on pre-legislative scrutiny and I think, Sir Roger, you said that it had become part of the norm. When you look at the figures, the number of draft bills are going down.

Sir Roger Sands: It has gone down, yes.

Q255 Paddy Tipping: Why is that and what is happening around that?

Sir Roger Sands: I do not know in detail, but I suspect it may have something to do with the fact that we had an Election in 2005 and the system has taken time to crank back up again and for the parliamentary draftsmen to get ahead of the wave in the way they need to be for pre-legislative scrutiny to operate. Your remark about support for backbenchers, which I will ask Malcolm to deal with in a moment, reminds me that there was a point which Mr Vaizey made about support for Opposition frontbenchers, as I understood him. That should be something which comes out of the famous Short money, which I now sign off to the tune of well over £5 million a year, a large part of which goes to the official Opposition, and it is precisely intended to provide the research assistance which Opposition frontbenchers need to carry out jobs like that.

Dr Jack: Just on the point of support, with our desperately thin resources the Public Bill Office, as Mr Tipping knows, is more than willing to help backbench Members, and Sir Nicholas knows that as well. During the course of any bill there is a single clerk in charge of it and he or she will certainly try to help any backbench Member who comes up and wants to table amendments. That is rather different, I understand, from the point you are making about the pressure groups. Some of that again would depend on how controversial a bill was, what the political content was, and so on, which would mean we might not be the best people to forge amendments of that sort. But certainly the Public Bill Office is always open for backbench Members. I would like to make that point very strongly.

Sir Roger Sands: The Chairman indicated earlier on his interest in the idea that special standing committees should become a more routine feature of our proceedings, and of course they are slightly more lavishly supported, but not much more lavishly supported, because they operate initially as a select committee and they have to have a clerk operating in that role and other support as well to deal with the evidence that comes in, and so on, and to process it for Members. So if the special standing committees were to become a more routine part of our procedures, I think your point would in large measure be met.

Ms Butler: Just a quick question. It is not in relation to standing committees, to be honest, but because I know we are running out of time I just want to know your views on speakers lists just before you go. I have to put that in before you disappear.

Q256 Sir Nicholas Winterton: Only if our witnesses wish to comment on this because it is not strictly, I think, part of the legislative process, but if, now that he has announced his retirement, Sir Roger feels free to reflect on how much time was needed in the standing committee stage? Finally, and this is a wider point, the paper is very good on pre-legislative scrutiny and I think, Sir Roger, you said that it had become part of the norm. When you look at the figures, the number of draft bills are going down.

Miss Butler: Just a quick question. It is not in relation to standing committees, to be honest, but because I know we are running out of time I just want to know your views on speakers lists just before you go. I have to put that in before you disappear.

Q257 Sir Nicholas Winterton: Exactly!

Sir Roger Sands: And I understand why he has them, but there is no more that I wish to say about that.

Sir Nicholas Winterton: I will say from the Chair to Dawn that the Speaker is strongly opposed to speakers lists, which he thinks would impair his discretion as Mr Speaker. Ann Coffey, and then I have a question which I must put to our witnesses.

Ann Coffey: Do you think over the years there is any evidence that maintaining a speakers list has helped populate the Chamber with MPs?

Mr Vaizey: That is a comment more than a question.

Sir Nicholas Winterton: It was certainly posed as a question. It might have been rhetorical.

Q258 Ann Coffey: It was certainly a question, just evidence-based.

Sir Roger Sands: Certainly the general tendency of attendance in the Chamber to go down has been very marked during my 41 years and I suspect it would take a constitutional crisis to change that.

Q259 Sir Nicholas Winterton: Sir Roger, could we deal with one or two other very relevant matters to this Committee. Could I just refer to standing committee papers. In your view, and that of Dr Malcolm Jack, who is responsible for legislation as
the Clerk of Legislation, would any changes, such as increasing the notice period for amendments, be necessary to produce more elaborate standing committee papers, and would that be helpful to the debate in standing committee?

Dr Jack: This may sound slightly evasive, Sir Nicholas, but I think it depends what sort of elaboration of the papers you meant. I think there is a number of different aspects to this business. One of them is the possible provision of amendments. Is that what you are thinking of, papers which marshal the amendments to the bill?

Q260 Sir Nicholas Winterton: Yes, that is part of the question.
Dr Jack: Obviously, I think slightly more time, three days, for example, for minimum notice of amendments instead of two would certainly help the administrative marshalling, but on the other hand, of course, it would involve a loss of flexibility for individual Members and I think that a lot of Members, for very good reasons, tend to table their amendments at the very last minute, so they would have to work a day ahead. We find certainly most backbench Members will table their amendments at the very last minute on the last available day for the minimum notice. The other thing is that I think the business of explaining amendments, which I think was the other strand of your question, a paper which showed how amendments related to bills, I think you have had evidence from the Library, a very useful paper, on how Members might be helped in that respect by receiving that support and I think that sounds like a very good project, particularly if it is done by the Library.

Q261 Sir Nicholas Winterton: Can I then follow this up. Government bill teams usually prepare for ministers a paper showing how the text of a bill would look if certain amendments or groups of amendments were agreed to. Would there, could there, be any drawback in circulating this particular paper produced by the government bill teams to standing committee Members on both sides of the house?
Dr Jack: No, I do not think there would be any drawback. The only thing which would have to be made quite clear—and I am sure if you were in the chair, Sir Nicholas, you would make that quite clear—is that that was not the bill before the committee, lest there was any confusion about what text was before the committee, but as an adjunct and as a help to Members, I see no reason why not.

Q262 Sir Nicholas Winterton: Following that up, it has been suggested in evidence given to us that Members tabling amendments to a bill might be allowed to table a brief explanatory statement, as of course the Government does, to be printed alongside amendments on the notice paper. What would the benefits on the one hand and the drawbacks on the other be to this proposal?
Dr Jack: I think the benefits are that there are often complaints that it is difficult to understand what the intention of amendments are and therefore some explanation, perhaps, at the bottom of the page of an amendment sheet, or next to the amendment, explaining that would help everyone to understand—including the public, of course—what was going on when the Member was proposing the amendment. The disadvantages are the questions of cost and possible bulk. There is a figure which I have been advised is fairly reliable, that there is a marginal cost of £70 per page for additional pages of amendments, so the costs of increasing the size of amendment papers could be considerable if they became long.

Q263 Sir Nicholas Winterton: Have you worked that out on an annual basis as an estimate?
Dr Jack: No, I think that is just a ballpark figure for a page.

Q264 Sir Nicholas Winterton: Can I move on again. I am not sure whether this is Sir Roger or Dr Jack, but how common is it—and we have not talked about the Lords in this evidence session—for the Commons to be kept sitting late into the night waiting for Lords messages?
Dr Jack: I am very happy to say that it is really quite rare occurrence. I did have a sheet of paper with me showing exactly how often it has happened.

Q265 Sir Nicholas Winterton: It certainly has not happened very often recently, although it has happened that the House has been kept waiting for Lords messages?
Dr Jack: Yes. It has happened once a session, usually, in the last few sessions. It is really quite rare.

Q266 Sir Nicholas Winterton: Is there any way, in your view—and this is very much, I suppose, for you, Dr Malcolm Jack—that papers relating to the exchange of messages could be made for Members of the House of Commons rather easier to follow?
Dr Jack: I think they could be, with the proviso that there was a little bit more time to prepare them. One of the things which the Clerk mentions in his memorandum is that it has become the habit almost invariably to take Lords amendments forthwith, ie without any notice at all, and, of course, if you are in that sort of game, if I can put it that way, then there is much less time to prepare papers. For example, with the papers which we colloquially call “A” and “B”, which are the Lords amendments and the Commons amendments and propositions, I think there could be a way, perhaps, of amalgamating those papers so that you would at least lose one of the papers. We could possibly run an experiment on that line, if you wanted, in the Public Bill Office.

Sir Roger Sands: Parliamentary Counsel has put to this Committee a very elaborate paper, which I have to say we struggled to understand in part, making various proposals for changing the way we handle exchanges between the Lords and Commons when we get into them. I would not suggest you immediately recommend any of the solutions which

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are there, but we would be happy to conduct some pilots behind the scenes to see if there is any merit in any of them.

Q267 Sir Nicholas Winterton: Before I bring in Greg Knight, could I just ask you in this area what would be the benefits, Sir Roger, or the disadvantages of abolishing the Reasons Committee, which most people in the House have not got any idea about whatsoever? Do you think there would be advantages, and what would be the disadvantages?

Sir Roger Sands: I think there is a distinction to be made between abolishing reasons and abolishing the committee which produces them. The House could produce reasons in another way without having the little committee which convenes in the Reasons Room behind the Chair and we could certainly devise an alternative way of generating reasons. Abolishing them altogether is slightly more problematic and I think you would need to enter into discussions with the Lords about that. The Reason often has no real substance—

Q268 Paddy Tipping: No, because we disagree!

Sir Roger Sands:—but it is a symbolic sort of handing of the baton from the Commons to the Lords.

Q269 Ann Coffey: So you are saying it is a positive thing, the baton?

Sir Roger Sands: We do that already. Abolishing the Reasons altogether and just sending saying, “We disagree,” is possible, but—

Q270 Sir Nicholas Winterton: The Committee could go, but the Reasons should remain?

Sir Roger Sands: Indeed. That is my view.

Sir Nicholas Winterton: Thank you.

Q271 Mr Knight: Could I just take you back to the comments about giving an explanation as to the scope of an amendment or new clause, because it seems to me there are negative aspects to this as well. If it was an optional scheme, many backbenchers and Opposition spokesmen might decide they would prefer to keep their powder dry, particularly on a probing amendment, and therefore the innovation, if it was introduced, would not be as valuable as some Members might think. Secondly, if it was a compulsory requirement that when you tabled an amendment or a new clause you had to provide an explanatory memorandum, this could greatly increase the workload on backbench Members and Opposition Members because they would have to do far more work at that stage, not knowing that their new clause or amendment was ever going to see the light of day because it might not be selected. So these are real and serious negatives, particularly in a system where the official Opposition, all the Short money they have, is usually taken up by either the party leader or the Shadow Secretary of State and other Shadow ministers have to do all this research on their own. So there are downsides to this suggestion.

Dr Jack: Yes, I do agree with those comments about the downsides. There is another complication. I think there would have to be some limit or other on the words of the explanation for the amendment, otherwise we are back in the situation of the amendment sheets getting inordinately long. That is the first thing. The second thing is that it might be a bit difficult for the Public Bill Office to vet these explanations because the argument that this was an argument, of course, or argumentative would be the benefits, Sir Roger, or the disadvantages of abolishing the Reasons Committee, which most people in the House have not got any idea about whatsoever? Do you think there would be advantages, and what would be the disadvantages?abolishing them altogether is slightly more problematic and I think you would need to enter into discussions with the Lords about that. The Reason often has no real substance—

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Sir Roger Sands: I think my general message to the Committee on this issue of papers, which is a very significant one because I know that Members find the papers difficult, is that you have to look for solutions which are going to work in all conceivable circumstances. You cannot invent a system which would work fine on one particular clause of one particular bill and then find that it would be a mess when you got to another one. That is my slight worry about the idea of circulating the Government’s pages showing the bill as amended. I guess that they only do that on a very selective basis and provided that is understood, that is fine; but if you were to imagine doing that for the whole of today’s amendment paper on the Finance Bill, for example, it would be just another load of paper which I do not think people would find very helpful.

Sir Nicholas Winterton: Can I say to colleagues on the Committee, I think we have reached the end of our questioning. It has been a pretty hell for leather session and all Members of the Committee have had a good innings. Can I thank Sir Roger, and in doing so wish him every happiness and the best of good fortune in his retirement, and also thank Dr Malcolm Jack, the Clerk of Legislation, both of them for the very valuable evidence which they have given to us. We are most grateful. Thank you very much indeed. There being no further business, the Committee can adjourn.
Written evidence

Rt Hon Eric Forth MP (M 20)

Thank you for notification of the Committee inquiry into “the Legislative Process”.

I believe that so-called modernisation has so far been for the convenience of Members and the Government, not the Parliamentary process. It cannot be to the benefit of Parliament (as opposed to Government) that business is controlled, predictable and restricted—eliminating entire debates and separating debate and division.

Previously, the Opposition determined the pace of business; now the Government does so. The single most effective way to restore the balance between Government and Parliament would be to eliminate automatic programming of Standing Committees. Deferred divisions are an affront, reducing even further the relevance of debate—when it is obvious that Members not even in the building (or the country!) for a debate can nevertheless vote on a ballot paper several days later.

It is not the Government which should decide which aspects of a bill require greater scrutiny, but the House, Committee or, indeed, Opposition. The Government has already scrutinised its own bill! My suggestions are to scrap programming, deferred divisions, and carryover—all of which simply enhance control by the Executive of the legislature.

What is “modern” about that?

November 2005

Rt Hon Eric Forth MP (further submission M 32)

The Committee Stage of Commons Parliamentary consideration of a bill is intended (or should be) to allow Members of Parliament to scrutinise, and where necessary, amend the Bill.

It should be a parliamentary, not a governmental, process—and should, therefore, be determined by legislative, not executive, considerations. It is essential, therefore, that proper opportunity exists for the members fully to scrutinise the details of bills—unconstrained by arbitrary governmentally determined timetables.

This is equally important for legitimate outside interests—who need time to prepare and submit facts and draft amendments for committee members to consider.

It is essential, therefore, that the practice of government imposing timetables on committee deliberations before they have even commenced is ended—in order that committees may decide how much time they require adequately to scrutinise bills.

The difficulty with having select committees perform the work of standing committees is that select committee members are largely self selecting “volunteers”—who have both knowledge but also interest in the policy area—which may not provide the most effective, disinterested scrutiny.

Furthermore, there would inevitably arise a conflict between the work of legislative scrutiny and departmental fact finding and inquiry.

The problem with so called “first reading committees” is how it is decided whether this truncated procedure is appropriate. In other words, who determines whether there is “no appreciable difference between the principle of the bill . . . and its detail.”

There appears to be no reason, other than the convenience of the government and Members of Parliament, why the House should not revert to the procedures in effect pre 1997, when standing committees were able to determine their own consideration.

January 2006

Adam Afriyie MP (M 21)

As a relative newcomer to Parliament, my experience is of only part of the parliamentary cycle; however, my advice would be to ensure that consistent times and days of the week are set for both select committees and standing committees. A consistent programme of work makes it a lot easier to ensure that scrutiny and investigation is more competently achieved because one can settle into a pattern of work and diarising of upcoming events.

November 2005
INTRODUCTION

We welcome the renewed investigation of legislative scrutiny by the Select Committee on Modernisation of the House of Commons. Democratic Audit has recently carried out with two partner organisations, Federal Trust and One World Trust, a research project into parliamentary oversight of external policy. The results of the work will be published early in 2006. The general conclusion was that the executive is able to make external policies subject to at best minimal parliamentary scrutiny and accountability.

In the following paper we address the parts of this problem that relate to issues raised in the Modernisation Committee call for evidence. We argue that improvements in the legislative process have not benefited sufficiently the scrutiny of external policy; and we propose means by which this problem might be rectified.

The overall effectiveness of the recommendations from the First Report (1997) of the Modernisation Committee on The Legislative Process

We believe the Modernisation Committee recommendations, especially for pre-legislative and post-legislative scrutiny, were welcome and have helped bring about significant improvements to democratic scrutiny of legislation. However their overall effectiveness is limited by the fact that their application to external policy is slight. This is a major area of concern since in the globalised world of today external policies affect the domestic lives of British citizens in manifold ways.

External policies are rarely framed in legislation. From 1997–98 to 2004–05 the government introduced a total of 298 bills. Of these, the principal departments concerned with foreign policy introduced only 16 bills between them (the Foreign and Commonwealth Office nine, the Department for International Development four and the Ministry of Defence three). The Department of Trade and Industry introduced 22 bills, of which just one was primarily concerned with external matters. This compares with 54 for the Treasury over the same period, 53 for the Home Office, 28 for the Lord Chancellor’s Department/Department for Constitutional Affairs, 19 for the Northern Ireland Office, 15 for the Department of Health, and 10 for the Department for Culture, Media and Sport. In its existence of little over four years the Department of the Environment, Transport and the Regions managed six more bills than the Foreign Office did in eight years. In three of the eight sessions the FCO did not introduce a bill at all.

Therefore any improvements to the legislative scrutiny process have had far less impact upon oversight of external policies. There is already an “accountability gap” between external and domestic policies, partly as a consequence of the small quantity of legislation concerning the former. The effect of recent improvements to the legislative process, valuable though they are, has been to widen this gap further. We suggest in the present paper means by which this deficiency might be corrected.

One reason why so few laws are passed dealing with external matters is that ministers make policies in this area largely under the Royal Prerogative, not requiring the formal involvement of Parliament. Graham Allen MP has had a motion on the Order Paper since autumn 2002 proposing that the prerogative power to engage in armed conflict without a vote in the legislature be reformed. It was signed by more than 100 members of all the major parties. Democratic Audit has submitted evidence to the current House of Lords Constitution Committee inquiry that also proposes that the executive should be obliged to gain Parliamentary approval before entering into armed conflict abroad.

But ministers—and indeed officials—make external policy in other significant areas that have consequences for the everyday lives of British citizens—for example, making treaties, entering into trade negotiations, playing a part in the United Nations and its agencies. As we have noted, Parliament does not have a formal role in the decisions that are made. Moreover—and importantly from the perspective of the present inquiry—it has never been presented with legislation setting out the discretion enjoyed by the executive. These multifarious powers, comprising the framework within which much of external policy is conducted, have, therefore, never had the rigours of the legislative process imposed upon them. For this reason (and others) we support the Public Administration Select Committee (PASC) recommendation that prerogative powers in general be placed on a statutory basis. By bringing forward legislation for this purpose, with a full pre-legislative phase conducted on the broadest possible basis, an important step could be made towards rectifying the lack of parliamentary accountability and legislative scrutiny applying to external policies.

1 Not In Our Name: Democracy and Foreign Policy in the UK, Simon Burall, Brendan Donnelly and Stuart Weir (Politico’s, London).
2 Government Bills introduced each session (by department) 1997/98—2004/05, Parliamentary Information List, Laurent Palacio and Helen Holden.
One area of the prerogative which PASC argued required urgent attention was the power to make treaties. Treaties (taken in the broadest sense as meaning all international agreements) can be regarded as the external policy equivalent to legislation. But at present the only provision for parliamentary scrutiny of treaties is the convention known as the “Ponsonby Rule” which does not require votes to be held and very rarely leads to an agreement being debated, unless the government or opposition wants it to be.

We appreciate that the traditional constitutional position is that treaties which require alteration to internal law must be enacted by domestic legislation. According to this theory, the implementation of any treaty with an internal implication is therefore subject to Parliamentary scrutiny and approval. However we believe this doctrine is flawed on two counts. First, there is no reason that the external actions of government should be subject to any less democratic accountability than the internal ones. Second, treaties not requiring domestic legislation for their implementation are nonetheless likely to have internal implications. International agreements affect (among other matters) industry and business, public health and the environment, even anti-crime and counter-terrorism measures. Treaties should therefore be treated as analogous to legislation, with similar forms of scrutiny applied to them. We believe this could be achieved through the following measures:

- The introduction of a convention (possibly confirmed by an addition to the Ministerial Code) that ministers will give evidence to relevant specialist select committees before they attend international meetings likely to result in agreements being reached. From this a form of “soft mandating” could be developed—providing an equivalent to pre-legislative scrutiny for treaties.
- The establishment of a treaty sifting committee (possibly a joint committee of both Houses), able to seek expert opinion on the contents of agreements from relevant specialist select committees; and with the power to refer treaties it deems of sufficient importance to the plenary of the Commons to debate its clauses and vote to accept or reject it.
- Systematic monitoring of the implementation of treaties by specialist select committees. For especially significant treaties or those covering many policy areas, special committees could be established, perhaps co-ordinated by the sifting committee proposed above. This process could be an equivalent to post-legislative scrutiny.

Has pre-legislative scrutiny resulted in better legislation? Could its use be extended and, if so, what consequences would there be for the legislative process?

Generally speaking, we believe that pre-legislative scrutiny should become the norm for all legislation. Too much legislation is passed too quickly and with too little scrutiny. We believe pre-legislative scrutiny has resulted in better legislation. For example, greater protections were added to the Civil Contingencies Act 2004 to guard against abuse of the powers it gave the executive after concerns were raised during its pre-legislative phase. An extension of pre-legislative scrutiny would improve the quality of legislation and contribute to raising public regard for Parliament if its work were seen to be done better.

The current Terrorism Bill might also have benefited from a longer phase of pre-legislative scrutiny than it received. This would have given more space for considered judgment and might have preserved the consensual approach that the government originally sought. We are aware that in this case the government was very anxious to get the legislation onto the statute book. However, scrutiny need not have had to be based on a draft bill since the main proposals were known in advance; and in general we consider that scrutiny of white papers or instructions to counsel could be appropriate alternatives to pre-legislative scrutiny of actual draft bills.

We are also strongly of the view that pre-legislative scrutiny on-line, as for the Communications Bill in 2002, which allowed members of the public to submit comments on committee proceedings as they took place, is a model which should be employed more frequently. This is a process that can strengthen the links between Parliament and the public and so strengthen our democracy.

There is another area in which the practice of pre-legislative scrutiny could be extended. Between 1997–98 and 2004–05, the government published 50 draft bills or sets of clauses which were suitable for pre-legislative scrutiny. Only two on the list had a clear external policy remit. One, the Export Control and Non-Proliferation Bill, from 2000–01, received scrutiny from committees in both Houses. But the other, the International Criminal Court Bill (1999–2000) was one of only five draft bills to have received no scrutiny. Proliferation Bill, from 2000–01, received scrutiny from committees in both Houses. But the other, the International Criminal Court Bill (1999–2000) was one of only five draft bills to have received no scrutiny.

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As we suggest above, an equivalent to pre-legislative scrutiny for treaties could be introduced.

Parliamentary committees require research support for their pre-legislative work. Following recommendations by the Liaison, Procedure and Modernisation Committees, the Committee Office Scrutiny Unit was established in November 2002. It reached its full complement of staff in January 2004, with ten specialists and seven core staff. Something over half its work is devoted to assisting committees carrying out pre-legislative scrutiny: in 2003–04, of 2,137.5 staff days in total, 1,449.5 were spent on draft

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bill-related work. Given the small number of bills dealing with external policies, the Scrutiny Unit—a valuable innovation—makes less of a contribution to parliamentary oversight of external than of internal policies. Of the 10 projects with the most Scrutiny Unit staff hours expended upon them, none related to external policy. The developments in scrutiny of treaties and legislation relating to external policy that we recommend would entail more work for Parliament and its committees. An additional “External Policy” branch attached to the Scrutiny Unit could be established to support the new tasks.

Graham Allen MP
House of Commons

Dr Andrew Blick
Professor Stuart Weir
Human Rights Centre
University of Essex

December 2005

Chairman of Ways and Means (M 31)

INTRODUCTION

1. I welcome the opportunity to contribute to the Modernisation Committee’s consideration of the process of legislation. Some of the issues mentioned in the Committee’s Press Notice of 9 November 2005 raise questions which are not for me as Chairman of Ways and Means, nor for the Chairmen’s Panel. What follows, therefore, concentrates primarily on the passage of bills through Parliament.

2. I should say at the outset that part of the problem of achieving more effective scrutiny of legislation—whether by pre-legislative scrutiny, by committing bills after second reading to a select committee, or by post-legislative scrutiny by a departmental select committee—is time.

3. Given that legislation is inevitably a complex process, the House has yet to find an ideal formula whereby, both in the Chamber and in committees, all the substantive matters in a bill can receive scrutiny within a reasonable compass of time. Scrutiny extends the proceedings on the bill in question and this, in turn, puts pressure on parliamentary time for legislation and introduces an element of uncertainty into the overall legislative timetable. Ultimately, the extent to which time can be made available for more thorough scrutiny is likely to depend, at least to some extent, on the size and complexity of the Government’s legislative programme for the session and on the ability (willingness, even) of Members to give priority to the scrutiny process in the face of increased demand from constituencies and the pull of the increasing number of parliamentary committees and groups.

STANDING COMMITTEES

4. Any discussion about the possibility of modernising the work of standing committees engages two issues that are interlinked: programming and sitting hours.

5. The vast majority of Government bills are now programmed. In my Memorandum to the Modernisation Committee in Session 2002–03 I suggested that the use of internal knives in standing committees on programmed bills was “frequently unhelpful” and that it was often genuinely difficult to estimate the length of debating-time that a specific part of a bill would require. That Committee recommended that the programming sub-committee “should keep the operation of knives under careful review”. That recommendation was evidently heeded, since the fashion for a multiplicity of internal knives in standing committee has been superseded by the tendency to set a simple out-date. I have no evidence that this change has made any difference to the length of time devoted to each part of a bill and it seems to have been a positive move.

6. The Committee should also note that, provided there is agreement between the Whips, it is perfectly possible to give a bill orderly consideration in standing committee without any programme at all: since the beginning of the last Parliament only one Finance Bill has been programmed and there is no evidence that lack of a programme caused any difficulty in securing an agreed conclusion to the proceedings in standing committee.

4 See: House of Commons Liaison Committee, 2003 and 2004 annual reports.
5 In the last Parliament 95 Government bills (excluding consolidated fund bills) were programmed, six were guillotined and 10 were unprogrammed. By the end 2005, 24 Government bills (excluding consolidated fund bills) had been programmed during the current session and two had not: the Finance Bill and the Crossrail Bill.
7 Ibid, paragraph 33.
8 That of Session 2002–03.
7. The second issue is that of sitting hours. I noted in my previous Memorandum that standing committees needed more flexibility in times of sitting. One effect of programming that was possibly unintended was that committees soon got into the habit of adjourning immediately after the fall of the last knife in the afternoon, even though they were at liberty to sit until someone moved the adjournment. The result of this is that there is now an informal “tariff” of two-and-a-half to three hours for an afternoon sitting. In the days when the moment of interruption of business in the House was 10 o’clock, committees routinely sat in the late evening after a dinner-break but nowadays they rarely do so; at the time of writing, in the current session there had been only 18 sittings of standing committees on bills that had lasted for three hours or more and only two of those had lasted for more than four.

8. The change in sitting-times and the expectation of “regular hours” that have been engendered by programming have together led to fewer hours being spent in standing committee. No doubt standing committees could be more effective if they were enabled to devote more time to clause-by-clause scrutiny—but there is no guarantee that the new generation of Members would be prepared (or be encouraged) to sit for the necessary number of hours. It should not be forgotten that 418 of the current membership—65%—entered the House on or after 1 May 1997.

9. Similarly, my view is that if standing committees are going to become a vehicle for more effective scrutiny of policy (as opposed to scrutinising the text of the bill, important though that undoubtedly is), then an obvious route is greater use of the special standing committee procedure. Given the impact that this would be likely to have on the Government’s timetable, however, one would have to question the feasibility of such a course. Recent history is against the suggestion: there has only been one special standing committee since the beginning of the last Parliament. Regular use of pre-legislative scrutiny, on the other hand, might allow for more give-and-take before Ministers feel bound to defend every dot and comma in front of them once a bill has been presented. Again, this might be seen as an extension of the length of time devoted to scrutiny, although effective pre-legislative scrutiny could in some cases lead to shorter committee stages. A concomitant of pre-legislative scrutiny might have to be greater flexibility in relation to carry-over.

REPORT, THIRD READING AND CONSIDERATION OF LORDS AMENDMENTS

10. Report stage is a very different procedure from standing committee or Committee of the whole House; and though programming of proceedings in standing committee has sometimes worked well, it has become clear that report stages often need more time than they are allocated at present. There is a tendency to allow a day for report and third reading on all but the most complex bills. The result of this is that simple, relatively uncontentious bills often finish early, while controversial and complex ones are rushed.

11. Coupled with this is an inevitable tendency to tailor the selection and grouping to the time available. There is no point in creating 15 groups of amendments when it is unlikely that the House will be able to debate more than seven or eight, with the result that groups tend to become larger and more generalised. This is now an ever-present consideration in the selection process, both for Committee of the whole House and for report stage. Whether or not this is a worthwhile development is again debatable: in the case of the recent Terrorism Bill some Members of the House thought that important matters of detail were being brushed aside as a result of broad groupings. I draw the matter to the attention of the Committee as an observable by-product of programming.

12. I also detect a change in the nature of third reading debates which, because of the shortness of the time that is usually allocated to them, have almost become a formal proceeding—as was the case, for example, with the Terrorism Bill. I would invite the Committee to reflect on the true purpose of a third reading debate: to discuss the principle of the bill in question, rather than to range over matters that it does not contain. The traditional purpose of third reading is now observed only in its breach, while the debate itself can often be cut to ribbons by time lost to divisions at the end of report stage or by speeches that are more appropriate to second reading.

13. It is currently the case that some bills need more time than they receive at present while others need less. I am very doubtful that more frequent use of programming committees would alleviate the situation since, ultimately, these are issues that have to be negotiated between the Whips. Whilst the Whips may try to take into consideration the relative length and complexity of bills when deciding on the time to be made available for report and third reading it is a very difficult judgment to get right every time.

14. As to Lords Amendments and Messages, the problem of delay is partly a function of the system of communication by Message. The US Congress resolves differences between the two Houses by means of a Reconciliation Committee; and adopting a similar system at Westminster might seem superficially

10 On 12 July Standing Committee D on the Identity Cards Bill sat from 4 pm to 10.20 pm, with a one-and-a-quarter hour suspension for dinner and a division in the House. On 13 December Standing Committee B on the Northern Ireland (Offences) Bill sat from 14.30 pm to 11.45 pm, with a one-and-a-quarter hour suspension for dinner and a 20-minute suspension at 11 pm.
attractive. However, the American system is very different from ours in all sorts of ways and any comparison with US procedure must always take into account the fact that at Westminster legislative business is controlled by the Executive—and that control is exercised largely in the Commons, not in the Lords.

15. It is not clear that communications between the two Houses could be speeded up by any simple procedural reform. The difficulty of relations between Lords and Commons lies primarily in the fact that no party has a majority in the Lords (nor, under the present constitution of that House, is any party ever likely to have one). The process of communication requires the Government to consider its response to a defect in the Lords and to draft any alternative propositions that it is going to put forward in lieu of a proposition that has been rejected. It is not the physical delivery of the Message that causes any serious delay but, rather, the process of deliberation by Ministers; and the House would have to be suspended in any event while the Government business-managers pondered their next move.

16. Finally, one should not underestimate the importance of the Lords in the overall scrutiny process. One cannot feel easy with the situation when, for want of time, the elected Chamber has been unable to give any consideration to important parts of a bill and has been obliged to leave that consideration to the Upper House. A considerable amount of legislation also begins in the Lords.

**POST-LEGISLATIVE SCRUTINY**

17. The Committee’s Press Notice mentions post-legislative scrutiny as an issue on which views are sought. The first thought that comes to mind is that select committees already scrutinise existing legislation in the course of inquiries into the operation of Government policy. The second is that Government itself conducts a considerable amount of post-legislative scrutiny as part of its own development of policy—which is why, for example, the major part of the text of any modern Finance Bill consists of amendments to existing legislation.

18. It is difficult to see how any more formal system could be devised. Given that in every Session Parliament makes a vast amount of primary and secondary legislation, any proposals for systematic post-legislative scrutiny will have to include some system for deciding precisely which pieces of legislation should be scrutinised. Since defects in an Act or an Instrument are not usually apparent until it has been in force for some time, post-legislative scrutiny would probably involve looking at legislation after it had been in force for two or three years. The complexities of this are self-evident, and any such scrutiny would have to be undertaken either by the existing departmental select committees or by an ad hoc select committee established for a particular inquiry. That said, however, the lessons learned from technical (as opposed to policy) scrutiny might lead to improved legislation in the first place.

**THE COMMITTEE’S CONSULTATION ON ALTERNATIVE OPTIONS**

19. The recent paper by the Modernisation Committee, Committee Stages of Public Bills: Consultation on Alternative Options, seeks opinions on the various options for committal of a public bill other than a standing committee.12 Various points arise.

20. The Committee asks whether different approaches appear to recommend themselves in respect of particular legislation. The answer to this is almost certainly “yes”. It seems to me that the special standing committee option is only feasible in the case of a bill where there is a genuine cross-party consensus as to the principle and where Ministers have not come to a final conclusion as to the detail. In recent years, for example, both the Children and Adoption Bill of Session 2001–02 and the Children (Scotland) Bill of Session 1994–95 were referred to special standing committees. All sides of the House agree on the importance of a robust legal structure to guarantee the welfare of children: the technical means by which this is to be achieved is an obvious topic for a special standing committee. Similarly, the practice of committing successive Armed Forces Bills to a select committee recognises the fact that their scrutiny requires specialist knowledge that most Members do not possess. On the other hand, it is not clear that there is much to be gained from committing a controversial bill to enact Government policy in a particular area to anything other than a standing committee.

21. The Committee also asks about flaws and strengths in the current procedures. SO No 91 (special standing committees) provides for “up to four morning sittings” within 28 days for the purpose of agreeing a programme and taking evidence. This was drafted in the days when standing committees sat on Thursdays from 10.30 am until 1 pm. Obviously, the motion appointing a special standing committee can vary the terms of the standing order, but perhaps the standing order itself needs revision to take account of the changed sitting-times of the House.

22. I also note the fact that the Select Committee on the Armed Forces Bill currently before the House has been given power to admit the public “during consideration of the bill”13 so that clause-by-clause consideration can be taken in public. This might be a helpful precedent for future select committees on bills, if the Modernisation Committee is inclined to recommend more extensive use of select committees for that purpose.

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CONCLUSION

23. Current thinking on sitting-patterns has been influenced by two successive Parliaments (1997–2001 and 2001–2005) characterised by very large Government majorities. There is always a danger that in an “unbalanced” House both Opposition Members and Government backbenchers will begin to disengage from the parliamentary side of their duties in favour of constituency work: the former because they can see no prospect of winning a division, the latter because they assume that their Government will always have its way.

24. In my submission to the Modernisation Committee’s inquiry into programming I pointed to the inevitable tension between the general wish for better scrutiny on the one hand, and the Government’s desire for swift despatch of business on the other. There is an equal tension between Members’ desire to hold the Government to account (coupled with the natural inclination of Opposition parties to obstruct Government business) and an apparently growing desire in all parties to spend more of the working week in the constituency. I cannot help wondering whether the Committee should consider that the remedy might be fuller sitting weeks but fewer of them.

25. In my earlier submission I aired the possibility of employing a procedural means of settling the pattern of business but doubted that such a radical change would be welcome to either side of the House. That remains my view.

Rt Hon Sir Alan Haselhurst MP
January 2006

Work and Pensions and Home Affairs Committees (M 34)

This submission is put forward on behalf of the Work and Pensions and Home Affairs Committees, based on Members’ experience of pre-legislative scrutiny of the draft Corporate Manslaughter Bill. We first briefly explain the background to our scrutiny and then divide our comments on the process into four sections, each of which addresses some of the terms of reference given in the Modernisation Committee’s call for evidence.

BACKGROUND

In the 2001–05 Parliament, the previous Home Affairs and Work and Pensions Committees had expressed an interest in scrutinising the Government’s promised draft legislation on Corporate Manslaughter. The Government finally published the draft Corporate Manslaughter Bill on 23 March 2005, just before the dissolution of Parliament for the General Election. The deadline for responses to its consultation on the draft Bill was 17 June 2005.

On reappointment in July 2005, both Committees decided to examine the Government’s proposals. Since the draft Bill cut across both our remits and since we did not feel it should form part of our busy main programme of work, we each decided to appoint Draft Corporate Manslaughter Bill Sub-committees that would meet concurrently “to consider and report on the draft Bill”.

COMMUNICATING THE CONTENT OF BILLS TO A WIDER PUBLIC

The draft Bill was short but complex, with some technical legal drafting that we ourselves found difficult initially. The Government’s consultation document contained a very clear and useful introduction, as well as Explanatory Notes, to the draft Bill. When announcing the inquiry, we included a link to this document and also posted it on our website, in order to assist the public in understanding the draft Bill.

However, we would have found it useful if in the pre-briefing session for the inquiry, Home Office officials had given us more explanation of the Government’s rationale for its drafting. In particular we would have welcomed more detail on the principal arguments they had considered. This would have helped us when questioning witnesses.

ENCOURAGING THE PUBLIC TO CONTRIBUTE

We did not find it difficult to obtain responses to our inquiry. On 20 July we sent out a press notice asking those who had already contributed to the Home Office’s consultation for permission to use their responses as evidence, but also welcoming new or updated memoranda from these respondents or others. We received a large number (over 150) submissions from a wide range of interested individuals and organisations, including victims’ groups, trade unions, lawyers, and business representatives.

Many of those who sent us written evidence lobbied the Committee to appear as witnesses to the inquiry. However, the Government had expressed the hope that we would report to the House before Christmas and this timetable restricted the amount of evidence sessions we were able to schedule. We were therefore unable to hear from all organisations who contacted us during the course of the inquiry requesting to be heard.

**Improving the Pre-legislative Process**

We note that para 23 of the Modernisation Committee’s first report into the legislative process stated:

> “it is not uncommon for bills to straddle the responsibilities of several departments, which would render examination by any one Committee unduly awkward”. 17

We did not find it awkward working with Members of another Committee—indeed we welcomed their knowledge of the issues in the Bill that fell outside our usual remit.

However, we did find the rules about divisions during concurrent meetings restrictive. Members in both Committees were concerned that the only formal way to bring an amendment on the Chairman’s draft report to a division was to divide in each Committee separately. 18 This could have meant different text being agreed by the two Committees, therefore putting us in the embarrassing situation of being unable to publish a joint report despite having taken all our oral evidence together.

As we had decided to delegate the pre-legislative scrutiny to our Sub-committees, the process of agreeing our report was complicated. The separate Sub-committees had to agree to report the report to their main Committees and the separate main Committees had to agree to report it to the House. 19 One of our Members commented that this process was “arcane” and “cumbersome”.

In retrospect Members felt that it might have been better to have appointed an ad hoc select committee on the draft Bill made up of interested Members of both the Home Affairs and Work and Pensions Committees so that we could divide on issues as one Committee. An alternative recommendation would be to allow Committees working concurrently the power to decide to divide jointly.

**Better Legislation?**

We considered all the evidence, written and oral, submitted to us and feel we produced a well-argued report with strong recommendations. We divided on the issue of individual liability for directors but were otherwise able to agree on the remainder of the report. If the Government accepts our recommendations when the Bill is finally published, we believe it will be a better piece of legislation than the current draft Bill.

Finally we would like to highlight that we did not delay the legislative process, with Members of the Committees and their supporting staff working hard to ensure we reported before Christmas as the Home Office had urged us to do. However, as the time to agree our report approached we began to hear media reports that the Cabinet had decided to shelve the Bill. 20 We will be very disappointed if the Bill is not introduced this session.

**Mr Terry Rooney MP**
Chairman, Work and Pensions Committee

**Rt Hon John Denham MP**
Chairman, Home Affairs Committee

January 2006

**National Assembly for Wales (M 40)**

I am writing in response to the request for comments on the Modernisation Committee’s current inquiry into the Committee Stage of Public Bills to bring to the Committee’s attention the recent joint formal working between committees in the National Assembly for Wales and the House of Commons’ Welsh Affairs Committee.

I read with interest the Committee’s First Special Report of Session 2005–06 that set out alternative options for committees’ consideration of Bills, in particular the references to devolution and to the interest of the devolved legislatures in the Bills that impact on Wales or other parts of the UK.

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18 The Standing Order governing the power of Select Committees to work with other Committees (137A) only gives committees meeting concurrently the power to ‘consider’ draft reports, not to agree them. In practice this has been interpreted as:

   — to divide informally (provided it has been agreed in advance to abide by the result)
   — to divide formally, but in each Committee separately (in such circumstances the results of the divisions cannot be aggregated; and a report can only be published jointly by committees that have agreed the same text.)
   — to abandon the attempt to reach agreement.”


20 For example, “The unions are also likely to be angered by a cabinet decision last week to shelve a proposed corporate manslaughter bill,” *The Sunday Times*, 27 November 2005, p1.
Informal liaison between the Assembly committees and committees of the Houses of Parliament on matters of mutual interest has evolved since the Assembly was established in 1999. However more recently some elements of this joint working have been formalised. I will set out some of the background.

In March 2003, the Welsh Affairs Committee (WAC) published a report, *The Primary Legislative Process as it Affects Wales*, that included a proposal for formal joint working between the House of Commons and the National Assembly. This proposal, subsequently termed “reciprocal enlargement” was supported by the House of Commons Procedure Committee and, as a result, the UK Government agreed to a “limited experiment” permitting formal joint working between WAC and the Assembly’s committees until the end of the last Parliamentary session.

This resulted in joint pre-legislative scrutiny in the summer of 2004 by the WAC and the Economic Development and Transport Committee of the National Assembly for Wales of the *draft Transport (Wales) Bill*. Both committees agreed that it had been a worthwhile and valuable experience. This was followed by joint scrutiny of the *Public Services Ombudsman (Wales) Bill* by WAC and the Assembly’s Local Government and Public Services Committee, and joint scrutiny of OFCOM’s consultation on “Proposals for the Nations and Regions” by WAC and the Assembly’s Culture, Welsh Language and Sport Committee, both of which were successful and well received by those involved. As a result, following the General Election in May 2005, the House of Commons Standing Order permitting formal joint working of the WAC with Assembly Committees was made permanent.

In July 2005, the Government’s White Paper, *Better Governance for Wales*, referred to the joint scrutiny of the *draft Transport (Wales) Bill* as a useful and worthwhile experiment suggesting that it was something that could be built into Parliament’s and the Assembly’s Standing Orders on procedures for Wales-only Bills. The WAC, in its report on the White Paper, endorsed the approach for further draft Wales-only Bills, and the Government’s response to the WAC report acknowledged that the joint working had led to improvements in draft Bills.

The recently published *Government of Wales Bill* provides for the Assembly and Parliament to approve draft Orders in Council (these will confer enhanced legislative powers on the Assembly). The nature of the pre-legislative scrutiny of Orders in Council will be for Parliament and the Assembly to determine, but I would envisage, and welcome, some form of joint scrutiny between the relevant Assembly Committees and the WAC.

I welcome the commitment to the continuation of formal joint working between the WAC and Assembly Committees, and would ask that the Modernisation Committee consider endorsing the positive experience of formal joint scrutiny, support its continuation and consider, as part of its deliberations, the potential for extending the joint working on primary legislation affecting Wales to other House of Commons’ Committees.

*Dafydd Elis-Thomas PC AM*

*Presiding Officer*

*February 2006*

**Rt Hon Geoffrey Hoon MP, Leader of the House of Commons (M 48)**

**INTRODUCTION**

1. The Committee has agreed to conduct an inquiry into the legislative process. This will look at a range of areas in which practices and procedures might be significantly improved and made more effective, as well as providing an opportunity to review developments since the Committee’s First Report of 1997. I very much welcome this inquiry.

2. The list of specific issues identified by the Committee is a useful one. I recognise that the question of the role and practices of standing committees may be a particularly important area for examination.

3. This paper contains some personal thoughts, first on standing committees and the committee stage of a bill, and then on other areas. The Government has not formed a view on the various ideas raised, but would welcome a broad discussion as to possible ways forward. It is important however that reforms reflect the need for the legislative process to be effective in delivering legislation within a reasonable timescale. New approaches and procedures must aim at improving the quality of scrutiny while avoiding a lengthening of the process.

**THE COMMITTEE STAGE OF CONSIDERATION OF A BILL**

4. Any system for scrutiny of legislation will require a stage involving the detailed consideration of amendments and clauses. The standing committee has evolved to perform that role. It operates in effect as the Chamber in miniature, providing an opportunity for the Opposition parties and backbench Members to probe the details of the bill and for the Government to bring forward amendments for which the need
has been identified (or on which drafting could only be completed) after the bill was introduced. In many ways it performs these roles effectively. But equally, standing committees have been the subject of much criticism over the years, reflecting a perception that debates are often sterile in nature and ineffective in terms of addressing the points which need real examination. In addition, the current processes can be difficult to follow from outside, making them work disproportionately to the advantage of larger organisations and professional lobbyists.

Alternative approaches

5. There is a recurring theme in discussions on legislative procedure that there could be benefit in widening out the process into a more open, inquiry-style process, using more select committee style techniques. Although not directly linked to standing committees as such, pre-legislative scrutiny has reflected this approach. Special Standing Committees are another available tool. There is also the model traditionally used for the quinquennial Armed Forces Bills of formal committal after second reading to a select committee, with the select committee itself conducting the principal amending stage for the Bill. The Committee has issued a consultation paper inviting comments on a range of these and other models.

6. A great number, indeed probably the vast majority, of other legislatures operate more along such lines. A standard approach is that most or all the members (or non-ministerial members) of the legislature are members of permanent subject committees which both look at legislation and have wider responsibilities. The style of consideration of the legislation can be different with less apparent emphasis on the 'line by line' approach and more emphasis on specific areas of interest.

7. Of course such major differences in approach can reflect a whole range of different circumstances pertaining in different countries. In some (as in France for example) the constitution may be more prescriptive as to how the parliament is to operate. In many, there is a more inbuilt cross-party approach, reflecting different political traditions and different electoral systems. The prevailing political culture will often be one of coalitions and/or minority governments. These factors affect the whole way that legislative procedure is structured and also the way that any particular structure will operate in practice. But while these contextual differences must be kept in mind, there are certain common threads which bear examination.

8. One such thread is the principle of having genuinely standing legislative committees. There are clearly some advantages to having permanent committees looking at legislation in a particular area. Of course there may be more continuity in Commons standing committees than at first appears, since bills on similar subjects will tend to attract many of the same members (in particular the frontbenchers) to serve on them. Equally there will often be representation from the relevant select committee on a standing committee on a bill. But these are entirely ad hoc arrangements and there is no continuing engagement between a committee of Members and the legislative programme in a given area. This is not to say that permanent legislative committees do not raise significant problems of their own. One issue is that membership of such committees in some parliaments can be very large, which can dilute the concept of subject expertise and reduce the flexibility necessary to ensure legislation is progressed efficiently.

9. A closely related aspect of other models is the mixing of legislative and non-legislative work. Again, it is clear that committees with responsibility for all aspects of a subject—both legislative work and scrutiny/oversight work—can in principle bring extra expertise to bear on both sides of their work. This is common in many parliaments. Equally, it is not without problems of its own. One danger is that non-legislative work is excluded because of the higher priority given to legislative work. Another problem is that scrutiny work is hindered by the fact that the legislative work requires the activities of the committee to be more closely managed (whipped) by the government.

10. Under the present Westminster system, the House at the second reading approves the principle of the bill, leaving it to the standing committee to give approval to each individual clause. This can lead to situations in which debate on the key clauses in effect repeats the second reading debate. Conversely (although standing committees can and do choose to pass over certain sections of bills very quickly) committees can be encouraged to spend undue amounts of time on uncontroversial parts of bills. It might be possible to develop the basis on which second reading is understood more towards an approach under which the House at second reading gives provisional approval to the bill as a whole. The committee stage could then explicitly limit its work to those areas of the bill which Members want to examine further. Without losing any accountability or opportunities for scrutiny, the committee’s work could become more focused.

21 For example, many of the main committees of the Bundestag have comprised 30–40 members; French National Assembly committees may have over 100 members.
22 A variant example of the Australian Senate is cited in the paper submitted by Dr Meg Russell to the Lords Constitution Committee’s inquiry of session 2003–04. In the Senate each department is shadowed by two committees, one non-legislative and one legislative, with overlapping membership.
Greater engagement with outside interests

11. The Committee has highlighted the issue of communicating the content of bills to the wider public. This is a process which must involve both the relevant Government department(s), the two Houses and individual Members. It is at (or in preparation for) the committee stage that the issue is most important.

12. There is scope for further thinking about the way in which the detailed scrutiny of bills within the two Houses is linked to the outside world. It is primarily a matter for each House to consider, but there is something of a contrast at present between the treatment of draft bills, where the public can normally—through the work of the relevant scrutinising committee and the Commons Scrutiny Unit—see clearly how they can contribute to the process, and the treatment of full bills, where the public have to some extent to work out for themselves how to contribute.

13. The Committee may therefore wish to explore whether there are means available to make clearer to the public how a given bill is being considered in Parliament and how they may get involved. The key area for potential development lies of course in the parliamentary website, on which major and welcome development work is currently under consideration. This could involve perhaps a web page for each bill, with opportunities provided for the submission of contributions by e-mail at appropriate stages. More information about forthcoming standing committees on the website might also help to encourage increased interest from the media in standing committee proceedings.

14. This links to the way in which support is given to members of standing committees. At present, the House provides dedicated support for members of select committees in the form of committee staff responsible not only for the administrative arrangements required for servicing committees but also for the provision of subject briefing, both internally generated and through external submissions. The way standing committees have developed, by contrast, means that support is provided for the Chairman and Members through the Public Bill Office only in respect of the drafting and tabling of amendments and the procedural handling of a bill. Additionally, the Library produces research papers on each bill, which Members find extremely useful. But the House does not provide clear channels for the provision of briefing or receipt of suggestions from outside.

15. It is quite right that individual spokesmen and Members in standing committees should be responsible for obtaining their own briefing on a bill from party and other sources. But arguably the system as a whole works in favour of the more well-resourced and experienced professional bodies and lobby organisations, who know how to feed their ideas into the process. The Committee might wish to examine whether structures could be developed to allow the systematic provision of evidence and opinions to the committee as a whole—in effect to allow a standing committee to receive written evidence and to enable it to be received from a wider variety of sources. 23 A dedicated web page for each bill, with instructions as to how memoranda or opinions were to be submitted, could be part of this.

Committee papers

16. There may also be scope for further work to be done on reducing the complexity of standing committee papers. This is an area in which ideas have been put forward in the past, with input from the Procedure Committee. It is recognised that the different documents required—principally the bill, the amendment paper and the selection list—exist precisely because they have different roles (reflecting the fact that clauses and amendments are debated in groups but are formally considered in sequence), come from different sources and (necessarily) appear on different timetables. Members understand this and have long experience in working under the present arrangements. But new technology is continually providing opportunities to re-examine how things are done and if there are possibilities for beneficial developments they should be looked at.

17. Examination could also be given to the possibility of providing members with an opportunity to give an explanation of the purpose of an amendment (or group of amendments) when tabling it. Particularly in the case of non-government amendments, it is not always fully clear what the purpose of the amendment is or what effect it is intended to have. If it were possible to include on the amendment paper a brief explanation of the amendment then the other members of the committee—including in particular the Minister, who will be expected to respond to the points involved—will be able to be better prepared.

Other issues

Pre-legislative scrutiny

18. The Government is committed to the process of promoting pre-legislative scrutiny of bills where appropriate. The suitability of a bill for publication in draft will depend both on its subject matter and on timetabling issues. Where the need for legislation is certain, then it will often be the case that the bill needs to be enacted by a certain time, making it difficult to allow time both for a draft bill stage and for the passage of the final bill. Conversely, where there is no certainty that there will in due course be a legislative slot

23 Consideration would of course have to be given, as with submissions to select committees, to a mechanism for identifying any communications which would not formally attract a privileged status.
available for a particular piece of possible legislation, it can be difficult for departments and government to prioritise resources (including the drafting resources of Parliamentary Counsel) towards preparation and consultation on a draft bill.

19. There is a twofold objective in the process, namely:
   — the delivery of better legislation; and
   — the more efficient passage of that legislation through Parliament.

Ideally, pre-legislative scrutiny, in the course of identifying some of the problems with draft legislation as submitted, should ease some of the obstacles to the progress of the bill once introduced. Government cannot use the fact that a bill has undergone pre-legislative scrutiny in Parliament as an excuse for providing insufficient time for consideration of the final bill. But at the same time pre-legislative scrutiny will not have been fully effective if in practice it lengthens rather than reduces the time required for the bill. An examination by the Committee of how far the process in recent years has delivered on these objectives, perhaps using a cross-section of draft bills as case studies, could be helpful. Lessons can then be learnt as to how pre-legislative scrutiny might be used to streamline the process of consideration of the final bill.

20. The mechanism for consideration of draft bills has been deliberately non-prescriptive. Some have been examined by Commons departmental (or other) select committees and others by Joint Committees, on an ad hoc basis as appropriate and following discussions. There has been a slight non-binding presumption in favour of consideration by the relevant Commons committee, where that committee has expressed a strong interest in considering a draft bill. These arrangements appear to have worked well. The Government is aware of the value of giving as much notice as possible of the timetable for a particular draft bill, so that the relevant committee can accommodate it into its programme of work or (in the case of a Joint Committee) be established in time to move quickly.

Publication of the text of bills

21. At present, Members who have presented a private member’s bill—whether as a presentation bill or under the 10-minute rule procedure—are not required to publish the text of the bill. The only constraint is that the Question can not be put on the Second Reading of a bill if it has not been published at least by the previous day. The effect of this is that, where a bill has been put down for Second Reading on a particular private member’s bill Friday, the House can be uncertain until the day before what the bill is likely to say. This can impose a significant burden on all sides within the House (particularly of course for the Government which has a responsibility to take a considered view on any bill, including expenditure and other implications) and also makes it difficult for outside interests to contribute. It is not what the House expects in respect of a Government bill. There may be a case for the Committee examining whether the period for which the text of a private member’s bill should be published ahead of Second Reading should be longer.

Proceedings on report and on consideration of Lords Amendments

22. Consideration of bills on report and of Lords Amendments is still an area where difficulties arise for the House and for Members. Consideration of a wide range of amendments of differing political significance is taken together in a way which can lead to partial and unfocused debate. Members are held on a running whip for a lengthy period of time and then face voting on a string of amendments for what can on occasion be up to an hour (or potentially more). In this latter respect specifically, consideration by the Committee of whether there is any scope for the introduction of alternative forms of voting could be helpful.

23. Programming has to some extent helped in this respect, in providing more certainty about the likely times for divisions and in providing a vehicle for partial separation (on report) of different areas of the bill for consideration at different times. There will often of course be differing views as to whether enough time has been provided for debate on any specific occasion. The Government, for its part, needs to be mindful of its obligation to ensure that so far as possible the need for amendments at report stage is minimised. Other Members too, of course, need to be selective over what they table at report stage.

24. But it is possible that more still could be achieved. The 1997 Modernisation Committee Report floated the idea that much of the detailed work on the less controversial amendments currently dealt with on report and on consideration of Lords Amendments might be undertaken in some form of committee off the floor of the House. Now that many of the other reforms developed in recent years have bedded down, it might be worth exploring this possibility further.

Impact of programming and carry-over

25. The House agreed in October 2004 to make the orders governing programming into permanent standing orders. Although the way they work does not yet command the universal support of all Members, the House as a whole recognises programming as a desirable and effective part of the legislative process. Programming can work to the advantage of opposition parties as well as government. It is when the parties are able to work together in agreeing the relevant programme motion that programming can be most effective in targeting the parts of a bill which most need scrutiny.
26. The principle of carrying over bills from one session to another in appropriate cases has widespread support and greater use of it appears attractive. As the Committee notes, one of the intended objectives of programming and carry over is the benefits they can bring to the management of the legislative programme and the cycle of business over the parliamentary year. Examination of how this has worked, both in the Commons and in the Lords, and of what further steps could be taken, would be valuable.

Post-legislative scrutiny

27. The Government has already indicated its recognition that there could be benefits in strengthening post-legislative scrutiny.24 There is a range of different ways of approaching post legislative scrutiny. Post legislative scrutiny conducted internally within government would be of a different nature for example from an exercise conducted externally. There are issues about the timescale on which it would be conducted, the degree of transparency, and how it would feed back into policy making. There are a range of potential benefits from such scrutiny, including:

— the immediate lessons for present and future policy (legislative and non-legislative) in the area covered by the Act;
— the discipline that the knowledge of such a process would place on the preparation of the legislation;
— the opportunity for scrutiny of the delegated legislation made under the Act; and
— the wider lessons for preparation of bills in other areas.

28. At the same time there would be little net benefit in establishing a burdensome system of review which applied irrespective of need and which was not capable of feeding in effectively to the decision-taking process. An effective case would therefore need to be made for supplementing the present ad hoc scrutiny which emerges from the normal political process with a more systematic structure. As noted in the Committee’s invitation to submit evidence, the Government has asked the Law Commission to undertake a study of how different kinds or levels of post-legislative reviews might work. This study is underway and, like the Committee, we look forward to considering its conclusions.

Handling of Lords Messages

29. When a bill reaches the stage of exchanges between the two Houses after the initial consideration in the first House of the amendments made in the second House, then where there is an external deadline—such as the expiry of a legal provision or imminent prorogation—both Houses can find themselves sitting late into the night while agreement is reached. In these circumstances, Members in both Houses will want to be assured that every opportunity has been taken to ensure that the minimum amount of time is lost after one House has completed its consideration of a message and before the other is reconvened to consider the message.

30. Delays can arise potentially from two sources. One is the time needed to receive, prepare and circulate the necessary papers—including the formal copy of the bill with the amendments marked in—to allow the House which is receiving the message to begin its work. To address this, the Committee will no doubt wish to learn from the relevant offices in the two Houses how new technology has been utilised to reduce any delays to the minimum possible and to see whether there is anything further which can be achieved. But of course it will remain important to ensure that any procedures adopted do not give rise to risk of serious errors in the form of uncertainty or disagreement between the two Houses as to what has actually been agreed.

31. The other area for delay is the time needed to allow decisions to be taken by members of the receiving House (in practice, this will principally mean the Government) as to how it wishes to react to the decision taken by the House sending the message. If the exchanges, in terms of the substance of the amendments and the point which the exchanges have reached, are such that the Government may have ready alternative amendments to propose, or is proposing a simple agreement or disagreement to the other House’s amendment, then this may not take too long. But if the substance is more difficult, or there is a procedural imperative to ensure that the Government’s proposal does not have the consequence of bringing the bill to an end through repeated insistence on a particular provision, then this process may take longer and delay the House in resuming its sitting.

32. Recent reviews of the legislative process have not given great consideration to the role of Reasons Committees. The Committee may wish to explore whether they continue to serve a useful function in their present form.

CONCLUSION

33. In paragraph 14 of its report, the 1997 Committee set out a range of essential requirements for effective reform of the legislative process:

(a) The Government of the day must be assured of getting its legislation through in reasonable time (provided that it obtains the approval of the House).

(b) The Opposition in particular and Members in general must have a full opportunity to discuss and seek to change provisions to which they attach importance.

(c) All parts of a Bill must be properly considered.

(d) The time and expertise of Members must be used to better effect.

(e) The House as a whole, and its legislative Committees in particular, must be given full and direct information on the meaning and effect of the proposed legislation from those most directly concerned, and full published explanations from the Government on the detailed provisions of its Bill.

(f) Throughout the legislative process there must be greater accessibility to the public, and legislation should, so far as possible, be readily understandable and in plain English.

(g) The legislative programme needs to be spread as evenly as possible throughout the session in both Houses.

(h) There must be sufficient flexibility in any procedures to cope with, for example, emergency legislation.

(i) Monitoring and, if necessary, amending legislation which has come into force should become a vital part of the role of Parliament.

34. These remain valid benchmarks for future reform. Almost all the conclusions and recommendations of the 1997 report have either been acted upon or remain relevant today. The proposed review by the Committee—following work by other committees, including the Lords Constitution Committee in 2004—is therefore timely.

February 2006

Hansard Society (M 57)

1. INTRODUCTION

The Hansard Society is very pleased to contribute to the Modernisation Committee’s inquiry, The Legislative Process. Since 2003, we have been undertaking a review of Making the Law, the 1992 report of the Hansard Society Commission on the Legislative Process chaired by Lord Rippon of Hexham.25 Our conclusions and recommendations in this submission are based on our findings from that review.26 Our evidence concentrates on the themes and issues contained in the Committee’s Special Report, Committee Stage of Public Bills: Consultation on Alternative Options, (January 2006, HC 810).

2. THE PURPOSE OF A BILL’S COMMITTEE STAGE

In this evidence we identify a number of reforms that would, in our view, improve the committee stage of Bills. First, however, it is important to discuss an essential question: What is the committee stage meant to achieve? By far the most frequently used type of Bill Committee Stage in the Commons is the Standing Committee (STC) and its characteristics highlight some of the wider issues involved in this part of the process.

It is clear from our work, through talking to MPs of all parties and reviewing the evidence, that there is almost unanimous agreement that STCs rarely achieve consistent or genuine scrutiny. The overwhelming dominance of government (through its majority and whipping) ensures that the Bill clears the committee in the form that it wishes and that only amendments that government finds acceptable are passed. Therefore, meaningful input from MPs is extremely limited.


26 We have produced series of “Briefing Papers” on Private Members Bill, Standing Committees, Delegated Legislation, Programming of legislation, Pre-legislative Scrutiny, Post-legislative Scrutiny, European Scrutiny. Also connected to this review are our publications, Parliament, Politics and Law Making (December 2005), the review of parliamentary modernisation, New Politics, New Parliament? (June 2005).
Some would say that this situation is inevitable: Parliament and its legislative functions are part of a political process. However, this reality is at odds with the widely-held impression that STCs undertake detailed, line-by-line scrutiny and are able to identify and rectify problems in a considered and analytical manner. It is the belief that evidence might be able to influence and change the detail of the Bill in STC that leads pressure groups and lobby organisations to make considerable effort to influence them. In fact, this effort is largely wasted as the Government is usually loathe to concede and change the provision.

There is an alternative view that STCs were never intended to deliver dispassionate and detailed scrutiny and that the political process should therefore be allowed to dominate openly. From this perspective, STCs should be about trench warfare and should allow the opposition to attempt to delay the Bill or inconvenience the government, if it feels sufficiently strongly about the issues. However, many parliamentarians have alleged, (across both Government and Opposition parties) that the advent of programming has seriously weakened these potential weapons and, as a result, STCs have lost this oppositional and political function as well.

The result, many argue, is that STCs fall badly between several stools: they fail to deliver genuine and analytical scrutiny of the provisions involved, their political functions are neutered, dominated almost exclusively by government (and this has been exacerbated by programming), they fail to engage with the public and the media (in contrast to select committees) and they do not adequately utilise the evidence of experts or interested parties.

Therefore, it is not surprising that STCs receive an extraordinary level of opprobrium. For example, Andrew Tyrie MP cited colleagues on both sides of the House who described STCs as “desperate”, “dire” and a “pointless ritual”. According to Peter Riddell, “The system has been geared entirely to getting Bills through regardless of whether they are properly scrutinised. During the Standing Committee stage of line-by-line scrutiny government backbenchers are actively discouraged from participating lest their speeches delay progress on a Bill, so they can be seen doing their constituency correspondence, and depending on the season, their Christmas cards.” Such criticisms are nothing new. Richard Crossman in his diaries described STCs as inane and a waste of time. The conflicting purposes of STCs led one MP in our review to say that when she first went onto an STC (as an opposition Member), she did not know whether she was there to improve the Bill or to attempt to destroy it.

It is our contention that the dominant feature of the Committee Stage of Bills should be detailed analysis and scrutiny of the provisions involved, taking evidence and utilising expertise as required. In our opinion, the present situation is clearly inadequate and the Committee Stage of Bills is long overdue for reform.

3. PIloting and E xperimentation

We welcome the Modernisation Committee’s acknowledgment in its Special Report that “It is likely that the outcome will not be a recommendation for a ‘one-size-fit-all’ alternative to the current standing committee arrangement, but a range of proposals . . .” In addition to this flexible approach, tailored to particular circumstances, we support experimentation with different mechanisms to suit different purposes. In our 2001 report of the Commission on Parliamentary Scrutiny, The Challenge for Parliament: Making Government Accountable, we proposed that Parliament should pilot innovations and that a parliamentary committee (the Liaison Committee was suggested) should monitor and evaluate their effectiveness. Given that changes to the structure and operation of STCs would represent a significant change from long-standing practice, we believe that piloting and experimentation will be particularly vital tools in testing whether the legislative process has been improved.

4. Options for Reform

Some core themes: In this section we consider a range of options for reform that could be introduced to improve the functioning of the committee stage.

(i) Scrutiny guidelines

In an attempt to bring some certainty to the process, guidelines for scrutiny should be introduced which would direct the work of a committee undertaking legislative scrutiny towards analysis of the provisions. Some essential questions should always be asked:

— Is the proposed law as clear and unambiguous as possible?
— Are the measures practical and likely to be administratively sound?
— What are the law’s possible unintended consequences?

27 Andrew Tyrie MP, Mr Blair’s Poodle, An Agenda for Reviving the House of Commons, (2000).
— Will the provisions be likely to affect negatively or differentially some groups within society?

The potential list of issues is lengthy and will vary for each Bill. However there should at least be some broad criteria and benchmarks for scrutinising legislation and these do not appear to exist at present.

(ii) Changing the methods of working

STCs are constituted and operate to reflect the Commons chamber. It is obviously proper that the composition should reflect the balance of parties in the Commons but in other respects STCs might attempt to introduce different methods of working and presentation. For example, their appearance and layout could be changed to a round table model rather than the current adversarial set-up. The procedures, and the language and style of the meetings, could be made more straightforward to encourage greater understanding for outside bodies and the media.

(iii) Introducing External Expertise

In order to bring additional expertise to the committee deliberation, individuals with specialist knowledge might be allowed to sit on committees (but obviously not vote). At the very least, Committee Members could have greater access to experts and officials than is currently the case, including contributions for advice and clarification.

(iv) Greater use of Special Standing Committees

The Committees’ Special Report refers to greater use of Special Standing Committees (SSCs). The Hansard Society has long proposed that Bills should be more regularly committed to SSCs to allow for expert witnesses to be called and provide an additional forum for consideration and scrutiny. The key issue in this approach is to take evidence and expert advice at an early stage in the process where it is more likely to make a difference, particularly before political battle lines are drawn.

Such an approach would suit less controversial Bills, albeit ones that may involve complex or novel questions of policy. One possibility would be to obtain advance agreement that SSCs (or other forms of close scrutiny by Committee) should be used where the Bill in question has particular technical, administrative or implementation issues. Obvious recent candidates would be subjects such as Child Support and Tax and Pension Credits where the legislation’s success relies as much, and possibly more, on the detail in the Bill as on the policy intentions underpinning it. It is regrettable that SSCs have been used so rarely in the past. We hope that the Committee will propose a marked extension of their use.

(v) Changing the name

The name “Standing Committee” means very little, nor is it even accurate given that it is a temporary committee, rather than permanent as the word “standing” usually implies. Changing the name to Legislative or Legislation Committee would reflect their role and functions more accurately to a wider public.

(vi) Delegated legislation

In many cases the real detail of an Act is contained in the secondary legislation which is subsequently brought forward. Although the full details of the delegated legislation may not be available at the time of the Bill Committee Stage, it would help genuine scrutiny if, in the case of government Bills, some idea of the key elements of the delegated legislation could be provided to the Committee so that they would be able to have greater understanding of the Act’s likely effects.

5. Changes to the Structure of STCs

(i) Piloting Combined Select and Standing Committees

Our report, The Challenge for Parliament, proposed the introduction—on a pilot basis—of one or two dual-purpose committees that combine standing and select committee functions. Such combined legislative and scrutiny committees are the norm in most other Parliaments including those in Scotland and most of Western Europe. The report noted that the expertise built up on select committees would make it more likely that Bills would receive a closer level of scrutiny than under the current system of STCs.

The report also proposed the introduction of larger select committees working through a variety of sub-committees to carry out legislation and scrutiny work on a separate basis. The use of sub-committees would ensure that greater legislative scrutiny, especially pre-legislative scrutiny, need not dominate the activity of the committee. The Scrutiny Commission also recommended that all MPs should sit on select committees. Currently about 150 or more Members are not on any committee; they represent a valuable resource which could be used and is currently wasted.
(ii) **A semi-permanent Standing Committee?**

Another possibility to improve STCs’ scrutiny functions might be the formation of an STC that lasted for a Session or even longer and which considered all (or most) of the legislation on a particular subject area. At the very least a pool of MPs could be called upon to form the nucleus of such a committee. These MPs might consequently build up greater subject knowledge and legislative scrutiny skills.

There is also the view that select committees, or those which are more permanent in nature, are more likely to take greater “ownership” of Bills, and the subsequent Act, in contrast to temporary STCs which disband immediately. As a result, members may feel a greater responsibility for the quality of the Act and its outcomes and be more committed to monitoring its progress and effectiveness.

(iii) **Evaluate Legislative Committees in the Scottish Parliament**

The Scottish Parliament has taken a different approach to passing legislation and Westminster may find that there are lessons to be learnt from its system. Subject Committees deal with a particular subject of public policy and combine the functions of Westminster’s Select and Standing Committees. In short, there are three stages of a Bill’s passage:

**Stage 1**

The Bill is referred to the relevant subject committee, known as the “lead committee” which may take evidence at this stage. Other committees may be involved, such as Equal Opportunities or Finance. Once the lead committee has reported on the Bill, the Parliament itself considers the general principles as well. The Bill may be referred back to the lead committee for a further report on the principles of all, or any part, of the Bill before Parliament makes its decision on the general principles.

**Stage 2**

The Bill receives more detailed “line-by-line” consideration by the lead Committee.

**Stage 3**

Parliament debates and decides whether the Bill should pass. At this point, up to half of the sections of the Bill may be referred back for further Stage 2 consideration by the relevant committee(s). The Parliament then considers whether to pass the Bill.

(iv) **Introducing different mechanisms**

A number of specific reforms might improve the operation of STCs, including:

- Splitting the detailed scrutiny of the Bill between a Committee of the whole House and STCs. This was raised in the 1997 Modernisation Committee report and used for Bills such as the Sexual Offences (Amendment) Act (2000). This procedure might allow for clauses requiring greater scrutiny and consideration to be considered in depth by a STC whereas other parts of the Bill, which required a lighter touch, could be detached.

- Re-committal to a Committee. One of the main complaints about legislative scrutiny is that substantive amendments can be added at Report Stage which have not previously been considered or debated. *Making the Law* recommended that there should be the ability to re-commit new clauses to a Standing Committee or Special Standing Committee to ensure that they are fully scrutinised and consideration should be given to establishing a mechanism for this purpose.

6. **Communication with the Public**

Currently the formal committee stage has little direct contact with members of the public. The benefits of encouraging citizens to play an active role in the legislative process are numerous. Legislators can canvass a sense of public opinion around the issue, utilise the expertise and experience of relevant members of the public, and speak to those who will be directly affected by a Bill to assess its potential consequences. However, public knowledge of the law making process is very limited. Few people would have any idea that they could contribute in any way. The language used throughout the legislative process is often prohibitively obtuse and too technical for most members of the public. Explanatory notes are helpful, but even these are fairly dense and not particularly user-friendly. Our 2005 Commission, *Member’s Only? Parliament in the Public Eye*, put forward a range of proposals to improve Parliament’s communication with the public. One possibility would be a pro-active strategy by Parliament to identify more grass roots groups and individuals affected by a Bill. Furthermore, greater efforts should be made to engage the media which STCs usually fail to do.
7. PRE-LEGISLATIVE SCRUTINY

In recent years, partly to address the widespread criticisms of the quality of legislative scrutiny, various measures have been introduced to try and improve matters. These changes include pre-legislative scrutiny as well as government moves to consider the introduction of a form of post-legislative scrutiny. The Hansard Society has long advocated the introduction of these stages and welcomes these developments. However, they do not remove the need for reform to the formal committee stage.

We believe that some form of pre-legislative scrutiny should be part of the scrutiny process for all legislation (with certain exceptions such as emergency legislation). Pre-legislative scrutiny provides an important mechanism for collaboration between executive, legislature and electorate and can utilise expert evidence to strengthen Parliament’s legislative functions, particularly when technical detail lies at the heart of the Bill. The ability to hear expert evidence, early in the process, provides parliamentarians with a form of scrutiny that was previously lacking. The evidence from the pre-legislative stage can be used to bolster the Committee Stage and MPs who took part in pre-legislative scrutiny should be routinely involved in the Committee Stage, so that their expertise can be utilised.

Given that the formal scrutiny stages, particularly in STCs, are characterised by very tight whipping and a marked reluctance by Government to accept any changes, pre-legislative scrutiny can provide the only real time for genuine dialogue. Nonetheless, pre-legislative scrutiny should not be seen as a substitute for effective scrutiny in the formal committee stage.

8. POST-LEGISLATIVE SCRUTINY

The Hansard Society welcomes recent developments on post-legislative scrutiny, including the Government’s decision to request that the Law Commission make a study of the issues involved. There are a number of issues relating to post-legislative scrutiny which go beyond this evidence focusing on the Committee Stage of Bills.

However, one specific element is relevant. In order to assess effectively the impact and consequences of an Act, it is necessary to know the policy intentions and intended outcomes of the government (or the sponsor in the case of a Private Members Bill). The Constitution Committee in its 2004 report, Parliament and The Legislative Process, recommended, in conjunction with its recommendations about post-legislative scrutiny, that the Explanatory Notes to each Bill should include 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. The Government replied that it was sympathetic to the principle that lies behind this recommendation, noting that “The Government agrees that it is desirable that departments are clear about the purpose of a Bill” and “The Government agrees that explanatory notes should clearly indicate what the purpose of a Bill is.” The current Explanatory Notes “explain briefly what the legislation does and its purpose, including any relevant background and describe in broad terms how the legislation goes about achieving its aims”. It would aid detailed scrutiny at Committee Stage (as well as with post-legislative scrutiny) if a detailed Statement of Purpose and Outcome could be provided as early as possible in the legislative process.

9. PROGRAMMING OF LEGISLATION AND A BUSINESS COMMITTEE

It is impossible to consider the Committee Stage of Bills without considering the impact of programming. Our review of modernisation showed that programming of legislation had been the most controversial of all post-1997 changes, and not just with the opposition parties. One principle underlying its introduction was that an easier legislative passage—with consequent benefits for government—would be balanced by better pre-legislative scrutiny and wider consultation and consideration of parliamentary and public concerns. One of the main concerns with programming as it currently operates is that it has become detached from these measures so that almost all government Bills are now timetabled, regardless of whether or not they have had adequate consultation or pre-legislative scrutiny. Greater certainty about the government’s legislative timetable should be balanced against the opportunity for less rushed, more thorough, and more effective scrutiny. Increased use of draft Bills, the regular use of Special Standing Committees and the provision of adequate time for Report Stages on the floor of the House should accompany the development of timetabling.

When Making the Law recommended programming it was in conjunction with the introduction of a Business Committee. The report argued that it would provide a mechanism to organise elements of the process such as pre-legislative scrutiny and improved scrutiny of Bills and would allow greater input and agreement between all interested parties in the Commons about the shape and timing of the legislative programme. In order for reforms to the Committee Stage to be fully effective, any proposals should consider the wider structures that govern the legislative process, such as programming and a Business Committee.
10. Conclusion

Underpinning many of the concerns about the quality of legislative scrutiny is the widespread view that Parliament passes too many laws and that, as a result, MPs in particular are overloaded with work and are unable to carry out all their functions effectively. The Modernisation Committee may wish, as part of its inquiry, to consider this broader picture about the totality of legislation and the capacity of Parliament to deal with it.

Our main theme is that to improve the quality of detailed scrutiny, at some stage in the progress of every Bill, there should be a mechanism to take evidence and allow consultation with outside experts. This may be through pre-legislative scrutiny or the use of Special Standing Committees. The proposals outlined in this paper represent a range of different methods which might be suitable in some situations but not in others. We do not favour a uniform approach. Rather, we believe that Parliament should pilot and experiment with different approaches and canvass the views of MPs and others to monitor and evaluate their effectiveness. The Hansard Society is happy to assist in any way that might be helpful to the Committee.

March 2006

Study of Parliament Group (M 62)

COMMITTEE STAGE OF PUBLIC BILLS

COMMENTS BY THE STUDY OF PARLIAMENT GROUP

I have arranged my comments in terms of the issues that the Consultation Paper seems to me to raise rather than addressing each alternative option individually.

1 What’s the Problem?

The Consultation Paper focuses essentially on two conceptions of the function of the Committee stage, each of which is directed towards the same (implicit) objective, namely, to improve the quality of the product (to make Bills “better” by the time they leave the Committee):

— A technocratic conception: how this betterment may be achieved by different arrangements for (closer) scrutiny
— A democratic conception: how this betterment may be achieved by engaging the interested / affected public

This project then raises two immediate questions, both of which address the implicit objective but neither of which is amplified in the Paper:

— In what ways are Bills as enacted (or as leaving the committee stage) so defective that those defects could have been corrected by the different arrangements that are proposed (or variants on them), or by engaging the public more closely?
— How might Parliament determine what those defects are?

The Paper sets out a number of possible alternative options. In inviting comments upon them, it is not clear to me how the procedural variations address what the Modernisation Committee considers are the problems with the conventional procedures, since those problems are not set out. To put the question in different terms, what gains does the Committee expect to follow from the adoption of any one of these various alternatives (in a suitable case)?

If the (unspoken) reason why the Committee stage is not delivering the goods is for reasons of time (and other resources), programming or politics, then no amount of structural innovation will improve the position unless it also addresses these matters. Indeed, those innovations that contemplate public engagement will inevitably require a greater allocation of resources, in particular from the clerks.

2 Thinking about the Problem

Assuming that the purpose of this exercise is to make Bills better, we might begin by asking, how they might be? A number of (non-exhaustive) answers could be given. A Bill is better when

— In the short term: for the remainder of its parliamentary stages it is not open to complaints about the clarity of its drafting, to the criticism that it is obviously over- or under-inclusive in its apparent legal effect when compared with its purpose, to criticisms concerning its compliance with other relevant norms, such as concern the creation of criminal offences and sanctions and Convention rights; in short, that any obvious problems that are revealed in debate (or by taking evidence) have been identified and addressed
— In the long term: that when implemented, those responsible for its implementation and those affected by it can readily determine their legal rights and duties without excess expenditure of time and effort.
One of the major problems with the long-term objective is that success or failure is conceptually always a difficult matter to demonstrate, because:

— if an Act is working well it will be very difficult to attribute that success to an identifiable amendment (or debate on an amendment where the clause stood part) that was made at the Committee stage unless it is clear from the manner in which the Act is being implemented that had the unamended clause become law, it would have caused a problem

— an Act that is working badly may be so for a variety of reasons, and, once more, the question will arise whether, had the Committee stage engaged in closer scrutiny, it would have identified and remedied the defect at that time.

3 Thinking about Improvements

Again, assuming that the purpose of the exercise is to reduce the number of potential defects that a Bill might contain as it leaves the Committee stage, we can identify two complementary approaches to their identification and resolution.

One of these is retrospective, relying mainly on the pathology of legislation and may imply some post-enactment tracking (post-legislative scrutiny, on which the Law Commission is consulting). This might bring to light judicial or administrative challenges that were then corrected by further legislation or administrative action, which challenges (and therefore the remedies) might have been identified at the Committee stage had there been greater opportunities for scrutiny or public input. This is not of immediate value to the present Consultation, although if it were the case that some form of regular post legislative scrutiny were adopted by Parliament, that exercise could in time generate general lessons about the scrutiny of Bills that would contribute to the second approach. (As the Law Commission suggests.)

Of potentially greater immediate value at the Committee stage is the use of checklists. These involve reading clauses in a variety of ways in order to anticipate defects and to take remedial action that it is hoped will meet them. These ways could include, for example, the European Council’s drafting guidelines as a statement of good drafting practice (Resolution (OJ 1993 C166/1), adapted to domestic legislation:

— the wording of the Act should be clear, simple, concise and unambiguous; unnecessary abbreviations, “community jargon” and excessively long sentences should be avoided;

— imprecise references to other texts should be avoided as should too many cross-references which make the text difficult to understand;

— the various provisions of the Acts should be consistent with each other; the same term should be used throughout to express a given concept;

— the rights and obligations of those to whom the Act is to apply should be clearly defined;

— the Act should be laid out according to the standard structure; (chapters, sections, articles, paragraphs);

— the preamble should justify the enacting provisions in simple terms;

— provisions without legislative character should be avoided (eg wishes, political statements);

— inconsistency with existing legislation should be avoided as should pointless repetition of existing provisions. Any amendment, extension or repeal of an act should be clearly set out;

— an Act amending an earlier Act should not contain autonomous substantive provisions but only provisions to be directly incorporated into the Act to be amended;

— the date of entry into force of the Act and any transitional provisions which might be necessary should be clearly stated.

Checklists of this kind could also include the government’s formal compliance with its obligations to produce full Regulatory and Environmental Impact Assessments and Human Rights assessments, and, as is the case with RROs, information about consultation. But of more substantive value lies in the Committee asking itself the question, “are we satisfied with the accuracy and detail of the RIA / EIA?” or, “are we (whatever the government says) satisfied that this bill is compatible with human rights and international treaty obligations?” A checklist would be useful in giving focus to the work to be conducted at the Committee stage, as well as alerting government to the fact that these questions will be asked.

Similarly, a checklist should include further substantive matters such as “is the Committee satisfied that this bill is compatible with constitutional principles such as:

— non retroactivity of penal provisions

— provision for access to a court of tribunal to appeal against certain decisions

— protection of state held databases against abuse

— placing new tribunals under the supervision of the Council on Tribunals

— non delegation of power to amend primary legislation?
(These and other principles are listed in the Constitution Committee’s Reports in the last Parliament.) A number of questions flow from this approach. The Committee can ask whether it is satisfied that the bill is compatible with these principles? If not, what reasons has the government produced to justify the incompatibility and how far should the Committee press Ministers on them? These are questions on which evidence from the public, or from expert groups could be taken. Being aware that the Committee is using these checklists, government would (and should) be able to prepare thoroughly for them in advance. Where its justifications are sound, time may be saved, and where they provoke disquiet but which can be addressed by acceptable changes, there should be gains to both the short-term and the long-term objectives.

The points made in the foregoing paragraphs are discussed at much greater length in Professor Dawn Oliver’s article, ‘Improving the scrutiny of Bills: the case for standards and checklists’ to be published in [2006] Public Law (summer).

“Advance” proofing of this kind might well improve the product when it comes to be implemented.

4 Engaging the Public

Where does engagement with the public fit into this exercise? One inference that could be drawn from question 3c) is that engaging the public in the Committee stage will add to the legitimacy of the legislative process. That is no doubt an important value, but I take the main purpose to be as suggested in question 3f), namely that the public will assist the Committee to identify strengths and weaknesses in the Bill, which in the latter case can be corrected.

By “public” in this context must be meant those (perhaps representative of larger groups) who have a particular interest in the Bill’s subject matter, possibly because they or, say, their commercial interests will be affected in some way, for good or ill. They may, indeed, have some expert knowledge of its likely application.

These, of course, are the kinds of selected members of the public who are typically invited to give evidence to select committees or to pre-legislative scrutiny committees. Here I can speak with some direct experience as a special adviser to select committees and more particularly to the Joint Committee on the Draft Gambling Bill. In this case the taking of evidence was without any doubt a positive contribution to the clarification of the Bill. In this respect the objection that is recorded in section 1 of the Appendix to the Consultation Paper, that those who oppose Special Standing Committees do so because the views of those who had influenced the Bill “would have been taken into account anyway” miss two points. The first is the public examination of their views (which goes to legitimacy as well as cogency); the second is their reduction to a formal record. In the short term, during the later parliamentary stages, Members will be able to refer to the evidence and the exchanges to which it gave rise. Later, they may cast light on why the Act’s implementation has not been as expected.

The key is to be clear on the focus of the witnesses’ evidence. This needs first, to be directed not to the policy objectives, but, given them, to the success with which the Bill gives them legal effect. Thereafter, the evidence falls broadly into two types: the disinterested and the interested.

— The disinterested witness can be expected to address the points, first, that if HMG wish to pursue policy P then clause C1 will or will not achieve it, or could do so more efficiently; and secondly, that C1 when enacted is likely to lead those affected by the Act to change their behaviour for good or ill in terms of P.

— The interested witness can be expected first to praise or condemn P (or say that it goes too far / not far enough), and secondly to argue that it should be changed (or not) so as to meet W’s interests.

That the interested witness has an interest in seeing the Bill succeed or fail does not invalidate the evidence, but it may raise questions, for example, about the interpretation that W places on current and predicted practice as showing that the Committee is using Select Committee-type procedures involving backbenchers. These could include oral evidence in public and written evidence from those involved in the preparation of the legislation and from interested parties. Much of the evidence would be taken in writing. ‘As I have implied, the evidence could be something of a mixed bag. Some was top-drawer, identifying clearly and precisely the witness’ concerns about policy or its application in particular cases. Careful questioning (the brief is important) was an effective means by which concerns that were less well articulated in writing could assume a more useful base on which to test the Bill’s legal effectiveness.

I might add that the kind of hypothetical question, “does this clause apply to …?” which is a characteristic of the Committee stage, and which may equally be raised in pre-legislative scrutiny, may raise issues that go beyond the test, whether the clause as drafted achieves in law the policy objective, and test the coherence of the policy itself. That was a not infrequent experience in the draft Gambling Bill, and was one that required the government then to rethink or clarify its policy.
5 Engaging the Government

I have no doubt but that the Draft Gambling Bill as it left the Committee in April 2004 had been much improved by the engagement with the public. Apart from the examination of the oral evidence, typically based on the witness’s written evidence, the product of this exercise was then translated into what I understand is colloquially known as a Whitaker Schedule; it is Appendix I of the Joint Committee’s Report.

If I may repeat again what I said to the Lords’ Committee:

I feel very strongly that this is one of the most valuable products of the Committee’s work. This is not just because I worked very closely with the Legal Clerk on it, but because it exemplifies how a process of enquiry can (a) identify detailed issues that are in doubt and (b) present the Department with the opportunity to respond in point or to think again. I would like to think that the process will, in the words of the Modernisation Committee, ‘lead to less time being needed at later stages of the legislative process; [as] the use of the Chair’s powers of selection would naturally reflect the extent and nature of previous scrutiny and debate’.

And, it may be added, the Schedule provides a ready list of points that might be used for the purpose of post-legislative scrutiny. Part of the value of the Whitaker Schedule was that it required the department to give detailed answers to the points raised; this was so even where the answer was to the effect that the clause was being reconsidered. Here again, there is an obvious audit trail of Committee questions and government responses that could be used in post legislative scrutiny.

Could it also be used at the Committee stage? In suitable cases, where there can be sufficient time between the Committee and Report stages, why not? The Committee stage could comprise two sub-stages. The first hears evidence and constructs a Whitaker Schedule. At the second stage it considers the Government’s responses and then debates further and / or (dis)agrees the clauses.

This is close to the correspondence exchanges that already take place between the Regulatory Reform and the Delegated Powers and Regulatory Reform Committees and the government, a process with clear benefits for the proper scrutiny of RROs.

6 Institutional Questions

It follows from a functional analysis that institutional arrangements are determined only after there is agreement on what they are to achieve; in modern parlance, ‘are they fit for purpose?’ In this respect the Consultation Paper is entirely right to say that no one kind of procedure is suited to all Bills.

I do not have any particular preference for any one model. As the Introduction puts it, with a better equipped legislative toolbox, the question for any particular Bill is, which tool is most likely to yield the best results in terms of the functions that the Committee stage is to perform?

These functions have been identified frequently enough in the past. Your Committee identified in para 14 of the First Report of 1996–97 eight ‘essential criteria which must be met’ in making any reforms to the legislative procedures of the House

(a) The Government of the day must be assured of getting its legislation through in reasonable time (provided that it obtains the approval of the House).
(b) The Opposition in particular and Members in general must have a full opportunity to discuss and seek to change provisions to which they attach importance.
(c) All parts of a Bill must be properly considered.
(d) The time and expertise of Members must be used to better effect.
(e) The House as a whole, and its legislative Committees in particular, must be given full and direct information on the meaning and effect of the proposed legislation from those most directly concerned, and full published explanations from the Government on the detailed provisions of its Bill.
(f) Throughout the legislative process there must be greater accessibility to the public, and legislation should, so far as possible, be readily understandable and in plain English.

To these we might add, that (leaving aside the perceived defects to which para 8 of the First Report draws attention), the primary scrutiny functions of the Committee stage are

(g) to test the success with which the Bill gives effect to the stated policy, and more particularly,
(h) to test the scope / legality / practicability / clarity of definition of the powers conferred on public bodies and others addressed by the Bill
(i) to test the scope / legality / practicability / clarity of definition of the obligations imposed on public bodies and others addressed by the Bill
I rehearse these for the purpose of reinforcing the point that the (rephrased) question to be asked when a Bill is committed to the Committee stage is not, to what type of Committee should it be committed? The question is, what type of Committee would do the best job given (1) these criteria and (2) the particular Bill? The answer to that depends on the views of those regularly engaged in the Committee stage.

Professor David Miers
March 2006

Centre for Public Scrutiny (M 63)

The Centre for Public Scrutiny has been created to promote the value and potential of scrutiny in modern and effective government—not only to hold executives to account but also to create a constructive dialogue between the public and its elected representatives—to improve the quality of public services.

We believe that “better scrutiny means better government”: and that this message can equally apply at legislative stages as through post-hoc reviews of the public services that result. We therefore welcome the Modernisation Committee’s enquiry and the opportunity to comment on how to ensure appropriate and proportionate scrutiny within the legislative process.

Our response to your call for evidence will particularly reference our four principles of good scrutiny, which are mutually reinforcing and lead to improved public services:

GOOD PUBLIC SCRUTINY . . .

1. provides “critical friend” challenge to executive policy-makers and decision-makers;
2. enables the voice and concerns of the public;
3. is carried out by “independent minded governors” who lead and own the scrutiny role; and
4. drives improvement in public services.

The CfPS Four Principles of Good Scrutiny & Cycle of Public Accountability 30

We will discuss how better pre-legislative scrutiny can lead to better legislation and better public services, arguing that Select Committee style scrutiny—in which elected representatives as “independent minded governors” examine legislative proposals in the public interest—has a better chance of achieving better legislation than the more adversarial style of Standing Committee scrutiny.

**Better Pre-legislative Scrutiny Can Lead to Better Legislation and Better Public Services**

CfPS Chair, Dr Tony Wright MP [also Chair of the Public Administration Select Committee] quite emphatically states that current systems for legislative scrutiny are insufficient. Starting the new session of Parliament in the House of Commons in July 2005, he said:

“Over the years, we have had umpteen reports which show that we do not scrutinise legislation effectively here [the House of Commons], with the result that our legislation is often flawed. We all know that that is true. We still do not see enough draft legislation, we legislate too much, our Standing Committees do not work well in scrutinising and, when amendments come back from the other place [the House of Lords], we often do not consider them at all.”

This statement suggests the current system for pre-legislative scrutiny is weakened by a lack of openness, a lack of executive cooperation and the domination of standing committees.

The merits of improved pre-legislative scrutiny as a catalyst for service improvement are recognised widely:

“The system works much better when executive decision-makers and non-executive scrutineers work openly and constructively together, both in the development and the implementation of legislation, to identify and resolve problems in the public interest—before they turn into poor service delivery.” (Parliamentary and Health Service Ombudsman Ann Abraham, CfPS Annual Lecture, January 2005)

Ann Abraham is recognising here that pre-legislative scrutiny at its best should be part of a “virtuous cycle” of establishing better legislation, which leads to improved services. Early involvement of stakeholders, through the scrutiny process, plays a central role in learning from good practice and helps bridge the accountability gap.

According to the CfPS principles of effective scrutiny, this ideal can best be achieved when “independent minded governors” are leading the scrutiny process, and engaging the public and stakeholders through an evidence-based, investigative process. Such criteria correlate much more closely with the work of select committees than those of the more widely used standing committees. We would therefore advocate that the future development of pre-legislative scrutiny should be based upon a select committee model—providing that necessary consideration is given to several practical constraints that may otherwise limit its potential.

**The Shortcomings of Developing the Standing Committee Model**

Developing the standing committee model by further extending “Special standing committee” powers could help engage the public and allow for better legislation to be produced: but does not solve the inherent lack of independence that compromises this model generally.

The strength of MPs as scrutineers lies not only in the democratic mandate which legitimates their activity on behalf of the people but also in an independence from the executive. There have been longstanding concerns that standing committees are insufficiently independent from the executive. As the CfPS Scrutiny Map states:

“Their membership reflects the political composition of the House—so a governmental majority is guaranteed—and normally includes relevant ministers, opposition shadows and whips. The strong use of whips ensures that bills pass through the committee stage without significant alteration, meaning that their [standing committees’] potential to initiate genuinely independent scrutiny of proposed legislation is limited.”

Compromising the scrutiny/executive split by involving Ministers in the pre-legislative scrutiny process can blur the role of scrutiny committees and conflict with the principles of accountability. The need for a clear split has been advocated recently through the introduction of Overview and Scrutiny Committees (OSCs) as a check and balance on local authority executives. The Local Government Act 2000 states

“An overview and scrutiny committee of a local authority, or a sub-committee of such a committee, may not include any member of the authority’s executive.”

In addition to this inherent weakness, it should be noted that previous attempts to extend and open up the role of standing committees have been largely unsuccessful. As your consultation paper notes, arrangements are already in place for “Special Standing Committees” that allow a wider “inquiry” approach, including select committee style hearings. This move towards an evidence-based approach is essential to build strong pre-legislative scrutiny arrangements, however, has been used very rarely and without addressing issues around independence “the way in which standing committees operate remains fundamentally determined by the Government’s desire to see its own measures enacted.”

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32 CfPS Scrutiny Map, p 9.
33 Local Government Act 2000, 21 (9).
34 Scrutiny Map, p10.
THE STRENGTHS OF DEVELOPING THE SELECT COMMITTEE MODEL

Select committees, by contrast, possess the required measure of independence to provide genuine “critical friend” challenge to the executive in the public interest rather than merely follow the direction dictated by Ministers or whips. They are also accustomed to an evidence-based process and consensual cross-party working which is conducted predominantly in public and with significant input from external witnesses: including experts, community leaders and the general public. Furthermore, the subject-specific expertise developed by select committee members suggests they would be ideally suited to provide further “critical friend” challenge in a pre-legislative environment.

Provisions for pre-legislative scrutiny are strongly anchored within the first three core tasks of select committees, as defined by the Liaison Committee:

— To examine policy proposals from the UK Government and the European Commission in Green Papers, White Papers, draft Guidance etc, and to inquire further where the Committee considers it appropriate.
— To identify and examine areas of emerging policy, or where existing policy is deficient, and make proposals.
— To conduct scrutiny of any published draft bill within the Committee’s responsibilities.”

Whilst there is often enthusiasm for extending this remit as a successful way to improve the delivery of public services—both within Westminster and elsewhere—the patchy way in which existing powers have been taken up suggest a measured approach is required to any future developments. Namely:

CONTRASTING EXPERIENCES IN WESTMINSTER AND BEYOND

Under the provisions of the Standing Orders of the Scottish Parliament, Parliamentary committees have the power to introduce a bill on a subject falling within its scrutiny remit. (Other legislatures including the European Parliament also grant similar powers to their committees.) In Scotland this model has been used to secure early public involvement in legislation and this ability to innovate has often been considered a tremendous advantage. For example, in 1999, the Scottish Parliament’s Justice and Home Affairs Committee decided to consider the issue of protection from abuse, which resulted in a Bill extending the scope of existing legislation on the protection of victims. Alasdair Morgan MSP, convener of the committee at the time commented:

“Our Bill has extended legal protection to many people who were vulnerable to domestic abuse, but whose rights were not recognised by existing legislation.”

The practical experiences of Westminster committees demonstrate that some favour increased involvement of select committees in proactively pushing forward a legislative agenda, while others see pre-legislative scrutiny as beneficial only in specified conditions.

— The Public Administration Select Committee (PASC) broke with tradition in January 2004 by publishing a Civil Service Bill as part of its consideration of the case for an Act.
— In 2003, The Environment, Food and Rural Affairs Committee carried out pre-legislative scrutiny of the draft Animal Welfare Bill. Many of its proposed changes were accepted by Ministers, who commented on how useful the process had been. However the Committee concluded that the bill had not been an appropriate candidate for pre-legislative scrutiny by Parliament in the absence of proper consultation by Government. It further said that Government should not regard pre-legislative scrutiny by Parliament as a substitute for proper public consultation.

Extending existing pre-legislative scrutiny powers of select committees must thus be carefully considered, especially in terms of the below issues.

Powers, strategic levers and executive responsiveness

Both in order to prevent the unreasonable delay of urgent and important legislation and the overload of already pressed select committees, it is necessary that clear powers and terms of reference are attached to an enhanced pre-legislative role.

— As the EFRA Committee example demonstrates, clear frameworks have to be established for establishing which bills will be subject to pre-legislative scrutiny.
— There must be adequate provision to ensure a select committee’s work programme remains independent rather than swamped by statutory requirements for pre-legislative scrutiny. Within local authority health scrutiny committees, which have a statutory duty to be consulted on substantial variations and developments to health services, many are struggling to maintain a “proactive” element to their work programmes and investigate matters outside of this statutory remit.

36 CfPS, Successful Scrutiny 2, 2006.
37 Process, Progress and Making it Work—a University of Manchester evaluation of health scrutiny, available at www.cfps.org.uk/publications
— The quality of pre-legislative scrutiny will depend largely on timely availability of information to select committees. Involving committees as soon as possible in the process, and giving them a realistic timetable in which to carry out genuinely public facing reviews, would be advantageous.

— Scrutiny should be appropriate and proportionate: therefore complex or cumbersome procedures should be avoided. A split-committal process could prove useful for particularly large and complex legislation, but should be limited to such instances to guarantee a maximum amount of coherence. The re-committal system could however be seen to undermine the work of select committees, in the event that a standing committee amends the text after it has gone through the select committee. This could be an unnecessary duplication of the process, and undermine the legitimacy of select committees.

— Levers should be in place to ensure the executive is responsive to pre-legislative scrutiny. As with select committee’s standard reviews, there should be provisions for government to respond to recommendations publicly within a proscribed timescale.

— Additional levers should be considered, similar to the call-in procedure is a provision of the Local Government Act (2000) which allows the appropriate Overview and Scrutiny Committee (OSC) to compel the Executive to reconsider a decision it has made but not yet implemented. The procedure varies in different councils, but usually allow for a number of working days (typically five) during which a decision may be called-in before it is implemented, and places a number of other restrictions on who can call-in (typically three members, and sometimes giving the power to the OSC Chair on his own) and which decisions may be called-in (typically excludes urgent decisions and decisions within the policy framework or budget). These powers, if designed correctly, could allow a delaying mechanism where there are serious concerns about legislation.

— In order for such an approach to be successful, and avoid it being abused for political ends, select committees must remain unwhipped. This would maintain the level of cross-party support and collaboration they enjoy today. Consideration could also be given to removing whips’ involvement in selection of select committee members: although there is a general feeling that this does not interfere with members’ independence of spirit once they are on committees.

Involvement of the public

— Progress has been made recently regarding select committees’ public profile and the public’s ability to get involved in reviews: especially in relation to partnerships with Radio 4 and the extensive use of webcasts for evidence sessions. Similar provisions should be encouraged to ensure public input into legislation.

— Additional public input could be obtained by partnering with or learning lessons from local government scrutiny committees. Many local authorities “co-opt” members of the public, local experts or community leaders onto their scrutiny reviews, which could be practiced within pre-legislative scrutiny to ensure the public interest is represented. Additionally, dissemination of information on pre-legislative scrutiny to local government scrutiny committees could be easily achieved through the CIPS Scrutiny Champions’ Network and could result in increased public involvement at local level: whether through councillors feeding back their views as evidence or championing the issue locally so that members of the public become directly engaged.

Resources and innovation

Equally important is the need to provide adequate resources to select committees so that they can perform their work effectively and provide genuine “critical friend” challenge to the Executive. Any expansion of powers should be mirrored by an expansion of staff resources and careful thought about how to innovatively increase member time and expertise.

— Staff resources: The Scrutiny Unit has proved a useful resource in the work of select committees, providing support for members to tackle large and complex issues in the short time allowed by pre-legislative scrutiny. The House of Commons Commission commented: “The Unit has already established itself as a highly effective source of support to Committees in these and other areas. It has now reached the full complement of seventeen approved by the Commission. . . . An increasingly significant call on the Unit’s resources has been pre-legislative scrutiny, as more bills are published in draft.” Any increase in select committee responsibilities would need to see a similar increase in Scrutiny Unit resources.

— Member expertise: Given an incredibly busy parliamentary timetable of MPs, an effective way of enhancing capacity of committees may be to make more extensive use of joint committees with the House of Lords. This would refute allegations of scrutiny becoming “staff led”; and although questions may be raised about democratic legitimacy if the second chamber remains unreformed, there would be clear benefits in terms of the experience and expertise many members possess.

38 CIPS, Research Report 1.
39 Peter Ainsworth MP, then Chair of Environmental Audit Committee, CIPS Annual Conference 2004, p 22.
Indeed, Members of both Houses could be chosen for pre-legislative scrutiny review panels according to their expertise and interests. Such arrangements would provide a flexible range of tools as possible to ensure that they can carry out their pre-legislative scrutiny role. More flexible models of scrutiny such as ad hoc committees have been more widely used in local government, where they have helped scrutineers focus on specific topics. Smaller, focused, time limited panels allow for taking advantage of member expertise and contacts. Clear working arrangements, distinct from those of departmental select committees, can allow for in-depth analysis of important topics by MPs and Lords with a special interest in the area; especially when such topics cut across the remit of multiple departments.

March 2006

Sir Nicholas Winterton MP (M 66)

BACKGROUND

The Importance of Parliament

It is important to appreciate the role of Parliament within the British political process when considering how the legislative process could be improved. The most common assumption about legislatures is that they are, or should be, law-making bodies. In fact, legislatures with genuine powers to initiate and carry laws are relatively few and far between. Most legislatures actually have more of a policy-influencing role, to use Philip (Lord) Norton’s terminology, rather than a policy-making role.41 This lack of legislating ability, however, does not mean that legislatures are without use or are not fit-for-purpose, to use the modern terminology.

Prior to 1970, legislatures were, broadly speaking, analysed in terms of their lawmaking power and dismissed as “weak” if they lacked legislative power. Robert Packenham, however, identified a number of other functions commonly exercised by legislatures, broadening the way such institutions are viewed and assessed.42 Since Puckenham’s analysis of legislative functions, the true roles of Parliament have become clearer.

Lord Norton has written that the most important function of Parliament is that of legitimation—the generation of popular and elite support for the right of the government to rule. For this to happen, Parliament must be an effective scrutiniser of the executive, and be seen to fulfil such a role by the public. As the Conservative Party’s Commission to Strengthen Parliament noted.43

“Citizens need an effective Parliament. They need a body that can call the government to account, that can ensure that government answers for its actions and the actions of civil servants. They need a body that can scrutinise and, if necessary, change the legislative proposals brought forward by government proposals that, once approved by the Queen-in-Parliament, have the force of law. They need a body that can ensure that their voice is heard by government when they have a grievance, be it about the impact of a policy or the absence of a policy. They need the security of knowing that, if there is a problem, there is a body to which they can turn for help, a body that can force public officials to listen.

“Government needs an effective Parliament. It needs it because its authority derives from Parliament. Government is elected through Parliament and its political authority derives from that very fact. Undermine the authority of Parliament and ultimately you undermine the authority of government. The more government seeks to achieve autonomy in making public policy, the harder it has to work to maintain its capacity to achieve desired outcomes. The more it distances itself from Parliament, the more it undermines popular consent for the system of government. It needs Parliament to give its approval to measures and, prior to doing so, to scrutinise those measures.

“Parliamentary scrutiny should be seen by government as a benefit, not a threat. A healthy and vibrant government is one that is able to justify its measures and welcomes critical scrutiny. Riding roughshod over Parliament achieves no benefit: it undermines the popular legitimacy of government as well as Parliament; it results in poor—and potentially unpopular—legislation and it may require corrective legislation at a later stage. Ultimately, no one government—Parliament or citizen—benefits from such a situation. An effective Parliament ensures that government engages in rigorous thinking, is able to argue convincingly for what it proposes, and that its proposals emerge after robust probing—probing that takes place in the full glare of public exposure. In essence, good government requires an effective Parliament.”

The House of Lords Select Committee on the Constitution has underlined the importance of strong Parliamentary scrutiny:\(^{44}\)

“The scrutiny of legislation is fundamental to the work of Parliament. Parliament has to assent to bills if they are to become the law of the land. Acts of Parliament impinge upon citizens in all dimensions of their daily life . . . Subjecting those measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if bad law is to be avoided . . . If Parliament gets it wrong, the impact on citizens can on occasion be disastrous.”

The ability of Parliament to scrutinise, then, is crucial to the stability and health of the political system as a whole.

**Parliament Under Pressure**

There is an increasing paradox at the heart of legislative scrutiny in the UK. The amount of legislation passed by successive administrations has increased steadily, but the capacity of Parliament to properly scrutinise this activity has not increased commensurately.

While the number of Acts of Parliament has declined over the past three or four decades, as shown by Figure 1, the use of secondary legislation and the number of pages of legislation per session have grown significantly.

**Figure 1**

**NUMBER OF ACTS OF PARLIAMENT PASSED 1950 TO 2005\(^{45}\)**

![Graph showing the number of acts of parliament passed from 1950 to 2005.]

The use of secondary legislation remained consistent at just over 2,000 individual Statutory Instruments (SIs) per year until the late 1980s. This form of legislation increased in frequency throughout the 1990s and into the 21st century, however, reaching a peak of over 4,500 in 2001 and settling at around 4,000 per year thereafter.\(^{46}\)

There has also been a discernable up-turn in the number of pages of legislation passed each year, not entirely attributable to the increased use of SIs. In 1990, the total number of pages of primary and secondary legislation passed was 8,940; by 2000 it had reached 12,635.

Modern governments, therefore, have brought increased legislative appetites into office. This may be as a result of an increasingly informed—although decreasingly engaged—electorate being more demanding of government action, or at least governments perceiving such a demand. Parliament, however, has not been able to keep pace with the increased legislative workload. Heavier local demands on Members of Parliament, have increasingly taken them away from Westminster and shifted their focus to their constituencies, away from their primary role as scrutinisers.\(^{47}\) Institutional constraints and limited Parliamentary time have meant that legislation has often been ill-considered or even not debated at all.

The question for any reform of the legislative process at Westminster must therefore surely be: how can the quality of legislative scrutiny be improved?


The Legislative and Regulatory Reform Bill—Not the Answer

If the question is how to improve legislative scrutiny, the answer is indubitably not contained in the Legislative and Regulatory Reform Bill, currently before Parliament. The Bill contains a significant extension of the Regulatory Reform Act 2001 powers to make deregulatory orders without full Parliamentary scrutiny. The new powers would allow Ministers, by order, to repeal, amend or replace any primary legislation. The only exceptions to this power is that orders may not impose or increase taxation, create or increase criminal penalties beyond a specified limit, or authorise forcible entry, search or seizure, or compel the giving of evidence.48

Parliament could effectively be by-passed by orders made under this legislation, with very limited restrictions on the use of the powers. Although the Government Minister in charge of the Bill, Jim Murphy MP, has given assurances that orders will not be used for controversial measures, there is nothing on the face of the Bill to prevent future governments from using the powers for any purpose.

The extent of these powers has caused concern among politicians and among journalists such as Danny Finkelstein of The Times, who described it as “a Bill to End All Bills” and commented that “isn’t just a dangerous proposal. It is a flashing red light”49. Philip Johnson of the Daily Telegraph has described it as “the legal equivalent of the Doomsday Machine” and “one of the most pernicious measures to have come before a British parliament”50. The Liberal Democrat MP David Howarth described the Bill as the “Abolition of Parliament Bill” in an article in The Times.51

Proposals for Change

Evidence-Taking as Standard in Legislative Scrutiny

For legislative scrutiny to be successfully strengthened, Parliament must call upon all the resources available to it. MPs’ ability successfully to scrutinise legislation is only as good as the information they have available to them. Most Members will not have direct experience of how a piece of legislation might operate in practical terms or how it might impact upon certain groups. There are many interest groups who would be pleased to have the opportunity for greater input into the deliberations on legislation. Parliament should make the most of this resource of information and permit greater use of evidence-taking as part of the process of legislative scrutiny.

Standing Committees are designed to enable the detailed scrutiny of legislation, but there is strong argument to say that their ability to perform this role could be enhanced. Empowering standing committees to be able to take evidence would hone their scrutinising edge. Powers to do this currently exist in both Houses of Parliament, through Special Standing Committees, but are not widely used.52 Making the use of Special Standing Committees the rule rather than the exception has been advocated by the House of Lords Constitution Committee, the Conservative Party’s Commission to Strengthen Parliament, Robin Cook and Vernon Bogdanor among others.53

The belief that “scrutiny should not take place in a parliamentary vacuum” and that “Parliamentarians need to have access to expert opinion to know if there are potential flaws in a bill . . . they need to be aware of any strongly held views by citizens” led the House of Lords Constitution Committee to recommend that all Bills should be subject to scrutiny from a committee empowered to take evidence.54

Pre-Legislative Scrutiny as the Rule rather than the Exception

Pre-legislative scrutiny and the publication of Bills in draft form before being presented to Parliament has been a welcome development in the legislative process. Between 1992 and 1997, the Government published just 18 draft Bills. Between the 1997–98 and 2003–04 Parliamentary sessions, however, the Government published a total of 42 bills in draft form, of which 29 have been considered by a Parliamentary Committee.55 This is a great step forward in allowing Parliament to input into legislation before it is published as a finalised Bill, rather than the Departments presenting them as faits accomplis.

The practical desirability of pre-legislative scrutiny was highlighted in debate on the Pensions Bill in the House of Commons on 16 November 2004. When the Bill was first introduced in the Commons on 11 February 2004, it had 248 clauses and 12 schedules and ran to 235 pages. The Government made over

48 Hansard Society briefing: Legislative and Regulatory Reform Bill.
49 The Times, “How I woke up to a nightmare plot to steal centuries of law and liberty”, 15 February 2006.
450 amendments to the Bill during the Commons stages, adding 62 new clauses and 81 pages to its length. The Bill that was considered at Third Reading in the Lords on 15 November had increased still further to 326 clauses, 13 schedules and 266 pages. Nigel Waterson MP, the shadow pensions minister, commented on the floor of the House:56

“. . . if ever there were a piece of legislation that cried out to start its life as a draft Bill and be subject to the pre-legislative scrutiny procedures of both Houses, this is it.”

The perceived success of pre-legislative scrutiny, and the greater examination of draft Bills in the Scottish Parliament, have led to calls on the Government to publish all legislation in draft form unless there is a good reason not to do so. Draft Bills could then be considered by Departmental Select Committees or ad hoc Committees of both Houses as appropriate. Such recommendations have been made by both the House of Lords Constitution Committee and the Commission to Strengthen Parliament.

Greater Use of Post-Legislative Scrutiny

Post-legislative scrutiny of both primary and secondary legislation is, arguably, even more important than pre-legislative scrutiny. Although the likely or possible impact of a law can be assessed, this cannot compare with an assessment of how legislation has operated in real, practical terms. However, post-legislative scrutiny is not broadly used in this country, and tends only to be employed where something is obviously not operating properly or as intended. Minor improvements are generally not considered, potentially leading to a greater legislative burden on Parliament where unsuccessful measures are replaced with new ones.

The Commission to Strengthen Parliament proposed that Departmental Select Committees be granted research budgets to enable them better to assess the impact of legislation. The wider use of sunset clauses would also be a powerful tool of post-legislative scrutiny, but could take up a great deal of Parliamentary time. Post-legislative scrutiny should, arguably, only be undertaken selectively to achieve the best returns for the time and resources invested—the key question is how widely to draw this selection.

Carry-Over of Bills

Increasing the use of the carry-over procedure for legislation—in effect creating a rolling legislative programme would serve to remove the time restrictions on proper scrutiny of legislation. Under the current arrangements where most Bills fall at the end of a session unless they have been passed, scrutiny is often hurried and the success of legislation more the result of horse-trading than of proper consideration. A rolling programme would allow for a more evenly spread legislative workload throughout the year, rather than a glut of Second Readings in the winter, followed by overloaded Standing Committees in the spring and logjams in the House of Lords.

Not only would a rolling legislative programme lead to greater time for scrutiny within the legislative process—including evidence-taking in Standing Committee—it would also increase the time available for pre-legislative scrutiny. Alternatively, the use of carry-over could be available only for Bills which have been subject to pre-legislative scrutiny.

Critics of rolling legislative programmes suggest that it would remove a valuable discipline from the government business managers, would allow delaying tactics from those opposed to a Bill, and would open the door for a greater legislative workload to be imposed by the executive. Such obstacles could be overcome by placing a maximum time limit on the passage of a piece of legislation. The House of Lords Constitution Committee has suggested a 14-month limit.57 This would retain the discipline and reduce the utility of time-wasting tactics.

Programming

Consensual programming—a system of timetabling the consideration of legislation by agreement between the political parties—was introduced in 1997. This consensual approach, however, had broken down by 2000. Despite initial goodwill from all parts of the House, as expressed in All Party Programme Motions, opposition parties perceived that the Government regularly refused requests for flexibility and imposed too many guillotines. The current situation—whereby programme motions are put immediately following Second Reading—does not require cross-party agreement, and programme motions are often the source of controversy.

The current system leads to a significant number of clauses and schedules in Bills not being debated. The House of Commons Modernisation Committee has pointed to this (HC 1222), noting the “undesirable effect of curtailing debate on controversial matters on which Members wished to speak” and that “concern about the volume of legislation which passes undebated is entirely legitimate”.

56 House of Commons Hansard, 16 November 2004, col 1192.
The issue of programming was examined by the House of Commons Procedure Committee in a July 2004 report. The Committee expressed its belief that:

“We believe that if programming were used as originally envisaged by the Modernisation Committee, namely only when there is cross-party agreement, it would have the potential to be a more effective way of considering, and improving, legislation, and we regret that it has come to be seen as the same as the guillotine, though more widely applied.”

The Committee recommended that:

“programming motions should be decided without debate only where there is cross-party support; on other occasions the Government would, if necessary, have to justify such a motion in a one-hour debate. In exchange, we would expect parties to adopt a constructive approach to programming”.

“The initial programme motion for a bill should be taken not less than 48 hours after second reading, to allow the proposed date for the end of committee stage (the ‘out-date’) to take account of the second reading debate and any representations made; there should also be the possibility of a vote (without debate) on an amendment to the programme motion before the vote on the motion itself.”

“In standing committees, chairmen already have the power to intervene and suggest a meeting of a programming sub-committee to change the programme; we believe that this is a suitable activity to assist with orderly consideration of the bill. If no member objects, the standing committee should be able to dispense with a meeting of the sub-committee and itself make any arrangements which the sub-committee could have proposed. We believe that it is usually best for programmes in standing committee to specify as few intermediate deadlines (‘internal knives’) as possible, and that chairmen should have discretion to postpone a deadline by up to 15 minutes when it would be for the general convenience of the committee (during which time amendments to a programme motion could be considered if necessary); and any deadline should be delayed by the length of any suspensions earlier in the same sitting caused by divisions in the House. If time is insufficient longer afternoon sittings may sometimes be a reasonable alternative to a later out-date.”

Greater Parliamentary Control of the Legislative Timetable

The creation of a Business Committee in the House of Commons would take the organisation of the legislative timetable out of the shadowy recesses of the “usual channels” into the public eye and would take it out of party political control. A Business Committee would build greater consensus into the timetabling of Parliamentary business and could ensure that no important legislation should be slipped through under the radar.

As the House of Lords Constitution Committee has pointed out, such arrangements are common in other countries, and even within the UK—all three devolved bodies have their own business committees. Parliament is unusual in its executive dominance of the legislative agenda. It is logical for the legislature to be able to set its own timetables for scrutiny of legislation, and would not necessarily inhibit the Government in passing its business.

Secondary Legislation

Parliament needs to be better able to scrutinise secondary legislation, given the increase in its use over recent years. The Liaison Committee has described the system for dealing with Statutory Instruments (SIs) as “woefully inadequate” and many Instruments escape proper scrutiny. Most secondary legislation passes on the negative procedure, which relies upon any controversy being spotted and the instrument subsequently being prayed against. Even if an instrument is prayed against, it is not guaranteed that time will be found to debate it.

One method of strengthening the scrutiny of SIs would be to require all secondary legislation to be published in draft form prior to being laid before Parliament in a final form—effectively creating a “super-affirmative” procedure. This would enable greater Parliamentary scrutiny and better consideration of the likely impact of regulations.

In addition, a dedicated “sifting” committee could be established to spot any controversial instruments that should be prayed against. Departmental Select Committees could then be employed to decide upon the implications and the need for further scrutiny and debate.

To allow Parliament to amend SIs would, arguably, undermine their very purpose. However, the power of Parliament to deal with SIs could be strengthened by allowing the qualified rejection of an instrument—in other words, setting out the terms in which an instrument could be changed to be acceptable to Parliament.63

The current period for praying against a negative instrument could be increased from 40 days to, for example, 60 days to allow greater time for consideration.

Other Possible Measures

The following points are other potential changes that could be made to improve the legislative process:

- Require Standing Committees to include a certain number of Members from the relevant Select Committee to build in a greater degree of specialist knowledge.
- Encourage the greater use of evidence-taking sessions outside of Westminster and London, particularly where legislation is not urban in its focus.

March 2006

Sir Nicholas Winterton MP (further submission M 70)

Establishing a Business Committee

I hereby make the following submission to the Modernisation Committee’s inquiry into the legislative process using various sources to illustrate my support for the proposal to establish a House of Commons Business Committee, a matter which I have recently raised in the House with the Leader of the House, the Rt Hon Geoff Hoon MP:


“One of the most striking pieces of evidence we received was from Dr Thomas Saalfeld, of the University of Kent, on the extent to which the government controls the parliamentary agenda. That control is marked compared to other countries. We believe that the House should move closer to the practice of other legislatures, giving itself greater control over what it discusses. The evidence presented to us by Dr Saalfeld shows that this change can be achieved without undermining the government’s capacity to get its legislation.”

Select Committee on the Constitution, House of Lords, Devolution: Inter-Institutional Relations in the United Kingdom, Second Report, Session 2002–03, HL 28:

Lessons for Westminster from Holyrood, Cardiff Bay and Stormont?

146. The second feature, found in all three assemblies and legislatures, is the business committee. This meets regularly (once or twice a week) while the body is in session to discuss forthcoming business and arrange the timetable. It is usually chaired by the presiding officer or his deputy, and includes the Minister for Parliament or Assembly Business (in Scotland and Wales respectively), and the business managers (whips) of the other party groups, with the clerk and other officials in attendance. The business Committee is therefore both more formal and more open than the “usual channels” as they operate at Westminster. The Committee helps to develop a consensus about the conduct of business in the chamber, and ensures that the timetable for business is more clearly determined in advance. Again, it is a procedure that is to be found in other legislatures in Western Europe and has been variously proposed for adoption in Westminster. It seems to us that the use of business committees has a great deal to commend it, injecting a greater degree of transparency than exists in the current arrangements at Westminster and transferring some degree of control from the executive to the legislature. Their use does not prevent a government from getting its business, but it does ensure greater openness and time for the proper scrutiny of government.

147. We recommend that the use of business committees at Westminster be considered further in the light of the experience of the devolved bodies.

116. We confine ourselves to two related observations. The first is the fact that Westminster—which, in this context, means the House of Commons—is unusual among legislatures for the extent to which the Government dominates the legislative timetable. It is common elsewhere for the legislature to have greater ownership of the timetable. Research shows that handing over control of the timetable, or part of it, does not necessarily prevent the Government from getting its business.

117. Various proposals have been put forward as to how the issue may be addressed. It is common practice for legislatures to have their own business committees. We do not have to go beyond the shores of the United Kingdom in order to see such a committee operating. During our inquiry into inter-institutional relations in the United Kingdom, we looked at what lessons Westminster might learn from the experience of the devolved bodies. All three devolved bodies (the Northern Ireland Assembly was still in operation when the Lords undertook their inquiry) have a business committee. Each has followed a standard practice. The committee meets regularly (once or twice a week) while the body is in session to discuss forthcoming business and to arrange the timetable. It is usually chaired by the presiding officer or deputy, and includes the Minister responsible for parliamentary business and the business managers of the other parties, with the clerk and officials in attendance.

118. As was noted in the Lords report:

“The business committee is therefore both more formal and more open than the ‘usual channels’ as they operate at Westminster. The Committee helps to develop a consensus about the conduct of business in the chamber, and ensures that the timetable for business is more clearly determined in advance. Again, it is a procedure that is to be found in other legislatures in Western Europe and has been variously proposed for adoption in Westminster. It seems to us that the use of business committees has a great deal to commend it, injecting a greater degree of transparency than exists in the current arrangements at Westminster and transferring some degree of control from the executive to the legislature. Their use does not prevent Government from getting its business, but it does ensure greater openness and time for the proper scrutiny of Government.”

119. The case for a business committee has variously been made and on a cross-party basis. It was one of the recommendations of the Rippon Commission as well as the later Hansard Society Commission, chaired by Lord Newton, on Parliamentary Scrutiny. It was recommended by the authors of Parliament’s Last Chance: “A Business Committee”, they wrote, “would bring a greater degree of certainty to the parliamentary timetable and involve the main political parties in the management of business.” It was reiterated to the Lords during their current inquiry by the representatives of Parliament First. Sir Nicholas Winterton was a member of the Parliament First Group. It has also found support from Alan Beith and from a former Leader of the House of Commons, Robin Cook.

120. “I do find it rather strange”, Mr Cook told us, “that we have no corporate body that is responsible for considering the business of the House . . . . Indeed, one of the ways in which the executive retains its control over the Commons is to make sure that only it can propose the business before the House”

121. The idea of formalising the “usual channels” through a business committee need not necessarily be confined to the Commons. As Lord Carter, a former Government Chief Whip in the Lords, told us: “In the planning of the session, the draft bills and all the rest of it, that could equally well be done by a business committee because, in a sense, that is not adversarial; it is not political; it is just the programme of work. How do you organise a programme of work? That could well be done by a business committee” (Q 172). A business committee, as he pointed out, is essentially a workload committee (QQ 173, 193).

122. The Lords saw the argument for timetabling, the principle of which is generally agreed, and note that the use of business committees is common elsewhere, including in the devolved bodies. Given that the Lords reiterated what they said in their devolution report that there is much to commend consideration of such committees at Westminster.

123. We recommend that consideration be given to the establishment of a Business Committee at Westminster.

May 2006
Rt Hon George Howarth MP, Chairman of the Select Committee on the Armed Forces Bill (M 72)

The Select Committee on the Armed Forces Bill was established by Order of the House on 12 December 2005, after the Bill had received its Second Reading. As with previous Select Committees established to consider Armed Forces Bills, we were provided with powers similar to a departmental Select Committee/to receive oral and written evidence and to undertake visits in the UK and abroad. Our primary role was to consider the Bill, amend it if necessary, and report it to the House. The Committee could also publish its conclusions and recommendations in a Special Report.

Our predecessor Select Committee on the Armed Forces Bill, in 2001, noted that its inability to undertake the clause by clause consideration of the Bill in public was a hindrance to its scrutiny of the proposals. In response to those concerns the Government provided, in the Motion establishing this Committee, for a procedural innovation that allowed us to conduct the formal clause-by-clause consideration of the Bill in public. The Committee decided to take advantage of that power, and to conduct that formal consideration in a manner that followed Standing Committee procedure as closely as possible.

THE COMMITTEE AGREED TO:

Meet in a Standing Committee Room

Meeting in a Standing Committee room helped the Committee “shift” into a Standing Committee frame of mind.

An Order of Consideration motion

The Committee agreed a formal Order of Consideration motion to allow it to consider the Schedules with the Clauses that introduced them. Agreeing a formal Order of Consideration motion also enabled the Committee to alter the order in which it considered the bill when that became appropriate.

An informal timetable

The Committee decided against creating a formal timetable but agreed an informal timetable for the consideration of the Bill. Our meeting times were more flexible than for a Standing Committee. An informal timetable was a necessity given that we had no binding programme motion. The allocation of time for consideration of the Bill would be a potential area for difficulties for more contentious bills.

A time limit for tabling amendments

The Committee agreed to adopt the two day time limit for the tabling of amendments, as is the case in Standing Committees. This time limit has the benefit of ensuring that amendments are printed at least once prior to their being considered in the Committee.

Chairman’s provisional grouping of amendments

The Chairman of this Committee had no power of Selection, and therefore there was no authority under which amendments could be rejected. The Committee agreed that the Chairman should suggest groupings of amendments.

Publish an amendment paper

Arrangements were made to produce an Amendment Paper that was included in the Vote bundle. The Committee’s amendments appeared on the blue notice papers on the day after they are tabled, and on white paper on the day of the meeting.

A verbatim record of proceedings

Arrangements were made for Hansard to take a verbatim report of the proceedings, which was published in the same way as Hansard of a Standing Committee. It would be unacceptable for there to be no official report of proceedings given that the Select Committee was meeting in public.

We undertook the initial part of our work/taking oral evidence/in the same way as any other Select Committee. The majority of the oral evidence was provided by MoD and the Armed Forces. The Committee undertook two UK visits and one overseas visit to Cyprus, Oman and Iraq. The presence of a Minister on the Committee did not appear to affect the questioning or answers provided by witnesses. The Minister attended all but one evidence session, but did not question witnesses.
The overseas visit was a highlight for those Members who took part. The visit provided an opportunity for Members to “gel” as a Committee. The programme consisted mainly of informal discussions with officers and men. Those discussions were particularly useful and probably provided us with more frank views than structured briefing, or question and answer sessions would have done.

The Committee was accompanied during the visit by members of the bill team, all but one of whom were members of the Armed Forces. The Committee took advantage of the opportunity to have informal discussions with those who knew the Bill best; and that provided not only a clearer understanding of the effect and intention of the legislation; but also may have diminished concerns among Members about the level of Service involvement in developing the proposals in the Bill. I think other select committees might find such close contact with officials beneficial.

I believe Members found that approximating our proceedings as much as possible to the familiar Standing Committee format helpful. The lack of chairman’s powers did not impede the Committee. The goodwill generated on the visit survived into the Standing Committee phase and helped the Committee come to agreement on an informal programme, which it stuck to.

When the Committee came to consider the draft Special Report, party political differences became more apparent. This may be inevitable, particularly for a Committee that will not have to continue to work together once it has completed agreeing the report.

The approach we adopted for this Bill was beneficial to our scrutiny of an unusually large and complex piece of legislation by the standards of Armed Forces Bills. We agreed as a Committee that the approach should be applied to future Armed Forces Bills and could usefully be considered for politically uncontroversial legislation of appropriate scope and scale that scrutiny would profit from select committee style evidence-taking.

May 2006

Stephen Laws (M 73)

PAPER ON CONSIDERATION OF LORDS AMENDMENTS ETC

1. When the Modernisation Committee visited the Parliamentary Counsel Office in February, I was invited to submit a paper to the Committee on exchanges between the Houses relating to Bills. This is that paper. It has been delayed to take account of proceedings on the Identity Cards Bill and the Terrorism Bill.

2. The paper deals with the technical aspects of the process in the Commons. Inevitably a discussion of those aspects of the process has implications for the basis of relations between the two Houses. This paper is not intended to make any recommendations about that; nor does it set out proposals on behalf of the Government. It is written entirely from the technical perspective of the practitioner.

3. Clearly, many possible changes affecting Commons consideration of Lords amendments or other Lords messages would be impracticable without corresponding changes to the procedure in the Lords in respect of Commons amendments. Much of what follows is equally relevant to Lords procedure, because the procedures of the two Houses with respect to messages from the other are very similar, although not in all cases exactly the same.

4. This paper deals with five different aspects of exchanges between the Houses on Bills:
   — the giving of reasons and reasons committees;
   — the documents used on consideration of Lords messages;
   — the double insistence rule;
   — the packaging rule; and
   — the rules about what “remains in play” at each exchange.

5. The last four of these all interact with each other and a decision to change any one would have implications for the others. Indeed, decisions in relation to some of the last four might also affect the case for dispensing with reasons.

6. In this paper, the paragraphs setting out the questions the Committee may wish to consider in the light of the discussion are set out in bold type.

Reasons and the Reasons Committees

7. Commons procedure requires reasons to be attached to a message to the Lords if the message consists in no more than a disagreement with a Lords amendment. In the Lords, a reason is also given for a bare insistence on a previous message; but recent practice in the Commons does not require a reason for an insistence. In addition, a reason is not required in either House if a disagreement or insistence is accompanied by a proposed amendment in lieu or by a proposed amendment of words restored to the Bill by a disagreement with an omission proposed by the other House. Nor is a reason required in the case (which is rare, but theoretically possible) where a disagreement or insistence is accompanied by a new consequential amendment.
8. The requirement for a reason means that, where the Commons have resolved to disagree with a Lords amendment or message, a reasons committee is set up and decides on the reason for disagreement. The agreed reason is then reported to the House and attached to the message sent to the Lords. The procedure is described on page 636 of Erskine May (23rd edition).

9. The reasons committee usually consists of five or so members with a Government majority and, these days, its proceedings are invariably a mere formality. Where a Bill is programmed, as almost all Bills are, SO 83H allows a debate of half an hour on the reasons; but, in practice, the proceedings rarely last longer than it takes the Minister, as chairman of the committee, to read out the Government’s suggested reason and to put the question on it.

10. Reasons, with one exception, are rarely informative, consisting in most cases in a paraphrase of the proposition that the Commons do not think what the Lords have proposed is a good idea. An example from the proceedings on the Identity Cards Bill demonstrates the point: the following was the reason given for disagreeing with the Lords amendment making it only optional for a person applying for a designated document (such as a passport) to apply to be registered and for an ID card:

“Because the Commons consider it appropriate that a person applying for a designated document be required at the same time to apply to be entered in the Register and to have an ID card issued to him.”

11. Such reasons are rarely (if ever) referred to during the consideration by the Lords of the Commons message. If the reasons were useful in practice, it is difficult to see why they would not also be useful in the cases where they are not required (such as where an amendment is offered in lieu).

12. The only occasion on which a reason conveys a message that may be useful is where the Commons are disagreeing with a proposal from the Lords that the Speaker has ruled to be an infringement of the Commons’ financial privileges. (There are different categories of such proposal, one of them that is worth special mention is where SO 78(3) applies and disagreement is effected by a “book entry” because the proposal is not “franked” by a money resolution).

13. The Speaker’s ruling on a matter of privilege is made known to the Commons at the beginning of proceedings on Lords amendments. Any amendment infringing the Commons’ privileges with which the Commons disagree is disagreed with by a reason that states the subject matter of the amendment and concludes with the words “trusting that the reason given may be deemed sufficient”. Those words are used as a coded assertion of the Commons’ privileges. Where the Lords receive such a message, convention requires the Lords not to insist on their earlier message, although they may offer alternative proposals, even, in practice, alternatives that also infringe privilege.

14. As with other reasons, the Commons assert their privileges in the form of a reason only where they are disagreeing with a Lords amendment without more. No message is sent to the Lords to warn them that a reversion to their original proposal would be regarded as an infringement of the Commons’ privileges eg where the Commons are disagreeing with an amendment, but proposing an amendment in lieu. This would include each of the following situations:

— where the amendment in lieu incorporates a Commons amendment relating to the privileged matter—and so effectively waives the privilege; or

— where the amendment in lieu deals with the subject matter of the Lords amendment in a way that would not (if it had been proposed by the Lords) have infringed the Commons’ privileges.

15. If the Committee thought it appropriate to recommend the abolition of reasons and the reasons committees, it would be relatively easy to devise an alternative procedure for notifying the Lords of the Speaker’s ruling that a particular amendment infringes the Commons’ privileges. The ruling is made in advance and could easily be inserted as a book entry (as in the case where SO 78(3) applies), and it could, perhaps, be in a less cryptic form. It is for consideration whether it would be worth doing this in all cases of privilege, irrespective of whether the message being returned is a disagreement or a disagreement accompanied by some other message eg an amendment in lieu.

16. The questions the Committee may wish to consider in relation to reasons are as follows.

— Do reasons and reasons committees continue to serve a useful purpose, or should they be abolished?

— If they are abolished, what arrangements should be made for indicating to the Lords that a Commons decision is based on an assertion of the Commons’ financial privileges?

— Should the Commons also send a message about privilege to the Lords when they are making their own proposals in lieu of a Lords amendment that infringes privilege?
Documents Used for Consideration of Lords Amendments etc

17. When a Bill is returned to the Commons, all the amendments made in the Lords are converted into amendments of the Bill that was sent up to the Lords. The amendments are then printed as a complete list of Lords amendments in a separate document. This conversion can be a difficult and time-consuming process, particularly if a large number of amendments has been made both at Committee stage in the Lords and at subsequent stages. The Bill as amended on third reading in the Lords is not printed and the Commons considers all the amendments made by the Lords as amendments of the Bill as it left the Commons.

18. After that, further proposals (amendments in lieu, consequential amendments etc) are put down and printed as amendments either of the Bill sent to the Lords or of the list of Lords amendments or last message. After a number of exchanges between the Houses, the final text of the Bill that would result from the most recent proposal can only be worked out from putting together several layers of documentation. The matter is further complicated by the fact that, once an amendment has been agreed by both Houses, it drops out of the documentation. No single document is printed by either House at any stage showing what has been agreed so far and what is outstanding.

19. In theory, the advantage of this system is that it creates a degree of transparency about the outstanding issues between the two Houses. Because the documents at each stage are confined to outstanding issues, it is possible to see immediately where there is scope for further proposals. The list of Lords amendments or last message determines the scope for further proposals to be made.

20. In practice, however, this advantage is not a real one. The documents produced make it very difficult indeed for members in each House, and for officials, to determine after the first round what is being proposed as the eventual contents of the Act. And, without that context, the outstanding issues between the Houses are obscured.

21. What follows is part of the record of proceedings on the Prevention of Terrorism Bill 2005, and it amply demonstrates just how difficult the position can get:

   “The Lords insist on their disagreement to Commons Amendments 1A and 1B to Lords Amendment 1; insist on their Amendments 37Q to 37T in lieu of Lords Amendment 8, to which the Commons have disagreed; insist on their insistence on Lords Amendments 12, 13, 15, 17, 22, 28 and 37 in respect of which the Commons have insisted on their disagreement and insist on their disagreement with the Commons in Amendments 37A to 37O in lieu of those Lords Amendments; and disagree with the Commons in their Amendments 17H to 17M to the words restored to the Bill by the Commons insistence on their disagreement to Lords Amendment 17.”

22. The Commons replied to this with the following:

   “The Commons insist on their Amendments 1A and 1B to Lords Amendment 1, insist on their disagreement to Lords Amendments 12, 13, 15, 17, 22, 28 and 37 and insist on their amendments 37A to 37C and 37E to 37O, do not insist on their Amendment 37D, insist on their disagreement to Lords Amendments 37Q to 37T, proposed in lieu of Lords Amendment 8, insist on their Amendments 17H to 17M to the words restored to the Bill by their insistence on their disagreement to Lords Amendment 17 and propose Amendment 37V in lieu.”

23. What the Lords were, in fact, doing in this case was a straight rejection of the proposals last submitted by the Commons. What the Commons were doing was insisting on their proposals with one change, namely, the substitution of a new amendment, 37V for 37D (which the Commons were dropping). In fact Amendment 37V was different from 37D in only very limited and insignificant respects. The two amendments 37D and 37V (which each consisted of a new clause of nearly two pages) differed only because a difference was necessary to prevent the Lords from killing the Bill using the “double insistence rule”, which is discussed below. The insignificant differences between the two could only be ascertained by a careful comparison of the two clauses.

24. From the practitioner’s point of view, and also possibly from the point of view of Members, the system would be much clearer if what was returned to the Commons was the Bill as amended by the Lords—viz the Bill as amended on third reading (assuming third reading is the last stage at which amendments are made in the Lords). All subsequent stages could then proceed by reference to proposals for amendments of that Bill.

25. This in itself would not prevent the rules of order from continuing to limit the scope for further messages. If it were necessary for this purpose or otherwise helpful (and that might depend on the view the Committee takes of other issues discussed in this paper), a separate document could be printed when the Bill is returned to the first House which could be used just for the purpose of determining the scope for further amendment of the Bill.

26. There are various forms that such a document could take. On the first round, the list of Lords amendments could be printed, as it is at present but just for information purposes, to show how the Bill returned to the Commons differs from the Bill sent up. Alternatively, the software used for printing Bills would make it relatively easy, for information purposes only, to print a version of the Bill showing the changes made in the Lords. A utility already exists for this purpose, which works well, except in tables. At subsequent stages, a different sort of document might be required for this purpose and some possibilities are mentioned in paragraph 28 below. These documents would enable Members to decide what is in order at
each stage (assuming the rules of order continue to depend on what remains “in play”). In practice of course Members will continue to rely on advice from the clerks, and ultimately on the Speaker’s ruling, to ascertain what is in order.

27. How could all this work in practice? The Commons on receiving the Bill back could either agree it or agree it subject to a list of further amendments. These would, if necessary, reverse the effect of Lords amendments and restore parts of the Bill to the state in which they were when the Bill was first sent to the Lords. At the next stage, the Lords could do one of three things:

- disagree with all the proposed Commons amendments and insist on the Bill as originally sent back to the Commons;
- agree with the Bill as amended by all the Commons amendments;
- send back an alternative list of amendments that the Lords are willing to accept, which would also incorporate the Commons amendments to which the Lords are willing to agree.

28. The Commons could then respond with an insistence on their original list, agreement with everything the Lords propose or a proposal for an alternative list incorporating all the amendments (whether originally proposed in the Commons or in the Lords) which the Commons are willing to agree. It would be possible to use printing techniques (different fonts or weights of font etc.) to indicate which amendments proposed at the preceding stage had been accepted and which were new. It would also be possible to produce a document, again for information purposes only, which also showed which amendments proposed at the previous stage had been rejected (eg a comparison between the last list proposed by one House and the response to it from the other House).

29. The advantage of such a system would be that, at each stage, it would be possible to work out the form of the Bill as proposed by the Lords or Commons using only two layers of text: the Bill as amended on third reading in the Lords and the latest list of amendments proposed by the House in question. I do not believe that the production of these documents together with the information documents mentioned above would slow the process of exchanges between the Houses, although I have to accept that it would, at least in some cases, use more paper.

30. A change along these lines would also be consistent with the fact that, in practice, Government concessions and other Government amendments made in the Lords usually need to be approved only formally in the Commons. Approving the Bill as amended by the Lords subject to exceptions would have the practical effect that all non-controversial amendments made in the Lords would be approved as a block. This, in many cases, is the practical effect of the current programming Standing Orders 83F and 83G. It would still of course be in order to trigger a debate and division on a particular change made in the Lords by moving an amendment of the motion to agree to the Bill subject to specified amendments (eg to delete an amendment from the list of proposed Commons amendments, or to add to the list).

31. If a change of documentation along these lines were agreed, some further work would need to be done on the form or the motions to give effect to the various possibilities, and on the way in which those motions and amendments should be handled within the context of programming. If packaging is to remain important otherwise than for the purpose of grouping matters for debate (see below), some further work will also be needed on how the document returned to the other House would indicate the intended packages.

32. It would also be necessary to modify the programming standing orders, perhaps to allow the Speaker to select amendments to the main motion for separate division when a knife falls.

33. Furthermore, even the existing procedures are not without difficulty. There is uncertainty as to the effect of the defeat of a packaged motion and that uncertainty is complicated by the fact that motions and standing orders for programming do not allow the matter to be treated as undecided at the time when proceedings on the Bill must be concluded. It is assumed that, in the event of a defeat, each element of the motion is treated as decided in the opposite sense; but that can produce some surprising results where a motion disagreeing a part of a package includes a concession in the form of a non-insistence or an agreement in relation to another part of the package. A change to the form of motions to accommodate a change of the documents used might provide an opportunity to resolve this difficulty.

34. The questions the Committee may wish to consider in relation to documentation are as follows.

- Should the Bill used for exchanges between the House continue to be the Bill sent to the second House by the first House, or should it be the Bill as amended by the second House?
- Should the document sent back in an exchange provide a complete record of the amendments (whether already agreed or not) which the House in question is proposing to the Bill?
- Do additional documents need to be produced to indicate what is in order at each stage?—The Committee’s views on the remaining questions in this paper may affect this.
- If changes are made to the documents used what consequential changes are needed to the form of the motions used at each stage and to the way programming operates?
Double Insistence and the Packaging Rules

35. These two rules complement each other and need to be considered together.

36. The double insistence rule is the rule that says that a Bill is lost if one House has insisted on a proposal and the other House has then insisted on disagreeing with it. The purpose of the rule appears to be to identify the point at which a deadlock between the two Houses is reached and to terminate further consideration of the Bill at that stage. The application of the rule is complex and artificial in practice and, if that is its purpose, it is not clear that it serves it well.

37. The classic case of double insistence is where the Lords propose an amendment (stage 1), the Commons disagree with it (stage 2), the Lords then insist on their amendment (stage 3—first insistence). If at that stage the Commons then insist on their disagreement (stage 4—second insistence), the Bill falls.

38. At any stage of this four stage process either House can start the clock running again by making a new proposal (eg by proposing an amendment in lieu). That then takes the process back to stage 1: so, if, say, the Commons do not insist on a disagreement (producing a double insistence at stage 4), but instead propose an amendment in lieu, the Bill will not be lost until the Lords have disagreed the amendment in lieu, the Commons have insisted on their amendment in lieu and the Lords have insisted on the disagreement (stage 4 again with a second successive insistence). And that sequence itself can be broken and started again at any stage by a new proposal. In recent times, where the use of the Parliament Acts has not been inevitable and the opportunity for a first insistence has arisen, the Commons have often contrived to start the clock running again, so as not to put the Lords in the position of being able to kill the Bill.

39. The related packaging rules serve two functions. First, and independently of the double insistence rule, they provide a mechanism for grouping Lords amendments for debate and division in the Commons, and also in the Lords. This is useful and needs no further discussion; it is however only incidental to the main significance of the rules. Their main significance is that they mitigate what would otherwise be the harshness of the double insistence rule.

40. The way they mitigate the double insistence rule is to prevent that rule from applying amendment by amendment. So a proposal from the Lords may contain a single substantive amendment and a tail of consequentials. The Commons may disagree with the substantive amendment and offer an alternative that does not require the consequentials: so they also disagree with all the consequentials. There may be a number of exchanges with different options for replacing the substantive amendment, but all of them may require the same thing in relation to the consequentials. It would not make sense if the Bill had to fall while the Houses are still trying to reach agreement about the substantive amendment, just because there had been a double insistence in relation to one or more of the consequentials.

41. The packaging rules therefore allow amendments to be packaged together as part of one story for the purpose of deciding if the clock should be started again in relation to all the amendments in the package. Amendments, which as a matter of analysis, are really only in lieu of one amendment in a package are treated by the packaging rules as in lieu of all the amendments in the package.

42. The packaging rules were the subject of an agreement in 2005 between the two Houses. The agreement is set out in the report of the House of Lords Select Committee on Procedure and the relevant part of the report is set out as the Annex to this paper.

43. This report was debated in the House of Lords (Hansard 24 March 2005 col 365 to 386).

44. The practice of the Lords since the 2005 agreement has been to accept packages on the basis of the way the Lords amendments were treated in debate in the Lords. So, on the Identity Cards Bill, the Government were told that it would not be acceptable to treat as a single package:

- the removal by the Lords of the link between the application for a designated document (eg a passport) and a requirement to register on the National Identity Register; and
- the power to provide by order subject to a special affirmative procedure to provide for a general obligation to register.

This was because the two issues had been debated as separate issues in the Lords. And a relevant factor in this sort of decision may be whether the amendments on two otherwise related issues were moved by the spokesmen of different parties.

45. One particular feature of the combined operation of the double insistence rule and the packaging rules that is worth noting is that the rules treat a deadlock as having occurred if there is a deadlock on only one package, even if other packages are still subject to new proposals from one House to the other.

46. Another is the apparently arbitrary way the rules can operate in practice. This is demonstrated by an example from the Terrorism Bill 2005–06. On one round the Commons sent back a package of amendments with some consequential amendments of subsection (9) of clause 3. The rest of the package was accepted by the Lords but the consequential amendments were rejected because the omission of subsection (9) was part of another package of amendments that the Lords were insisting on. On the next round, the Commons did not insist on the consequential amendments, accepted the omission of subsection (9) and proposed a new subsection (9) as amended by the consequential amendments in lieu of other proposals being rejected by the
Commons. Although the practical effect of this, so far as subsection (9) was concerned, was identical with the proposal on the previous round, the rules treated it as a new proposal which started the double insistence clock running again.

47. But perhaps the most important feature of the combined operation of the rules is that they can always be manipulated to ensure that there is no double insistence. This is easy and common and the Committee may think that the fact that it frequently happens, and is allowed to happen, demonstrates that the rules are not in fact in tune with political reality and the will of the two Houses.

48. The easy manipulation of the rules is illustrated by the example given in paragraphs 21 to 23 above in relation to the Prevention of Terrorism Bill 2005. The Commons was able to keep the proceedings going and to deny the Lords the opportunity to kill the Bill, because the Commons was able to send the Bill back several times with what were, in substance, the same amendments subject only to a series of trivial modifications.

49. The purpose of this was to require the Lords to consider its position again on more occasions than the double insistence rule would have allowed. In addition, the manipulation secured that three separate packages were kept alive, because, as a matter of political reality—but not according to the rules—they were actually being treated as one package: in the sense that it was assumed that movement by the Government on one of the packages would be enough (as was the case in practice) to persuade the Lords to withdraw their objection to the Commons position on the other two.

50. In practice, it is always going to be possible to produce this situation with sufficiently ingenious drafting. Each House can use a trivial change to prevent the other House from being put in the position of being able to kill the Bill, although a consequence is likely to be that the best way of drafting something may be abandoned in favour of a different way of drafting it—just to keep the Bill alive (see paragraph paragraphs 21 to 23 above).

51. In practice, the rules do not prevent one House from asking as many times as it likes for the other House to think again about a proposal it has already rejected.

52. In these circumstances there are three questions the Committee may wish to consider:

— Is any useful purpose served by a double insistence rule which produces the death of the Bill through deadlock only where the majority in one House wants that and the majority in the other House has put it in a position where it is able to decide that?

— Is the intended purpose of the double insistence rule as well served by the existing ability of either House (subject to programming in the Commons) to adjourn consideration of the other House’s message indefinitely (perhaps after a warning in an earlier message) if it thinks that a real deadlock has been reached?

— If the Committee considers the double insistence rule still serves a useful purpose in identifying the point of deadlock, does it nevertheless make sense to assume that there is a deadlock when only one package is deadlocked and there are others that are still being negotiated (viz should any double insistence rule be applied to everything left in play, rather than package by package)?

The Rules about what “Remains in Play” at each Exchange

53. The rules of order about what can be considered by way of response to a message from the other House are designed, in theory, to ensure that the issues between the Houses are gradually narrowed. So:

— When the Bill is returned from the Lords to the Commons, proposals that are not relevant to one or more of the amendments made by the Lords are out of order.

— When the Bill is returned to the Lords, proposals that are not relevant to a disagreement (or to some new proposal) in the Commons response are out of order.

— When the Lords send back their response to the Commons, proposals that are not relevant to the matters that the Lords are insisting on (or to something new in the Lords response) are out of order.

— And so on.

54. This means that as soon as one House has made a proposal and the other House has agreed with it, that topic is “out of play” and cannot be revived. The effect of this is that the rules allow one House to “cherry pick” from a proposal for a compromise.

55. This applies irrespective of any packaging. An example is given above in paragraph 44 from proceedings on the Identity Cards Bill about how two issues (the link to passports and the introduction of compulsion by order) were treated as separate packages. However, even if they had been treated as one package, it would have been possible for the Lords (as they did in practice with separate packages) to accept the Government concession on the power to introduce compulsion by order but to continue to reject the link to passports.
56. The way the packaging rules operate in practice means packages are not “take it or leave it” packages; one House can accept the concessions contained in a package (taking them out of play) and then reject the part of the package that requires a concession from that House.

57. Like the double insistence rule, this rule too is capable of some manipulation where the political reality requires it, but not always as easily.

58. An example could have arisen in relation to the Identity Cards Bill. Clause 4 of that Bill set out the documents that were capable of designation and the procedure for designation. Clause 5 imposed a requirement to apply for registration in the National Identity Register when applying for a designated document. Both clauses were amended in the Lords but the amendments of clause 4 (which were Government concessions in the Lords) were accepted in the Commons on the first round. The amendments of clause 5—making it only voluntary to apply for registration when applying for a designated document—were Government defeats in the Lords and were the subject of subsequent exchanges between the Houses.

59. In the search for a compromise on clause 5, consideration was given to proposing further amendments of clause 4 (eg to the documents capable of designation or to the procedure for designation); however, had this been a satisfactory route to an eventual compromise (which, in fact, it was not), it would not have been allowed in a straightforward way because the acceptance by the Commons of the clause 4 amendments had put those issues out of play. Nevertheless (and this illustrates how manipulable and artificial the existing rules are), it would have been possible to produce similar effects in a more obscure way by eg amending clause 5 to say that it had effect with certain modifications where particular documents were designated under clause 4 or where a particular procedure had been followed under clause 4.

60. What this demonstrates is that there may be circumstances in which the political reality requires an issue settled at any earlier stage to be reopened to facilitate a compromise at a later stage.

61. The questions the Committee may wish to consider in the light of this discussion are as follows:
   — Do the rules that narrow the scope for further proposals with each exchange continue to serve a useful purpose?
   — Should the rules of order relating to exchanges continue to allow one House to accept concessions from the other House and take them out of play while at the same time rejecting the concession asked for in return?
   — If not, would a change best be secured by having a packaging rule that allowed for “take it or leave it” packages that could not be accepted in part or by allowing all issues sent back from the second House to remain in play until a compromise is reached on all of them?
   — If “take it or leave it” packages are to be allowed, are the current arrangements for determining what counts as a package for the purposes of the double insistence rule a satisfactory way of determining what counts as a package for the purposes of a “take it or leave it” rule?

May 2006

Annex

PUBLIC BILLS: EXCHANGES BETWEEN THE HOUSES

4. The Committee considered the implications of the practice of the House of Commons to package Lords’ amendments to bills. Packaging is currently used only in the House of Commons, where a number of related amendments may be grouped together for the purposes of both debate and decision. (It differs from grouping in the Lords, where related amendments may be debated together, but the fate of individual amendments in the group is decided separately.)

5. The Commons’ practice of packaging gave rise to difficulties in the Lords on the Planning and Compulsory Purchase Bill in May 2004, when the two Houses took differing views on the application of the double insistence rule [1]. It appeared to the Lords’ authorities that double insistence had been reached on an amendment and that the bill was therefore lost, whereas the Commons’ intention was that the bill could be further considered since that amendment had been decided in the Commons as part of a “package” with another amendment to which an amendment in lieu had been offered. In the event this difference was resolved by means of an exceptional motion, moved by the Leader of the House of Lords, to provide for further consideration of the bill in spite of the apparent double insistence.

6. Following these events, the Clerks of the two Houses agreed a joint statement (HL Deb. 21 July 2004 WS 19-21) on the subject of double insistence. The Clerks agreed that, if a Commons’ message clearly identified amendments as a package, “the resultant message to the other House would not amount to a double insistence, whether or not the House receiving it chose to “unpackage” the amendments for the purposes of debate”. Thus the Lords would have the opportunity to consider the amendments in spite of a double insistence within the package. The Clerk of the Parliaments invited us to consider changes to the practice of the House to deal with Commons amendments which have been packaged. Before we could consider the statement, there was a further instance of packaging of amendments on the Hunting Bill, which raised this issue once again.
7. In considering this subject, we had in mind that the House of Commons have been considering Lords’ amendments in packages since at least 1997, and are unlikely to change their practice, whatever the decision of this House. There may also be potential advantages to the Lords in considering Commons’ amendments in packages, in ensuring coherent and orderly debate by means of fewer, simpler motions. If properly used, packaging can be an aid to Parliamentary scrutiny.

8. However, there is a danger that the packaging of Lords’ amendments in the House of Commons would reduce the Lords’ legitimate power to ask the Commons to think again, if unrelated amendments were packaged together by the Commons in order to be able to reject them without offering any substantive alternative.

9. We therefore recommend that packages from the Commons should be considered by the House only if they are confined to single or closely related issues, not disparate issues joined together simply for reasons of convenience. We further recommend that, where packages from the Commons are confined to single or closely related issues, the House should in future be willing to consider amendments in packages and, where this is done, the double insistence rule should apply to the whole package and not to individual amendments within it.

10. In practice, this means that, if a bill is returned from the Commons with a clearly identified package of amendments, then in accordance with the joint statement the bill will be placed on the Lords’ Order Paper for possible consideration, even if there is a double insistence on part of that package. (By contrast, a double insistence which is not packaged with other amendments will kill the bill, and there can be no further consideration.) If the package concerns a single or closely related issue, the Lords should consider it and ping-pong will continue. If the package is not confined to a single or closely related issue, the Lords should refuse to consider it. The bill will then be lost because it will not be returned to the Commons.

11. When packages are constructed for debate in one House, due regard should be had to how those packages will be dealt with in the other House. However, each House remains master of its own procedures.

12. First Parliamentary Counsel has agreed that Counsel will (wherever possible) liaise with the authorities of both Houses during the preparation of packages, in order to avoid misunderstandings about the effect which a package in one House could have in the other House.

13. We propose that these arrangements should be reviewed in the light of experience.

The Lord Wallace of Saltaire (M 79)

MANAGING RELATIONS BETWEEN THE TWO CHAMBERS

1. The management of relations between the two Houses through the legislation process is one of the least “modern” aspects of Westminster business. Where the two Houses disagree, clerks pass across the Central Lobby with messages, with negotiations behind the scenes along “the usual channels” which do not bring in all relevant parties; the 180 crossbench Members of the Lords, in particular, are left outside such informal contacts, even though their votes may be a significant factor in reaching a compromise. In any future reform of the second chamber it seems likely that a significant non-party element, perhaps 20% of the total, will be retained. If the remaining 80% were to be elected on a different franchise from the Commons, it is also likely that several parties would be represented—there are representatives of six parties among the Members of the European Parliament elected from mainland Britain—and that no single party would command a majority of its members. Accepting that the primacy of the Commons will be maintained in any reform of the second Chamber, the revising chamber will nevertheless wish from time to time to insist on amendments to Bills. Negotiation between the two Houses will therefore be necessary, through one channel or another.

2. “Ping-Pong” is a process without agreed rules. Until recently, a Labour Government with a majority in the Commons has felt able to argue that in cases of disagreement the unelected and unrepresentative chamber should give way to the elected chamber, without compromise. The removal of hereditary peers (except for the limited number whose service has been extended until the conclusion of the process of reform) has weakened that argument. Second-stage reform that provided for a majority-elected second chamber would undermine it further. In practice, since 1999, the Lords has felt able to insist on its amendments when—as on constitutional and civil liberties issues—it has felt that matters of principle are at stake, or when it has felt emboldened by evidence of substantial discontent with the government’s position from its own backbenches as well as from other parties in the Commons. When the two Houses disagree in mid-session, without undue time pressure for completion of a bill, exchanges between them may take place over several weeks at a dignified pace, with time for informal discussions between each exchange. When there is time pressure on a bill, as with the Prevention of Terrorism Bill in March 2005, exchanges may end in an overnight sitting, or longer—in that case a sitting that started on Thursday morning, and ended at 7.00 pm on Friday. When agreement has not been reached at the end of a session, or more acutely when government disrupts the normal pace of parliamentary business by calling an election, hurried negotiations take place in ministers’ or whips’ offices; bargains are struck behind closed doors which may, or may not, be reported back to the wider membership of either House. The Commons currently considers Lords amendments on the floor, rather
than referring them to a committee of the House (most appropriately, to the committee that had scrutinised the bill in the Commons). The report of the Select Committee on Modernisation of July 1997 (para.53) estimated that consideration of Lords amendments consumed ‘considerable but variable amounts of time (typically 5-10% of all time taken on legislation).’

3. Westminster procedures have not always been so ill-defined. In the 17th and 18th centuries conference committees of the two Houses were an accepted part of parliamentary practice. “Ordinary” conferences of the Lords and Commons exchanged messages between the two Houses; “free” conferences brought together “managers” appointed by each to consider the reasons for differing on amendments to bills. Business in each House was apparently suspended during such conferences, while negotiations took place on mutually acceptable language. These committees went out of use in the second half of the 19th century, presumably because of the growing tensions between the two Houses, the struggle over precedence, and the competing claims to represent “the nation” (Lord Salisbury) and “the people” (Gladstone, and many others in the Commons). Repeated confrontation between the two chambers, whenever elections returned a non-Conservative majority to the House of Commons, made reasoned negotiation difficult, and left contested the basis on which any such negotiations should take place. The Salisbury-Addison Convention covered situations in which the Lords would give way to the Commons on bills, in spite of the views of the majority of its members. It did not cover situations in which the second chamber might make reasoned amendments to a government bill, and claim on grounds of ambiguities in the bill as presented, expert consensus on its implications, public opinion, or constitutional propriety that its amendments should be treated by the elected chamber as having some merit.

4. Some form of conference committee is a widely-accepted mechanism in other two-chamber parliaments. The example of the US Congress is not entirely relevant, since in Washington the Senate actively disputes primacy with the House. But in France, where there is no question of the relationship between the first and second chambers, as well as in Australia, Japan, Germany and South Africa, various forms of conference committees operate, with various procedures in case of prolonged disagreement. The role of such committees is to consider the issues on which the two Houses disagree, often after a bill has been exchanged twice or more between the two chambers, and if possible to negotiate an agreed compromise.

5. A conference committee for Westminster would not require major changes in other existing rules and conventions. A committee could, for example, be convened when a bill has passed between the two chambers twice without reaching agreement. It would, appropriately, be constituted on a different basis for each bill, bringing together the party managers and most active members from both Houses on that bill, with a membership reflecting the balance of opinion in both Houses. Such a committee could not, of course, guarantee to reach agreement. In the event of failure, the bill could be returned for a further vote in both Houses, and in the last resort be subject to the provisions of the Parliament Act—the constitutional sanction that ensures that in the last resort the first chamber retains primacy. What such a committee would achieve would be to end the undignified spectacle of overnight Westminster sittings, and also reduce the confused scramble at the end of each session and parliament. It would help to establish a greater sense of partnership between the two Houses, to replace the confrontations that have marked the unsettled relationship between the two Houses since the Commons first asserted its primacy.

6. Existing practice in other constitutional democracies suggest a number of possible variations on this proposal. Since a reformed second chamber is likely to have a smaller membership than the Commons, for example, the case for a larger Commons representation than from the second chamber might be persuasive; though the desirability of including representatives of diverse groups and opinions in the second chamber, including the cross-benchers, might suggest an equal number from each House. Exchanges between the two Houses might extend to three attempts to vote first on proposed amendments before proceeding to a conference committee, as in France. A conference committee might have a continuing core membership of business managers from both Houses, with those most concerned with a specific bill joining them for negotiations on that; or the committee might be reconstituted for each negotiation from those concerned to manage the bill in both Houses, together with those most concerned with pressing amendments. If the principle of such a committee were agreed, there would be room for some experimentation in composition and reporting back to both Houses, over one or more trial periods.

7. There might be some concern within the Commons that any move to return to a conference, or conciliation committee, between the two Houses would be to threaten the primacy of the Commons, by acknowledging the legitimate claim of the second chamber to amend legislation. If, however, there is to be a second chamber with a revising function, it has to have power to insist that the Commons reconsider some aspects of legislation. The primacy of the Commons is guaranteed by the convention that the second chamber does not vote down bills on second reading, nor deny them a third reading—leaving the Lords with the power to amend, but not to deny, legislation. The primacy of the Commons is reinforced by the convention that the Lords plays no role in “Supply”, thus leaving to the Commons alone the very broad field of taxation and spending. The Parliament Act operates as a “back-stop” to these conventions, guaranteeing that in the last resort the first chamber will prevail.

8. In recent years the Lords has come to play an increasingly prominent part in examining the details of complex legislation. A number of bills have been sent to the Lords with substantial sections left unexamined in Commons committees, due to strict timetabling; as a matter of practice the Lords continues to work through the entire text of bills in committee. Some complex and technical bills, as for example on Charities...
and on Company Law, have started in the Lords, in order to test out—and amend—detailed clauses before they reach the Commons. Lords committees go into further detail in their examination of statutory instruments (and European Union proposals), undertaking technical scrutiny that is beyond the scope of the more political prime chamber. The Lords thus acts as a secondary legislator—a revising chamber, not blocking government legislation, but subjecting it to careful scrutiny. A conference committee would contribute towards a more effective legislative process, without challenging the primacy of the Commons.

June 2006

Rt Hon the Lord Hunt of Wirral and Rt Hon Alan Beith MP (M 82)

Timing of pre-legislative scrutiny in 2005-06

1. Only three draft Bills were promised for the current session: Legal Services, Coroners and Courts and Tribunals. Legal Services is being examined by a Joint Committee and Coroners by the Constitutional Affairs Committee. No decision has been made about scrutiny of Courts and Tribunals, which has not yet been published.

2. The timescales have been as follows:
   Legal Services: draft Bill published 24 May; Joint Committee appointed on 23 May and ordered to report by 25 July.
   Coroners: draft Bill published on 12 June; expectation in Government that the Committee will report before the summer recess.

3. The time available for pre-legislative scrutiny has sometimes been short in the past. In 2004 the draft Charities Bill was published on 27 May and the Joint Committee was ordered to report by 30 September. In this case the Committee staff were able to draft the report during the summer recess, and the Committee then considered it during the September sitting, but the Committee nevertheless recommended “that neither House should agree to deadlines in motions to appoint Joint Committees where the time for consideration of the draft Bill is less than 12 sitting weeks from the date of publication of the draft Bill”.65

4. The Joint Committee on the Draft Legal Services Bill has been allowed just under eight sitting weeks (excluding the Whitsun recess) from the date of publication of the draft Bill to invite written evidence, set up a programme of meetings, take oral evidence and prepare and agree a report.66 The draft Bill is a long one: 159 clauses and 15 schedules on 172 pages, covering numerous complex and contentious issues. Oral evidence was taken from 6 to 26 June, and the Chairman’s draft report had to be circulated on 5 July to allow sufficient time for the issues to be discussed by the Committee and the report to be published on 25 July.

5. Questioned about the reasons for urgency and the date for introducing the Bill, the Minister’s response was: “We want it to be early in the second session in order that we can get all the proposals in. … there is a 12 to 18 month lead in so we need as much time as possible in order for the 12 to 18 months to end as early as possible.”67

6. The results of the limited time have been that:
   — The number of evidence sessions had to be restricted to seven, with witnesses seen in “panels” of three or four;
   — Given that format, questioning had to concentrate on the major aspects of the draft Bill, and there was not always enough time for the witnesses to be questioned in sufficient depth;
   — Where there has been conflicting evidence, it has been impossible to follow up points in writing;
   — The deadline for written evidence fell after much of the oral evidence had been taken;
   — Some issues raised by the draft Bill have not been dealt with at all.

7. The Committee’s difficulty has been increased by the fact that amendments to the Solicitors Act, on which some of the proposals in the draft Bill depend, were not provided to the Committee in time to be used in the examination of witnesses, and when they were provided they were incomplete.68 The Minister’s response was that “I think you will be able to give full consideration to the impact because the Bill sets out the policy and provides enough detail on the objectives and the framework for you to be able consider that

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64 The draft Corporate Manslaughter Bill was published before the election, on 24 March 2005, and the report on it by a joint sub-committee of the Home Affairs and Work and Pensions Committees was published on 20 December.
65 HC 660 (2003-04), para 398.
66 Staff of the Joint Committee were given a near-final copy of the draft Bill in confidence on 9 May, which made some preparatory work possible.
67 Uncorrected evidence of 26 June 2006, Q 441.
68 A letter was sent to the Committee on 27 June 2006, the day after the final evidence session.
sufficiently”. As one member of the Committee pointed out, the lack of detail had made it impossible for the witnesses to answer some questions, and “one of the things that is wrong is that the Bill shows what the policy is but does not show in sufficient detail how it is going to be achieved”.

8. The Joint Committee will produce a substantial and worthwhile report, but the effectiveness of the pre-legislative scrutiny, and particularly the opportunity for those affected by the bill to present their views in detail, has been severely reduced by the limited time.

CORONERS

9. The Constitutional Affairs Committee began its inquiry into reform of the system of coroners well before the publication of the draft Bill, intending to conclude the inquiry by examining the detailed provisions. The Department had long notice of the timetable for the inquiry. In the event the draft Bill was not published until 12 June, the day before witnesses were due to give evidence to the Committee on its provisions. Even a confidential copy of the draft Bill was not made available to Committee staff until 5 June, and then only in hard copy.

10. The Minister’s explanation for the delay in publishing the draft Bill was that it resulted partly from the Department’s desire to have a plain English version alongside the actual text, and she apologised for having allowed this to hold up publication. The Department has indicated its intention to proceed with the Coroners Bill early in the autumn.

11. The Committee took evidence on the draft Bill on 13, 20 and 27 June, with the aim of agreeing heads of report on 4 July and a report on 18 July for publication by the end of July. Information about the funding of the reformed coroner system, crucial for assessing the draft Bill’s proposals, is still not available at the time of writing. The limited time has meant that it has not been possible to complete the inquiry as originally intended and the report will include only interim recommendations on the broad policy set out in the draft Bill. As a result the Bill will be published without the Committee having been able to comment on the detailed provisions in the draft Bill. The Committee’s inquiry has been compromised by the delay in publishing the draft Bill.

12. At the end of the last evidence session, on 27 June, when no further evidence could be taken, the Minister asked the Committee to comment on three specific aspects of the draft Bill.

13. The Minister has also announced what has been described as “pre-legislative scrutiny” of the draft Bill by a panel of about 12 recently bereaved people in the Palace of Westminster. The status of this exercise is unclear.

CONCLUSION

14. Only two draft Bills published in the present session have been subject to pre-legislative scrutiny, and both on very restricted timescales. We do not know whether this reflects solely the timing difficulties following the general election. But it is clear that requiring a Committee to deal with issues as varied and complex as those in the draft Legal Services Bill in less than eight sitting weeks, or those in the draft Coroners Bill in an even shorter period, provides the illusion of detailed pre-legislative scrutiny rather than the reality and is unlikely to add to the reputation of either House.

15. We are particularly concerned by the attitudes of the relevant Ministers. In the case of Legal Services the Minister considered it enough for the Committee to be able to examine the objectives and framework. In the case of Coroners, the Minister is seeking to establish a parallel process of scrutiny by a panel selected by the Department. In both cases information crucial for effective pre-legislative scrutiny has become available or is expected to become available only at a very late stage in the process.

16. We ask the Modernisation Committee to recommend that 12 sitting weeks be the minimum time made available for pre-legislative scrutiny, with any exceptions to be agreed by the Liaison Committee and if appropriate, the authorities in the House of Lords.

17. We are copying this note to Lord Brabazon of Tara, Chairman of Committees, House of Lords.

Rt Hon the Lord Hunt of Wirral
Chairman, Joint Committee on the Draft Legal Services Bill

Rt Hon Alan Beith MP
Chairman, Constitutional Affairs Committee

July 2006

69 Uncorrected evidence of 26 June 2006, Q 442.
70 Ibid., Q 443-4.
71 Committee staff were permitted to brief the witnesses of 13 June about the draft Bill’s contents the day before their appearance.
73 Uncorrected evidence of 27 June 2006, Q 282.
74 11 See ibid., QQ 238-42.