



HOUSE OF LORDS

Select Committee on the Constitution

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14th Report of Session 2003-04

# Parliament and the Legislative Process

Volume I  
Report

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### *Select Committee on the Constitution*

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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## CONTENTS

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	<i>Paragraph</i>	<i>Page</i>
<b>CHAPTER 1: Summary of Recommendations</b>		<b>5</b>
<b>CHAPTER 2: Introduction</b>		<b>8</b>
The legislative process	9	10
Relationship between Parliament and citizens	13	11
<b>CHAPTER 3: Pre-Legislative Scrutiny</b>		<b>12</b>
Background	15	12
Parliamentary Counsel	18	12
Draft bills	20	13
Exceptions to publication in draft	29	15
Rolling legislative programmes	33	16
The decision making process	36	17
Responsibility for scrutiny	42	18
Methodology of scrutiny	49	19
Time constraints	58	21
Outcome of consultation process	70	23
Conclusions	72	24
<b>CHAPTER 4: The Legislative Process</b>		<b>25</b>
Part 1: Presenting Bills to Parliament	76	25
Explanatory notes	78	25
The purpose of legislation	82	26
Keeling schedules	88	27
European legislation	99	29
Part 2: Scrutiny of Bills	105	30
Timetabling	106	30
Management of parliamentary business	116	32
The committee stage	124	34
Evidence to assist scrutiny	129	35
Forms of evidence-taking	147	38
Informal briefing	151	38
Procedure	153	39
The adversarial culture	154	39
Carry-over	157	40
<b>CHAPTER 5: Post-legislative Scrutiny</b>		<b>42</b>
The importance of post-legislative scrutiny	166	42
Selecting measures for post-legislative scrutiny	174	43
Resources	182	45
Conclusion	193	46
<b>CHAPTER 6: Connecting with the Public</b>		<b>47</b>
The consultation process	196	47
Dissemination of information	203	48
Moderating responses	209	49
Assessing public opinion	214	50
Alternative forms of consultation	218	51

<b>CHAPTER 7: Conclusion</b>		<b>52</b>
The growth of legislation	222	52
A “culture of justification”	226	53
<b>APPENDIX 1: Membership of the Committee</b>		<b>55</b>
<b>APPENDIX 2: List of Witnesses</b>		<b>56</b>
<b>APPENDIX 3: Call for Evidence</b>		<b>58</b>

NOTE: References in the text of the report are as follows:

- (Q) refers to a question in oral evidence
- (p) refers to a page of written evidence

The Evidence Volume of the Report is published as a separately under HL Paper 173-II.

# Parliament and the Legislative Process

## CHAPTER 1: SUMMARY OF RECOMMENDATIONS

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1. We believe the Government should move from deciding which bills should be published in draft each session to deciding which bills should not be published in draft. Where the decision is taken not to publish a bill in draft, then the reasons for this should appear in the Explanatory Notes to the bill. (Para 34)
2. We endorse the view that there should be a rolling legislative programme, with Departments gaining slots in specified future sessions subject to the bills having first been published in draft. The presumption should be that no bill should be allocated a slot without being published in draft unless a compelling case has been made to the contrary. (Para 35)
3. The decision as to which draft bills should be subject to pre-legislative scrutiny should be the result of negotiation between the Government and the Liaison Committee of the House of Commons. We also propose the creation of a Joint Liaison Committee of the two Houses so that the opinion of the House of Lords can be taken into account. (Para 41)
4. A draft bill should normally be considered by a Departmental Select Committee. Failing that, the Liaison Committee of the Commons might consider appointing a temporary committee. For big and complex bills, and where there is particular expertise in the House of Lords, a Joint Committee should be considered. Where a bill cuts across several sectors, then a (sub)committee drawn from two or more Commons Select Committees, or a Joint Committee, may be appropriate. (Para 48)
5. Checklists should be employed by committees engaged in pre-legislative scrutiny, as well as by committees at other stages of the legislative process. The Joint Liaison Committee that we have recommended would appear well suited to draw up the checklists. (Para 57)
6. We endorse the recommendation of the Joint Committee on the Draft Gambling Bill that the Government should ensure that the full text of draft Bills is available to pre-legislative scrutiny committees in good time before they are asked to report. (Para 63)
7. We agree with the Joint Committee on the Draft Communications Bill's recommendation that Joint Committees be set up at least two sitting weeks before a draft bill is published and not be required to report until at least one month after the end of the consultation period. We add that, in the absence of a formal consultation exercise on the part of the Government, the minimum should be 4 months from publication of draft bills. (Para 69)
8. A committee considering a draft bill should be supplied with the findings of a consultation exercise, and the Government's response to those findings should be made available to it. (Para 71)

9. Each bill should at some stage be subject to detailed examination by a parliamentary committee of one or other or both Houses, empowered to take evidence. (Para 74)
10. Guidance given by the Cabinet Office on the preparation of Explanatory Notes should be closely adhered to, and the Cabinet Office should monitor compliance with the guidance. (Para 81)
11. The Explanatory Notes to each bill should include, in the introductory section, a clear and developed explanation of the purpose of the bill, incorporating or accompanied by the criteria by which the bill, once enacted, can be judged to have met its purpose. (Para 87)
12. Where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and should be included in the Explanatory Notes to the bill. (Para 98)
13. The Explanatory Notes to all bills introduced to give effect to EU obligations should carry a section detailing the scrutiny history of the measure. (Para 103)
14. Consideration should be given to the establishment of business committees at Westminster. (Para 123)
15. Every bill should at some stage be subject to detailed examination by a committee empowered to take evidence. (Para 143)
16. Bills should normally be committed after Second Reading to a committee empowered to take evidence; though that requirement may be dispensed with if the House is satisfied that the bill in that form has already been subject to detailed evidence-taking examination in the other House. (Para 144)
17. The membership of a committee examining a bill should normally include some Members who have been responsible for the pre-legislative scrutiny of the measure. (Para 145)
18. We commend the value of obtaining evidence through informal meetings and seminars. (Para 150)
19. We support the principle of the carry-over for bills that have been subject to pre-legislative scrutiny, but believe that bills carried over should be subject to a stipulated cut-off period from the time of their introduction. We suggest that 14 months would be appropriate. (Para 163)
20. Most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner. (Para 180)
21. Each Government department should undertake a review of an Act, against the criteria it provided in the Explanatory Notes, within the time period that we have identified, and copies of such reviews should be deposited with the appropriate Departmental Select Committee. (Para 189)
22. The reviews undertaken by Departments should include consultation with interested parties, similar to consultation at the pre-legislative stage. (Para 190)
23. Money should be made available from the parliamentary budget to allow Departmental Select and other Committees, if they elect to do so, to commission research on the effect of an Act. (Para 191)

24. Committees should retain the discretion to undertake an inquiry themselves should they deem it necessary, either in the light of the Departmental review or the research that they have commissioned. (Para 192)
25. Evidence-taking committees, at pre-legislative and committee stage, should be empowered to take evidence outside Westminster. (Para 202)
26. Each House should give priority to ensuring that material about itself put in the public domain explains in clear and accessible manner what they are doing and what consultation exercises are being undertaken in which comments from the public are invited. (Para 208)
27. We recommend the greater use of e-consultation, but such consultation should be moderated and seen as but one of the tools available to consult the public and interested groups. (Para 213)
28. Committees are encouraged to consider commissioning public opinion polls where they believe it useful to have an awareness of public opinion on the bill in question. (Para 217)

## CHAPTER 2: INTRODUCTION

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1. 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. They prescribe what citizens are required to do and what they are prohibited from doing. They stipulate penalties, which may be severe, for failure to comply. They can have a significant impact not only on behaviour but also on popular attitudes. Subjecting those measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if bad law is to be avoided and the technical quality of all legislation improved. Parliament has a vital role in assuring itself that a bill is, in principle, desirable and that its provisions are fit for purpose. If Parliament gets it wrong, the impact on citizens can on occasion be disastrous; and history has shown examples of legislation that has proved clearly unfit for purpose.
2. It has been recognised for many years that the scrutiny of bills undertaken by Parliament has not been as effective as it could or should be. As far back as 1947, L. S. Amery declared that Parliament “has become an overworked legislation factory”.<sup>1</sup> Various studies have been undertaken of the legislative process with a view to recommending change. In 1992, the Hansard Society Commission on the Legislative Process, chaired by Lord Rippon<sup>2</sup>, published a seminal report, *Making the Law*, identifying deficiencies in the legislative process and making proposals for reform.
3. The report of the Rippon Commission was extensive, covering every aspect of the legislative process from genesis to implementation and encompassing secondary as well as primary legislation; its recommendations were numerous and wide-ranging.<sup>3</sup> Given that it is now more than a decade since the report was published, we felt it would be timely to return to the subject. We are conscious that various other bodies have examined and made recommendations for change in the intervening period. Our purpose is not to repeat what has already been done but rather to draw together much of the extant material and to identify where significant deficiencies remain in the legislative process.
4. Our focus is the process by which Parliament deals with primary legislation. We are conscious of the increasing impact of secondary legislation. The Procedure Committee in the House of Commons reported on it in 2000<sup>4</sup> and there is a case for returning to the subject. That, however, would be perhaps best undertaken in two or three years’ time. In December 2003 the House of Lords appointed a new committee, the Select Committee on the Merits of Statutory Instruments. The Delegated Powers and Regulatory Reform Committee of the House deals with the input side of secondary legislation: that is, the inclusion of order-making powers in bills. The Merits Committee

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<sup>1</sup> S. Amery (1877-1955; Member of Parliament 1911-1945), *Thoughts on the Constitution*, Oxford: Oxford University Press, 1964 edn., p. 41.

<sup>2</sup> The Rt Hon Baron Rippon of Hexham (*cr* 1987), 1924-1997; Member of Parliament 1955-64 and 1966-87.

<sup>3</sup> A summary of the key recommendations is to be found in the evidence of Michael Ryle, who served as secretary to the Commission (Vol. II, p.17).

<sup>4</sup> Procedure Committee, House of Commons, *Delegated Legislation*, Session 1999-2000, HC 48. See also Procedure Committee, *Delegated Legislation*, Session 1995-96, HC 152.



covers the output side: the orders promulgated under the parent Acts. The case for a broader review will be stronger once the Merits Committee has had time to bed in effectively.

5. Our starting point is that the process by which Parliament considers bills should be structured, rigorous and informed, and sufficient to ensure that Members have adequate opportunity to weigh the merits of the bill and consider the detail. We believe that legislation is most likely to emerge fit for purpose if Parliament has the opportunity to be involved at all stages of the legislative process and has mechanisms to digest informed opinion and comment from concerned citizens and interested organisations. Parliament does not operate in a vacuum. It is important that those affected by, or with knowledge of or having an interest in proposed legislation should have an opportunity to make their voices heard while the legislation is being considered rather than after it has taken effect.
6. Existing studies suggest that this paradigm has not been achieved. Indeed, some critics have been strident in arguing that, if anything, Parliament is becoming less, rather than more, effective in calling Government to account. The authors of *Parliament's Last Chance*, published in 2003, begin with the stark words: "Parliament isn't working".<sup>5</sup> The Norton Commission, which reported in 2000, acknowledged that there were a number of areas in which Parliament performed well, but identified pressures that had eroded Parliament's capacity to call Government to account.<sup>6</sup> It made almost one hundred recommendations for change. Parliament itself recognises it is nowhere near the ideal. This is exemplified by the work of the Modernisation Committee in the House of Commons, chaired by the Leader of the House, which since its appointment in 1997 has variously looked at how the Commons role in the legislative process can be strengthened and, indeed, how it can connect with the public.<sup>7</sup>
7. Given the material already published, we decided it was appropriate to undertake a relatively short inquiry. This, we felt, would also have the advantage that our recommendations would be in the public domain, and available for parliamentary consideration, at a potentially apposite time. The Committee took evidence from the Leaders of both Houses and from a number of distinguished parliamentarians, commentators and officials and we are grateful to all of them for the contribution they made.
8. The evidence we received shows that, though there have been some improvements in Parliament's capacity to scrutinise and improve bills, there is still much that needs to be done if the ideal we have described is to come anywhere near being realised. *Making the Law* identified the deficiencies in the process and charted the way forward. There is still a substantial way to go. This is not simply a matter of arcane procedures, of interest only to a handful of MPs and peers. It is of concern to all. It is essential to the health

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<sup>5</sup> Parliament First, *Parliament's Last Chance*, London: Parliament First, 2003, p. 5.

<sup>6</sup> Commission to Strengthen Parliament, *Strengthening Parliament*, London: The Conservative Party, 2000, p.11.

<sup>7</sup> See, for example, The Legislative Process, First Report, 1997-98, HC 190; Explanatory Material for Bills, Second Report, 1997-98, HC 389; Carry-over of Public Bills, Third Report, 1997-98, HC 543; Modernisation of the House of Commons: A Reform Programme, Second Report, 2001-02, HC 1168-I; Programming of Bills, First Report, 2002-03, HC 1222; Connecting Parliament with the Public, First Report, 2003-04, HC 368.

of the political system that Parliament has an effective means of ensuring that Acts of Parliament—applicable to everyone in society—are fit for purpose.

### The legislative process

9. For the purpose of our inquiry, we have not interpreted the legislative process narrowly in terms of when bills are before Parliament. We are concerned with Parliament's role in the formulation, discussion, and implementation of legislation. We have therefore structured our investigation in terms of pre-legislative scrutiny, legislative scrutiny, and post-legislative scrutiny.
10. We believe that such a broad focus is essential to understanding and maximising Parliament's role of legislative scrutiny. Once Ministers have brought bills before Parliament, they tend to adopt a proprietary attitude toward them. For Ministers, getting bills introduced and enacted is a demonstration of ministerial strength. In his memoirs, Robin Cook<sup>8</sup> records sharing with a colleague his frustration at not having any "big bills to put before Parliament".<sup>9</sup> Once a bill is given a first reading, it is published. It is thus in the public domain. Ministers, advised by the sponsoring department, can then be reluctant to accept significant changes, since this may be seen as a sign of weakness and may be exploited by political opponents.
11. Clearly, once a bill is introduced, Parliament does need to be able to subject bills to rigorous scrutiny. That scrutiny has the advantage of being structured and transparent: proceedings are public and on the published record. However, we stress that Parliament's influence may be greater *before* a bill is formally introduced. Ministers may be more amenable to accept changes when the bill is not in its fully-drafted form and formally before Parliament. Ministers can consider changes without the need to go to the dispatch box and make a public defence of the existing provisions.<sup>10</sup> We thus attach considerable importance to looking at Parliament's capacity to influence Ministers at the pre-legislative stage.
12. We also attach importance to the post-legislative stage. Once a bill has received Royal Assent, there is a danger that Parliament will regard its responsibility for the measure as spent. We believe that such an attitude is inappropriate and potentially dangerous. Measures once enacted may not have the effect that Parliament intended. Unintended and negative consequences may become apparent very quickly, or they may take years to come to the notice of parliamentarians, by which time a great deal of damage may have been done. Once the impact is recognised, corrective legislation may be needed. The sooner the bad consequences of legislation are recognised and acknowledged by Parliament, the better, making it more likely that corrective action can be taken before the effect becomes significantly worse. There is thus a case for rigorous scrutiny at this stage as well as the pre-legislative and legislative stages. We have structured our report accordingly.

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<sup>8</sup> The Rt Hon Robin Cook MP, Leader of the House of Commons 2001-03.

<sup>9</sup> Robin Cook, *The Point of Departure*, London: Simon and Schuster, 2003, p. 10.

<sup>10</sup> See also the comments of the Modernisation Committee, House of Commons, *The Legislative Process*, Session 1997-98, HC 190. See also Dr Meg Russell, Written Evidence (Vol. II, p.35).

### Relationship between Parliament and citizens

13. The legislative process is not an insulated one. It is important that Parliament is aware of the views of others. Parliamentarians may not themselves be expert or especially well informed about the subject matter of a bill. It is essential that Parliament has the means to hear from experts and informed opinion in order to test whether a bill is fit for purpose. However, input should not be confined to such opinion. Citizens may have strong views on the subject. Parliamentarians should be in a position to know whether a measure is objectionable to citizens on ethical or other grounds. A measure may be technically feasible—and enjoy the assent of those affected by it—but it may not necessarily be desirable in the view of citizens. Parliamentarians do not have to go along with the views expressed to them by individuals, but it is important that citizens have an opportunity to express their views on measures before Parliament. It is then up to MPs and peers to assess the strength of feeling and the extent to which it is persuasive or informed.
14. The opportunity to be heard should apply to citizens operating individually and collectively. Groups have a right to make their opinions heard, but so too do citizens who are not organised in groups. Our intuitive view is that groups often have the knowledge and the means to make their voices heard: individual citizens often do not. We are concerned therefore to explore to what extent the means do and should exist in order to ensure that citizens have the opportunity to express their opinions on legislation being considered by Parliament. This concern forms the final part of our report.

## CHAPTER 3: PRE-LEGISLATIVE SCRUTINY

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### Background

15. There is an extensive gestation and drafting process before a bill is laid before Parliament. Government has to decide that a measure is necessary. Increasingly, Ministers will consult on proposed measures. This is one of the most positive developments since *Making the Law* was published. When the Rippon Commission examined the issue, there was no systematic process of consultation; the Commission was especially concerned that Government should prepare and publish guidelines to be followed by all Departments (Vol. II, p.17, para.3). Proposals now are regularly put out for consultation and there is an established framework for that consultation.
16. Consultation documents are disseminated widely to interested parties and are accessible through the Internet. The Code of Practice issued by the Cabinet Office stipulates that there should be a consultation period of twelve weeks.<sup>11</sup> The Department for Education and Skills as a standard practice issues customised versions of its consultation documents. The Green Paper, *Every Child Matters*, published in 2003, was issued in two forms, one aimed at adults and the other at children (Vol. II, p.16). Consultation is not necessarily confined to written submissions. The consultation on *Every Child Matters* extended to nine ministerial events around the country and sixty events involving children and young people.
17. When the decision is taken to bring a bill forward, approval has to be achieved from the relevant Cabinet Committee. Even then, this is no guarantee that the measure will find its way into the Government's legislative programme for the session. It will then form one of many considered by the Legislative Programme Committee for inclusion in the programme. Many will not make it. The Committee is chaired by the Leader of the House of Commons. In his evidence to us, the present Leader, Peter Hain<sup>12</sup>, made clear that the Committee took account of the degree of consultation that had taken place. Ministers have to identify if there are controversies surrounding the measure and if they have been addressed by consultation (Q 2).

### Parliamentary Counsel

18. When a bill has been agreed for introduction, the Office of Parliamentary Counsel then draft it on the basis of detailed "instructions" drawn up by the relevant sponsoring Government department. Drafting is a specialised art and it takes seven years to become fully proficient in drafting a bill of moderate size. The number of parliamentary counsel has increased significantly in recent years: from 36 in 1997 to 56 today; shortly there will be 62 (Q 317). (Ten, though, are seconded at any one time to assist the Inland Revenue and the Law Commission.) Two or three normally work on a bill, though the Finance Bill can absorb the time of a large number. (At one point this year as many as twenty were working on the Bill.) The increase in the number of parliamentary counsel has essentially enabled the Office to keep pace with the demands of the growth in the volume of legislation. Sir

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<sup>11</sup> Cabinet Office, *Code of Practice on National Public Consultation*; available at [www.cabinet-office.gov.uk/regulation/Consultation](http://www.cabinet-office.gov.uk/regulation/Consultation).

<sup>12</sup> The Rt Hon Peter Hain MP, Leader of the House of Commons 2003 - .

Geoffrey Bowman, First Parliamentary Counsel, noted that Robin Cook had referred to the Stakhanovite commitment of parliamentary counsel. “‘Stakhanovite’ is a very apt adjective. Life does get like that sometimes. We are constantly breaking records.”(Q 323)

19. The work of the Parliamentary Counsel Office has traditionally been devoted to preparing bills for introduction to Parliament. However, counsel have also in recent years been involved in drawing up draft bills: that is, bills that are intended to be available for comment prior to their formal introduction to Parliament. The publication of bills in draft has been a significant feature of the past decade; indeed, in the view of George Cunningham<sup>13</sup>, a member of the Commons Procedure Committee that recommended in 1978 the creation of the Departmental Select Committees, *the* most significant advance (Vol. II, p.167, para.3).

### Draft bills

20. In the period from 1992 to 1997, the Government published a total of 18 bills in draft. These were not subject to systematic parliamentary scrutiny but rather published for the purpose of external consultation. In 1997, the new Government announced that it planned to publish seven bills in draft in the new session. This was welcomed by the newly-appointed Modernisation Committee in the House of Commons, which advocated a more regular and systematic use of such bills. It recommended that some, or even all, of the draft bills be considered by ad hoc Commons Committees, ad hoc Joint Committees, or Departmental Select Committees.<sup>14</sup>
21. In the seven sessions from 1997-98 to 2003-04 inclusive, a total of 42 bills have been published in draft.<sup>15</sup> Of these, thirteen have not been subject to parliamentary scrutiny. The other twenty-nine have been considered by a parliamentary committee: seventeen by Departmental Select Committees, eight by Joint Committees, two by temporary committees in the Commons or Lords, and two by other existing committees (such as the Joint Committee on Human Rights, which considered the Gender Recognition Bill in 2002-03).<sup>16</sup>
22. In the laconic observation of the Hansard Society, all the indications are that pre-legislative scrutiny “has been an extremely positive development”.<sup>17</sup> The pre-legislative committees have probed the draft bills in some detail. The Joint Committee on the Draft Gambling Bill undertook a number of UK and foreign visits to consider the potential impact of the bill. In its response to the 148 recommendations embodied in the report of the Joint Committee on the Draft Communications Bill, the Government indicated that it had accepted 120 of them. In evidence to us, the Chairmen of the Joint Committees on the Draft Civil Contingencies Bill and Draft Gambling Bill stressed the value of the exercise (Vol. II, pp 111 and 112, and Q371).

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<sup>13</sup> Mr George Cunningham, Member of Parliament 1970-1983.

<sup>14</sup> Modernisation Committee, House of Commons, *The Legislative Process*, Session 1997-98, HC 190, para 91.

<sup>15</sup> Andrew Kennon, ‘Pre-legislative scrutiny of draft bills’, *Public Law*, Autumn 2004, p. 478.

<sup>16</sup> Kennon, *op. cit.*, pp. 482, 493-4.

<sup>17</sup> Hansard Society Briefing Paper, *Issues in Law Making, 5: Pre-Legislative Scrutiny*, London: The Hansard Society, 2004, p. 5.

23. We are especially impressed by the work done on the Draft Civil Contingencies Bill. The Joint Committee consulted us and other committees. The report of the Joint Committee was a substantial one.<sup>18</sup> It had a notable effect on the content of the Bill brought before Parliament. In its response to the Joint Committee's report, the Government acknowledged that "[t]o a large extent, we have accepted in full, or in part, most of the recommendations".<sup>19</sup>
24. The reports of the committees have not only affected the content of the bills brought before Parliament but have also been drawn upon by members in the debates on the bills. This was notably the case with the Communications Bill. The work of the committees is thus not something conducted in isolation of either House, but contributes to Members' understanding of the issues surrounding the bills. This enhances the quality of the scrutiny during the legislative process itself.
25. We very much welcome the pre-legislative scrutiny that has been undertaken. We have already identified the value to Members, enhancing the capacity of Parliament to influence legislation at a formative stage. It is also of value to interested individuals and bodies, as they have an opportunity to contribute to the committees' deliberations. It is of value to Government, since—as the Modernisation Committee noted in 1997—it should lead to better legislation and, potentially, save some time during the later legislative stages of the bills.<sup>20</sup> As Dr Lewis Moonie<sup>21</sup> succinctly put it in his evidence to us: "Scrutiny at this stage can resolve potential points of conflict, remove contradictions or impracticable suggestions, and speed up the passage of legislation through both Houses" (Vol. II, p.111, para.2 (a)). The recognition of the value to Government was also revealed by Peter Riddell, Assistant Editor of *The Times*, in his evidence to us: "I have heard civil servants say, admittedly privately, that the end result of such consultation has been worth the effort involved for them" (Vol. II, p.26, para.3).
26. Not all officials, though, are necessarily positive. As Lord Carter<sup>22</sup> told us, "there are some departments, in fact all departments, that have people within them who do not like draft bills. They think the best thing to do is to produce the bill and then put it through the parliamentary process" (Q 190). Against this, there is another value to Government that is frequently overlooked. Government is often seen as some monolith, with Ministers and officials indistinguishable. In fact, there may be differences between the two, with Ministers in charge of a bill not necessarily being able to achieve what they want. Departmental officials often consider it their task to defend their legislation, as drafted, regardless of the merits of arguments for improvement advanced as it passes through Parliament. Douglas Hogg<sup>23</sup>, a former Minister, told us:

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<sup>18</sup> Joint Committee on the Draft Civil Contingencies Bill, *Draft Civil Contingencies Bill*, Session 2002-03, HL Paper 184, HC 1074. The report occupied 227 pages and the written evidence a further 281 pages.

<sup>19</sup> The Cabinet Office, *The Government's Response to the Report of the Joint Committee on the Draft Civil Contingencies Bill*, Cm 6078, Jan. 2004, p. 3.

<sup>20</sup> Modernisation Committee, House of Commons, *The Legislative Process*, Session 1997-98, HC 190. See also Hansard Society Briefing Paper, *Issues in Law Making, 5: Pre-Legislative Scrutiny*, London: Hansard Society, 2004, p. 3.

<sup>21</sup> Dr Lewis Moonie MP, Chairman of the Joint Committee on the draft Civil Contingencies bill, 2003.

<sup>22</sup> The Rt Hon the Lord Carter, Government Chief Whip in the House of Lords 1997-2002.

<sup>23</sup> The Rt Hon Douglas Hogg MP, member of the "Parliament First" group.

“Now, on the big Bills it is extraordinarily difficult for Ministers to face down officials and therefore the process of pre-legislative scrutiny is vital because actually the Minister, very often a junior Minister..., is wholly dependent on his raft of officials and he is not in a position to argue with them. That is one of the great important consequences of external input because you are able to say, ‘Well, Lord MacGregor, who knows a damn sight more about this than I am afraid you do, sonny, says it’s balls’”(Q 277).

27. Also among the bodies that can benefit from publication of bills in draft are the elected assemblies in the different parts of the United Kingdom. Publication in draft can contribute to the process of devolution. This was an issue that we considered in our report on *Devolution: Inter-Institutional Relations in the United Kingdom*.<sup>24</sup> We recommended in the context of Wales that further thought should be given to how Members of the National Assembly can be afforded the opportunity to consider Westminster legislation that will affect the Assembly and its functions. As we wrote: “The trend toward publishing bills in draft is especially welcome and will, we believe, be especially helpful in this context.”<sup>25</sup> This view was also endorsed by the Welsh Affairs Committee in the House of Commons,<sup>26</sup> and has been commended to us by Lord Elis-Thomas<sup>27</sup>, the Presiding Officer of the National Assembly (Vol. II, p.72, para.15).
28. We not only welcome the use of pre-legislative scrutiny but wish to see it improved and extended. The Modernisation Committee in 2002 stressed that it wished to see publication in draft become the norm.<sup>28</sup> The Deputy Leader of the House, Phil Woolas, has stated that “a bill should be published in draft form unless there are good reasons for not doing so”<sup>29</sup> and has made clear that “it is the Government’s intention and policy to increase the amount of legislation that is subject to pre-legislative scrutiny”.<sup>30</sup>

### Exceptions to publication in draft

29. We recognise that there are occasions when it will not be feasible to publish a bill in draft. Finance Bills constitute a clear example. There will not be time to utilise the procedure for emergency measures, for obvious reasons. A new Government in its first session will not be able to publish all its bills in draft, since it will want to introduce and enact some of its flagship measures within that session. There is also a problem of rushing to get measures through at the end of a Parliament (Vol. II, p.35, para.3). Small bills, on which there is wide agreement—the sort that pass their stages on the floor of the House without much if any debate—also may not lend themselves to pre-legislative scrutiny, though that does not necessarily preclude their publication in draft.
30. We are aware that measures of high political contention have not been published in draft and subject to pre-legislative scrutiny. We do not, however, necessarily regard this as a category for exclusion. As Dr Meg

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<sup>24</sup> Devolution: Inter-institutional Relations in the United Kingdom, Session 2002-03, HL Paper 28.

<sup>25</sup> Ibid, para. 124 (d).

<sup>26</sup> The Primary Legislative Process as it affects Wales, Session 2002-03, HC 79, paras. 17, 38.

<sup>27</sup> The Rt Hon the Lord Elis-Thomas, Presiding Officer of the National Assembly for Wales.

<sup>28</sup> Modernisation Committee, House of Commons, *Modernisation of the House of Commons. A Reform Programme*, Session 2001-02, HC 1168-I.

<sup>29</sup> House of Commons, Official Report, Vol. 418, Col. 19WH [24 Feb. 2004].

<sup>30</sup> House of Commons, Official Report, Vol. XXX, col. 134W [4 Feb. 2003], col. 24WH [6 Jan. 2004].

Russell<sup>31</sup> told us, such bills “are arguably the bills that most need proper scrutiny” (Vol. II, p.35, para.4). However committed a Government may be to a measure—and however opposed other political parties may be—that does not necessarily mean that the technical elements of its provisions cannot be improved through early debate and objective scrutiny. As the Constitutional Affairs Committee in the Commons has noted, the use of draft bills “should not be confined to matters of technical complexity”.<sup>32</sup> It took the view that the Constitutional Reform Bill was an appropriate candidate for publication in draft.

31. We thus recognise that there are bills that will not be suitable for publication in draft, but we do not believe that this category is a large one and certainly not as large as some may believe it to be. We believe that the occasions when bills are not published in draft should be the exception rather than the rule. At the moment, despite the welcome increase in the number of bills published in draft, it is the other way round.
32. We also note that allowing bills to be carried over from one session to another—something to which we return in paragraph 157—facilitates more bills being subject to pre-legislative scrutiny before being introduced to Parliament. This linkage has been enshrined in the decision of the House of Lords concerning carry-over. The House has resolved that, if required, carry-over should normally apply only to bills that have been subject to pre-legislative scrutiny. With carry-over, there are not the same time constraints as exist with the sessional cut-off.

### Rolling legislative programmes

33. The carry-over provision would also enable Government to engage in a rolling legislative programme. A programme of legislative measures could be announced at the start of the session—the Queen’s Speech would remain as now—but with measures introduced at different points during the year, thus moving away from what Robin Cook has aptly titled the “tidal wave” principle of legislation.<sup>33</sup> Planning ahead would also enable bills to be published in draft, and for pre-legislative scrutiny, thus enabling the Government to achieve what Margaret Beckett<sup>34</sup> envisaged as “a portfolio of legislation which had already had any major wrinkles ironed out” (Vol. II, p.159).
34. Acknowledging that this entails an important shift of emphasis, **we recommend that the Government should move from deciding which bills should be published in draft each session to deciding which bills should *not* be published in draft. Where the decision is taken not to publish a bill in draft, then the reasons should appear in the Explanatory Notes to the bill.**
35. **We also recommend that there should be a rolling legislative programme, with Departments gaining slots in specified future sessions subject to the bills having first been published in draft. The**

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<sup>31</sup> Dr Meg Russell, Research Fellow, The Constitution Unit, UCL.

<sup>32</sup> Constitutional Affairs Committee, House of Commons, *Judicial appointments and a Supreme Court (court of final appeal)*, 1<sup>st</sup> Report, Session 2003-04, HC 48-I, para. 188.

<sup>33</sup> Cook, *The Point of Departure*, p. 11.

<sup>34</sup> The Rt Hon Margaret Beckett MP, Secretary of State for Environment, Food and Rural Affairs; Leader of the House of Commons 1998-2001.



**presumption should be that no bill should be allocated a slot without being published in draft unless a compelling case has been made to the contrary.**

### **The decision-making process**

36. Publication in draft is a necessary but not sufficient condition for pre-legislative scrutiny. There is then the issue of determining whether a bill should be subject to such scrutiny and, if it is, of ensuring that the committee has the means available—in terms of time, information and resources—to undertake sustained scrutiny of the measure. Who should decide whether there should be pre-legislative scrutiny we treat as an important issue of principle. The issue of which committee should consider a bill we treat essentially as a practical matter.
37. The decision as to whether or not a bill is to be subject to pre-legislative scrutiny is presently a matter for Government and the usual channels. In announcing its bills for the 2003-04 session, the Government sent a letter to the Liaison Committee in the House of Commons—following a request for more information from the Committee—setting out its preferences for which committee should examine each bill.<sup>35</sup> This represented a step forward in terms of the Government making clear its plans, which we welcome.
38. We would like to see this constructive approach developed further, with greater involvement for those bodies representing Parliament. Though consultation with opposition parties is important and necessary, it should not be to the exclusion of consideration of the wishes of each House (including those members who sit on the Government benches) or of its committees. Some committees have been denied the opportunity to engage in pre-legislative scrutiny, despite an express wish to do so.<sup>36</sup>
39. The House of Commons already has a Committee, the Liaison Committee, which is well placed to discuss with Government which bills merit pre-legislative scrutiny. By the very nature of the Committee, comprising the chairmen of Select Committees, a Select Committee wishing to examine a draft bill will be able to make its preferences known. We believe that there needs also to be some consultation between the two Houses on the issue, to ensure that the views of the House of Lords are known. The Lords' Liaison Committee could take the lead in arranging such discussions.
40. Dr Meg Russell suggested to us that a small Joint Liaison Committee “could seek to look rationally at the forthcoming programme of draft legislation and negotiate with Government about which bills should be considered in the Commons, which in the Lords, and which jointly, and using what committee(s).” As she adds, “It could help assert Parliament’s role in the process. Without any such arrangements Parliament remains too much at the mercy of Government” (Vol. IOI, p.36, para.6). We attach considerable importance to these views and concur with them.
41. **We recommend that the decision as to which draft bills should be subject to pre-legislative scrutiny should be negotiated between the Government and the Liaison Committee of the House of Commons. We also recommend the creation of a Joint Liaison Committee of the**

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<sup>35</sup> Annual Report for 2003, First Report from the Liaison Committee, Session 2003-04, HC 446, para. 18.

<sup>36</sup> Ibid, para. 26.

**two Houses so that the opinion of the House of Lords can be taken into account.**

### Responsibility for scrutiny

42. In terms of determining which committee a bill should be referred to, we have heard differing views. The advantage of referring a bill to a Departmental Select Committee in the Commons is that the committee constitutes a specialised body—covering the Department sponsoring the bill—and one that already exists. We have already seen that the usual but not invariable practice is for bills to be considered by these committees. The Liaison Committee of the Commons has called on the Government to adopt the working assumption that the committees “are usually the most appropriate means by which draft bills can be scrutinised”.<sup>37</sup>
43. However, there can be limitations to referring a draft bill to such a committee. Some Select Committees may already be fully stretched; accommodating scrutiny of a draft bill may be neither welcome nor feasible. Enlarging the size of Select Committees, so as to create sub-committees to engage in pre-legislative scrutiny, has been suggested; however, as Robin Cook reminded us, when he was Leader of the House “my proposal for larger Select Committees did not commend itself universally to the House” (Q 123). In addition, a Select Committee may not be best suited to dealing with bills that cut across several sectors of public policy.
44. Various witnesses have stressed the value of Joint Committees.<sup>38</sup> A Joint Committee is especially useful where there is a large, complex and cross-cutting bill, and one that relates to a subject on which Members of the House of Lords may have particular expertise. It may also serve, as Mark Fisher<sup>39</sup> told us, to encourage both Houses to see their role of scrutiny and monitoring is common “and that we are one Parliament” (Q 306). The value of Joint Committees is shown in the work that they have already done.
45. There are, though, practical problems. Referring a bill to a Joint Committee involves achieving the approval of both Houses, and approaching Members from the two Houses to serve.<sup>40</sup> This takes time and in dealing with draft bills time is often of the essence. There is also a problem for Government in that it will not enjoy an automatic majority on a Joint Committee. There is a problem for opposition parties in the Commons in that, if it is a small committee, it may result in only one or two MPs from opposition parties being appointed to it.
46. We have also had put before us innovative proposals for a new committee structure. Both George Cunningham and Dr Meg Russell have raised the prospect of legislative Select Committees to parallel Departmental Select Committees, with some overlapping membership (Vol. II, p.168, para.4; Vol. II, p.36, para.10). This, as Dr Russell notes, is a practice adopted in the Australian Senate. As she concedes, an alternative would be to establish

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<sup>37</sup> Ibid, para. 29.

<sup>38</sup> See Dr Lewis Moonie MP, Vol. II, p.111, para.3, and Q384; John Greenway MP, Q384; Lord Roper, Vol. II, pp.182-185; The Rt Hon. Douglas Hogg MP, Q306.

<sup>39</sup> Mark Fisher MP, Chairman of the “Parliament First” group.

<sup>40</sup> According to Sir Michael Wheeler-Booth and Professor Vernon Bogdanor, negotiation of joint procedures could also create problems (Vol. II, p.186, para 4), but this is not the case today, where the practice is for procedure to follow the Chair.

legislative sub-committees of Departmental Select Committees. The principal difficulty with such a proposal would be one of resources; attracting a sufficient number of Members to serve on a parallel set of committees may prove impossible. (We note the problems of getting members to serve when the European Standing Committees in the Commons were established to consider European documents).<sup>41</sup> We have drawn attention already (paragraph 43) to the less than enthusiastic response to Robin Cook's proposal to enlarge the size of the Departmental Select Committees.

47. We do not believe that any hard and fast rules should apply. We take the view that the arrangements utilised so far have, on the whole, proved effective. The only practice that does not appear to have worked well is having a bill considered by separate committees in the two Houses. The Freedom of Information Bill was considered by the Public Administration Committee in the Commons and a temporary committee in the Lords, entailing a duplication of effort and carried the risk of committees coming to different conclusions. That apart, there may be a case for the use of different committees, depending upon the subject matter, complexity, and range of the draft bill. We therefore incline to the view that existing practice should be followed, though over time we would envisage a growing use of Joint Committees.
48. **We recommend that a draft bill should normally be considered by a Departmental Select Committee. If a Departmental Select Committee declines to consider a bill, the Liaison Committee of the Commons should consider appointing a temporary committee. For big and complex bills (as with the Financial Services and Markets Bill and the Communications Bill), and where there is particular expertise in the House of Lords, a Joint Committee should be considered. Where a bill cuts across several sectors, then a (sub)committee drawn from two or more Commons Select Committees, or a Joint Committee, may be appropriate.**

### Methodology of scrutiny

49. In practical terms, we envisage that the use of Joint Committees will expand as bills become more complex and the number of bills subject to pre-legislative scrutiny increases. The more pre-legislative scrutiny becomes the norm—as we wish it to—the greater the burden on Departmental Select Committees, some of which will be under tremendous pressure if presented with all the draft legislation from the Departments they cover. This, we think, enhances the need for developing contact between the two Houses so that Joint Committees can be agreed and established with some expedition.
50. Consideration of draft bills is not necessarily confined to the committees appointed to consider them. We note that both the Delegated Powers and Regulatory Reform Committee and the Joint Committee on Human Rights have also taken an interest in some draft bills<sup>42</sup> and this is something that we very much commend. The Delegated Powers Committee, for example, examined the Draft Gambling Bill, and its recommendations were

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<sup>41</sup> The Procedure Committee of the Commons recommended five such committees; the Government agreed to three, but at the time could only recruit enough MPs to serve on two. (The number has since been increased to three).

<sup>42</sup> See Kennon, *op. cit.*, pp. 486-7.

commended by the Joint Committee on the Bill.<sup>43</sup> Ensuring that the expertise of these specialised committees is brought to bear at this stage can save the time of the House once a bill is brought forward.

51. Indeed, this consideration leads to a further important and fundamental point concerning the nature of the scrutiny that is undertaken at this stage. It is up to the committee considering a draft bill as to how it goes about its task. Practice has varied among committees as to whether they focus on the policy behind the legislation or on the specific provisions. The Joint Committee on the Draft Gambling Bill noted the different approaches taken by a number of committees;<sup>44</sup> the Committee itself looked at both the policy and the draft clauses. The value of this was drawn out in evidence to us from the Special Adviser to the Joint Committee.<sup>45</sup>
52. The variation in approach means that some aspects of a draft bill will, by definition, be considered by one committee but not by another. The case for greater consistency in approach has been put to us by Professor John McEldowney<sup>46</sup>. He cites the work of, among others, Professor David Feldman—former Legal Adviser to the Joint Committee on Human Rights—in arguing for Parliament assessing and setting standards for legislation.<sup>47</sup> As Professor McEldowney notes, “Standard setting provides a focus beyond procedural scrutiny of legislation. This elevates Parliament’s role beyond adversarial exchanges and party political considerations” (Vol. II, pp.174-179).
53. Professor McEldowney notes that what he terms standard-setting techniques are widely used in most private and public sector activities. Therefore, as he says, the use of such techniques for the parliamentary scrutiny of bills should not be perceived as unusual.
54. We see a case for pursuing a similar approach in pre-legislative scrutiny. In our report on the regulatory state, we drew attention to the value of the regulatory checklist utilised by the OECD and recommended that it be utilised as standard for legislation, regulatory decision-making and in establishing any new regulator.<sup>48</sup> We believe that a checklist to ensure that draft bills meet certain standards would contribute significantly to the process of pre-legislative scrutiny. Some element of this standard setting already takes place through the committees we have mentioned. The Joint Committee on Human Rights, for example, checks for compliance with the European Convention on Human Rights. Professor McEldowney’s argument is that such evaluation could be extended to cover other standards. In his model, the checklist would encompass compatibility with the ECHR, compatibility with EU law, value for money, risk assessment, as well as clarity in aims and objectives.

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<sup>43</sup> Joint Committee on the Draft Gambling Bill, 1<sup>st</sup> Report, Session 2003-04, HL Paper 63-I, HC 139-I, paras 44-47.

<sup>44</sup> Joint Committee on the Draft Gambling Bill, 1<sup>st</sup> Report, Session 2003-04, HL Paper 63-I, HC 139-I, paras. 22-26.

<sup>45</sup> Professor David Miers, Vol. II, pp.180-182, section 2.

<sup>46</sup> Professor John McEldowney, Department of Law, University of Warwick.

<sup>47</sup> D. Feldman, ‘Parliamentary scrutiny of legislation and human rights’, *Public Law*, 2002, p. 323. See also D. Oliver, *Constitutional Reform in the UK*, Oxford: Oxford University Press, 2003, pp. 176-7.

<sup>48</sup> The Regulatory State: Ensuring its Accountability, Session 2003-04, HL Paper 68-I, paras. 141-2.

55. Introducing a checklist of this sort would deliver consistency, thus enabling Parliament to avoid neglecting important aspects of evaluation. It would be able to draw on the work of existing committees as well as the National Audit Office. It would also provide Parliament with a framework for evaluation throughout the legislative process by employing standards for pre-legislative scrutiny as well as at subsequent stages. It would also, as Professor McEldowney stresses, introduce what in effect is a more objective element into the process of evaluation.
56. The use of a checklist also has the advantage that it is likely to improve the quality of draft bills, since it would inject a greater discipline on officials. The value of this was revealed by the Chairman of the Joint Committee on Human Rights (JCHR), the Rt Hon Jean Corston MP. She believed that the JCHR had affected outcomes, directly and indirectly. "Here, it is the *threat* of parliamentary scrutiny, and an adverse opinion from us, that is the key factor. This threat, I believe, is much enhanced by the comprehensiveness of our coverage" (Vol. II, pp. 164-167). A clear checklist would deliver comprehensiveness in a range of areas. Officials would be aware of what a committee would be examining.
57. **We recommend the employment of a clear and transparent checklist by committees engaged in pre-legislative scrutiny, as well as by committees at other stages of the legislative process. The Joint Liaison Committee that we have recommended would appear well suited to draw up the checklist.**

### Time constraints

58. For pre-legislative scrutiny to be effective, committees need information, time and resources. Information and time remain problematic. The issue of resources has been addressed through the appointment of new staff, in particular the creation of the Scrutiny Unit in the House of Commons in November 2002.<sup>49</sup> This comprises a staff of eighteen, including lawyers, accountants, economists and a statistician and exists to assist permanent or temporary committees in the analysis of draft bills and also to examine departmental estimates. As such, it complements the existing library and staff resources available to each committee. We would envisage the Unit expanding in size as the volume of pre-legislative scrutiny expands.
59. There remains a problem with obtaining information, in particular with the content of the actual draft bill. Sometimes what is placed before a committee is a mix of draft clauses and statements of intent. Material is sometimes published in instalments. This applied in the case of the Draft Financial Services and Markets, Communications, and Gambling Bills.<sup>50</sup> These were all substantial bills.
60. The difficulties that this mixing creates were highlighted in the report of the Joint Committee on the Draft Gambling Bill and in evidence to us by the Chairman of the Committee, John Greenway MP. Fifty clauses of the draft bill were published in July 2003, shortly before the Joint Committee was established. Further clauses, plus nine schedules, were published in

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<sup>49</sup> See *Annual Report for 2003*, First Report from the Liaison Committee, Session 2003-04, HC 446, paras. 75-81.

<sup>50</sup> Kennon, *op. cit.*, p. 488.

November 2003 and additional clauses—bringing the total to 268 clauses—in February 2004. Another three clauses were published the following month. When the Committee agreed its report, clauses covering important aspects of the bill had not been issued. As the Committee reported: “our work has been hampered by the lack of key clauses until late in our lifetime, and there are some areas in which we have not been able to conduct any scrutiny whatsoever. Many of those who submitted written and oral evidence to us noted that this was unsatisfactory.”<sup>51</sup>

61. We share the view of the Committee that this situation is clearly unsatisfactory and undermines the capacity of Parliament to undertake pre-legislative scrutiny. It is especially problematic if the case for benchmarking is accepted. The Committee attributed the problem to the relatively low priority given to draft bills by parliamentary counsel.<sup>52</sup> However, Sir Geoffrey Bowman informed us that parliamentary counsel “deal with draft Bills essentially in the same way as we deal with Bills which are intended for introduction without prior publication in draft”. They work closely with the business managers in deciding the priority particular work is to be given. “The fact that a Bill is or is not to be published in draft is generally irrelevant” (Q 349).
62. Given that there appears to be no problem with the level of priority attached by parliamentary counsel to draft bills, and given our earlier points about carry-over, we see no reason why draft bills should not be available as complete drafts in time for scrutiny by parliamentary committees. If Government is committed to the desirability and utility of pre-legislative scrutiny, then we believe it should commit itself to ensuring that draft bills are available in complete form for pre-legislative scrutiny.
63. **We endorse the recommendation of the Joint Committee on the Draft Gambling Bill that the Government should ensure that the full text of draft Bills is available to pre-legislative scrutiny committees in good time before they are asked to report.**
64. Time is, clearly, a related problem. Some pre-legislative committees have had to work to an extraordinarily tight deadline. The Joint Committee on the Draft Communications Bill, for example, had relatively little time to address what was a substantial bill. It is a testament to the commitment and hard work of the members of the Joint Committee, and of the officials servicing it, that it was able to report when it did.
65. Sometimes, committees may not even have the twelve weeks normally allocated to a consultation process. The Joint Committee on the Draft Communications Bill effectively carried out its work in the period from May to July 2003. The Joint Committees on the Draft Civil Contingencies Bill and the Draft Mental Incapacity Bills were appointed on 11 July 2003 and asked to report by November, a period including the summer holiday period. On the former, the Defence Committee in the Commons reported that it was not persuaded “that a draft bill could not have been produced soon enough to have provided for a consultation period which met the spirit of the

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<sup>51</sup> Joint Committee on the Draft Gambling Bill, 1<sup>st</sup> Report, Session 2003-04, HL Paper 63-I, HC 139-I, para 17. See also, for example, *Report of the Joint Committee on the Draft Disability Discrimination Bill, Session 2003-04*, HL Paper 82-I/HC Paper 352-I, para 18

<sup>52</sup> Joint Committee on the Draft Gambling Bill, 1<sup>st</sup> Report, Session 2003-04, HL Paper 63-I, HC 139-I, para 17.

Government's Code of Practice on Consultation and allowed a fair and adequate time for interested parties to express their views".<sup>53</sup> The Government responded by pointing out the degree of consultation that had preceded the introduction of the draft bill.<sup>54</sup> On the Draft Mental Incapacity Bill, Lord Carter told us that the deadline "was quite unreasonable" (Vol. II, p.52).

66. One particular problem is apparent from the examples we have cited: that is, the tendency for bills to be published in draft towards the end of the session. Given that the bills are intended for introduction in the next session, this leaves little time for pre-legislative scrutiny. Hence the haste that we have identified.
67. Unless there is sufficient time for consideration, then much of the benefit is lost. As Jean Corston MP put it to us:
- "Draft bills seem to me to be an entirely positive contribution to making the legislative process more rational, but these too will only be fully effective where there is a sufficient gap between the draft bill and the bill itself to allow parliamentary and other contributions to be fully taken into account" (Vol. II, pp. 164-167).
68. We concur with this view. The haste with which draft bills are considered strikes us as unjustified and reflects an incapacity or unwillingness to grasp the implications of the provision for the carry-over of bills. We have already mentioned that, in the House of Lords, bills that have been subject to pre-legislative scrutiny can be carried over. Carry-over is also possible and has been utilised in the Commons, notably in this context for the Financial Services and Markets Bill. There is thus no reason for the tight deadlines given to some of the committees engaged in pre-legislative scrutiny.
69. **The Joint Committee on the Draft Communications Bill recommended that Joint Committees be set up at least two sitting weeks before a draft bill is published and not be required to report until at least one month after the end of the consultation period.<sup>55</sup> We see no reason why such a schedule cannot be adhered to and would regard it, as the Joint Committee appears to ("at least one month"), as an absolute minimum. We endorse the recommendation of the Joint Committee and add that, in the absence of a formal consultation exercise on the part of the Government, the minimum should be 4 months from publication of draft bills.**

### Outcome of consultation process

70. This recommendation also facilitates a link between consultation and pre-legislative scrutiny. Public consultation does not necessarily result in changes to a bill. We believe that it is essential for a committee considering a draft bill to see the findings of any consultation exercise and the government's response to them. The Joint Committee on the Draft Civil Contingencies Bill

<sup>53</sup> Defence Committee, House of Commons, *Draft Civil Contingencies Bill*, Session 2002-03, 7<sup>th</sup> Report, HC 557, para. 11.

<sup>54</sup> The Cabinet Office, *The Government's Response to the Report of the Joint Committee on the Draft Civil Contingencies Bill*, Cm 6078, Jan. 2004, p. 25.

<sup>55</sup> Joint Committee on the Draft Communications Bill, Report, Session 2001-02, HL Paper 169, HC 876, paras. 393, 397.

had the benefit of seeing amendments suggested by respondents to the government's consultation exercise. These were summarised in Appendix 11 of the committee's report. We believe that this should be common practice. It will be helpful to the committee and is also likely to enhance public confidence in the consultation process through enhancing its transparency.

71. **We recommend that a committee considering a draft bill should be supplied with the findings of a consultation exercise and that the Government's response to those findings should be made available to it.**

### Conclusions

72. We thus believe that publication of bills in draft should be the norm and that those bills should normally be subject to pre-legislative scrutiny. All the evidence we have received on the subject acknowledges the value of such scrutiny. Although there still appears to be a departmental ethos that militates against the publication of bills in draft, the benefit of the process has been acknowledged to us by Government, Opposition, private members and commentators. *The Guardian*, for example, editorialised about the value of the scrutiny accorded the Draft Gambling Bill: "This is good for Parliament, good for law-making and good for politics".<sup>56</sup> We wish to build on what has already been achieved.
73. We believe that both Government and Parliament should move forward in expanding pre-legislative scrutiny and benchmarking of legislation. We note that Government still largely has ownership of the decisions about publication of bills in draft and sending bills for pre-legislative scrutiny. We want to see Parliament more involved in the process. We also believe that it needs to have recourse to powers which will cover such occasions when bills that members believe should be subject to pre-legislative scrutiny have not been selected for such scrutiny. We believe that bills not subject to pre-legislative scrutiny should be subject to a particular process of detailed examination when they are brought before Parliament.
74. We end with the basic principle that we believe should underpin the legislative process. **We recommend that each bill should at some stage be subject to detailed examination by a parliamentary committee of one or other or both Houses, empowered to take evidence.** The reasons for this we have adumbrated already. The most appropriate way of achieving this is through publication in draft and pre-legislative scrutiny. Failing that, the detailed scrutiny needs to take place once a bill is before Parliament.

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<sup>56</sup> The Guardian, 8 April 2004.



## CHAPTER 4: THE LEGISLATIVE PROCESS

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75. We address the stage at which Parliament considers bills in two parts. The first covers the way in which the bills are brought before Parliament and the material that accompanies them. The second covers the procedures which the two Houses adopt to examine bills. Though there have been some advances under both headings, many regard legislative scrutiny as the most deficient part of the way in which Parliament does its job.

### Part 1: Presenting Bills to Parliament

76. For Parliament to examine bills effectively, it needs to understand them. That encompasses the purpose of the bill and the provisions designed to achieve that purpose. For many years, the way in which bills were brought before Parliament was not conducive to aiding understanding. Bills were often drafted in fairly obscure language with no accompanying material to explain the provisions and no clear explanation of the effect of provisions that substituted words for those in earlier Acts. Members were dependent on the Minister's speech on Second Reading and explanations offered in response to probing amendments.
77. Recent years have seen some notable and very welcome changes. One has been in the drafting of legislation. There has been far greater emphasis on the accessibility of language, while ensuring that the language is such as to be amenable to judicial interpretation. We recognise the balance to be drawn between, as Baroness Amos<sup>57</sup> put it, legal accuracy and user-friendly language (Q 21). We commend the efforts of parliamentary counsel in rendering bills in more accessible language.

### Explanatory Notes

78. We also welcome the publication of Explanatory Notes to accompany bills. Introduced in the 1998-99 session, Explanatory Notes have enabled members to have a much clearer understanding of a bill and its specific provisions. Though the quality and provision of information vary, the Explanatory Notes represent a significant aid to understanding legislation. The incorporation of Regulatory Impact Assessments (RIAs) is also something that we very much commend. We have drawn attention in our report on the regulatory state to the importance of RIAs in all new policy initiatives emanating from regulators.<sup>58</sup> We recognise and have emphasised their value. Their use for bills represents best practice. We were pleased to note the importance attached to RIAs by the Legislative Programme Committee in preparing the legislative programme for each session (Q 3).
79. We also welcome the fact that the Explanatory Notes also now include a section detailing the effects on Wales. This was something we recommended in our report on *Devolution: Inter-Institutional Relations in the United Kingdom*.<sup>59</sup> The Welsh Affairs Committee in the House of Commons has also

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<sup>57</sup> The Rt Hon Baroness Amos, Leader of the House of Lords

<sup>58</sup> *The Regulatory State: Ensuring its Accountability*, Vol. 1: Report, Session 2003-04, HL Paper 68-I, paragraphs 145-46.

<sup>59</sup> *Devolution: Inter-institutional Relations in the United Kingdom*, Session 2002-03, HL Paper 28, para. 124 (b).

welcomed this development,<sup>60</sup> as has Lord Elis-Thomas, the Presiding Officer of the National Assembly for Wales (Vol. II, p.171, para. 8).

80. Beside these significant advances we would like to see other changes that we believe will provide Members of both Houses with more tools for understanding and assessing bills placed before them. These include the provision of additional material in the Explanatory Notes. We also believe that there is a case for ensuring consistency in the presentation of the Notes.
81. **We recommend that guidance given by the Cabinet Office on the preparation of Explanatory Notes should be closely adhered to and that the Cabinet Office should monitor compliance with the guidance.**

### The purpose of legislation

82. We have considered whether bills should incorporate a purpose clause<sup>61</sup>. These are incorporated in bills in some countries, such as New Zealand. A purpose clause would have the advantage of making clear what the bill was intended to achieve. As such, it would be an aid to parliamentarians in assessing the provisions of the bill; it would also be an aid to post-legislative scrutiny, a matter to which we return in Chapter 5.
83. However, we are conscious of the limitations. Both the Renton report in 1975 and the Rippon Commission in 1992 took a cautious view; the former said they should be employed selectively and with caution; the latter that they should not be used as a general practice (Q 338). Sir Geoffrey Bowman also adopted a cautious approach and identified several problems with them:
- “In the first case, it is sometimes not easy to express a purpose in a few words. They can degenerate into pious incantations. I am quoting now the late Professor Reed-Dickinson and he gave the example of an ecology Bill that in substance said, ‘Hurrah for nature’. They are vacuous. Another great difficulty is that problems arise if the general purpose provisions conflict with the specific provisions and the legislation. The risk arises because you are trying to say the same thing in different words. The third problem is that even if there is no overt conflict the relationship between the specific provisions and the general purpose provisions may not be clear” (Q 338).
84. We recognise these serious limitations. We are wary of making what would amount to a major change in the interpretation of law, since—if a purpose clause was left in the measure—it would invite the courts to engage in purposive rather than literal construction. Alan Beith<sup>62</sup> said that he was “not sure that I would relish the courts being full of cases that surrounded whether Clause 17 really did fulfil the purposes of the Bill” (Q 163). There is, in any event, as Sir Geoffrey Bowman reminded us, a strong case against putting additional material in bills: “It is said that parliamentary counsel some years ago came up with the aphorism ‘Excess matter in Bills, as in people, tends to go septic’. I think there is an awful lot in that” (Q 338).

<sup>60</sup> The Primary Legislative Process as it affects Wales, Session 2002-03, HC 79, para. 29.

<sup>61</sup> When we refer to ‘the purpose of a bill’, we refer to the main aims of a substantive kind that a bill seeks to achieve by making changes in the law. Since most bills are intended to make a group of related changes in the law, the purpose of a bill may in fact comprise a number of purposes that differ in importance and in the degree of detail that they represent.

<sup>62</sup> The Rt Hon Alan Beith, MP, Chairman of the House of Commons Select Committee on Constitutional Affairs.

85. Given these powerful points, we concur with the view that a purpose clause should not form part of a bill. We also recognise that there is what amounts to a succinct purpose clause in the long title of a bill.<sup>63</sup> However, the long title is not necessarily a clear adumbration of the purpose of a bill: “and for connected purposes” at the end of a long title is hardly enlightening as to purpose. We believe more could and should be done to delineate the purpose of a bill. The bill itself is not the place to include this delineation. We agree that it should not have legal force. Instead, we consider that the obvious place to include what would be the equivalent of a purpose clause is the Explanatory Notes.
86. Including a developed statement of purpose will, we believe, be a valuable discipline for departments in preparing measures. This is something that is already provided for in the Cabinet Office guidelines; paragraph 27 provides for the purpose of legislation to be included in the opening summary and background. We wish to see this applied consistently. The statement should be in the introductory passages of the Notes, not buried at the back. We also believe that it will concentrate minds if the statement is accompanied by a clear set of criteria by which the measure, once enacted, can be judged to have met its purpose. Such criteria will be helpful to the House in evaluating the provisions of a bill. They can also form the basis of post-legislative evaluation, providing the criteria against which the effects can be judged. The value of such an exercise was touched upon by Baroness Amos in her evidence to us: “what we need to do more of, I think, is to then find time to look back perhaps over certain pieces of legislation, the memoranda that accompanied them, as against the guide to see whether there is any learning that we could take on board over a period of time” (Q 22).
87. **We recommend that the Explanatory Notes to each bill include, in their introductory section, a clear and developed explanation of the purpose of the bill, incorporating or accompanied by the criteria by which the bill, once enacted, can be judged to have met its purpose.**

### Keeling schedules

88. As an aid to understanding the effects of a measure, we have also considered the use of a Keeling Schedule. This is used on occasion for a bill that significantly amends an earlier Act. It comprises a schedule which reproduces the provisions of the earlier measure and shows the effect of the amendments embodied in the bill. The value of this was stressed, by among others, Lord Carter; he noted that an unofficial Keeling Schedule was prepared for the Draft Disability Discrimination Bill and that it had proved enormously helpful (Vol. II, pp. 52-53; and Q 209).
89. The value of Keeling Schedules was also recognised by the Leader of the Commons, Peter Hain: “I can see a self-evident case for them because they read across to other legislation” (Q 22). He agreed with the assertion that a Keeling Schedule was an invaluable tool which was under-used at present (Q 24).
90. However, both Mr Hain and Sir Geoffrey Bowman drew attention to the practical problems generated by Keeling Schedules. They are time consuming and expensive:

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<sup>63</sup> As Sir Geoffrey Bowman reminded us, New Zealand has abolished long and short titles; Q 339.

- “In resource terms and time terms you will appreciate it is very, very considerable on the House authorities and therefore on the parliamentary budget” (Q 22);
  - “They have to reflect every amendment that the Bill makes to the Act. If the Bill is amended in Parliament to add, delete or alter an amendment to the underlying Act, the change has to be reflected in the Keeling Schedule. That adds to the many tasks that the drafter has to perform. Because the drafter will usually be short of time anyway, the scope for error is increased... A Keeling Schedule adds to the length of a Bill, sometimes considerably” (Q 357);
  - “I have even heard of cases where the Keeling Schedule could not be brought into force because it was inaccurate” (Q 359).
91. Sir Geoffrey Bowman also reminded us that it is a temporary but very important utility (Q 357): “the Keeling Schedule utility dies the moment the Bill is enacted” (Q 360). We recognise that. The value is to members when the bill is being considered. When it is being considered then it is, in Sir Geoffrey’s words, “a very important utility”.
  92. We believe that it is a utility that has the potential to improve significantly Parliament’s scrutiny of legislation. It is extraordinarily difficult at times to appreciate the effect of a bill on an earlier Act without seeing the Act and how it is amended by the bill. The Explanatory Notes provide some help but they are no substitute for looking at the original measure and seeing how precisely the bill changes it. We recognise the cost element and this has to be taken into account, but by itself cost cannot be taken as an insurmountable barrier to enhancing Parliament’s capacity to engage in effective scrutiny of legislation. We believe that, in principle, members of both Houses should have the opportunity to see exactly how a bill amends an earlier Act.
  93. To achieve this, Sir Geoffrey Bowman suggested various options. One is to incorporate a Keeling Schedule, all the problems already identified notwithstanding. Another is to incorporate the amended Act in the Explanatory Notes. The third option is for the instructing Department to produce the amended Act in an informal document (Q 357). The advantage of the last two options is that they do not form part of the bill and therefore have no legal force. An error would not generate the legal problems that can arise from an error in a Keeling Schedule.
  94. The use of informal Keeling-type Schedules, either as part of the Explanatory Notes or in a document produced by the sponsoring department, would still obviously incur a cost. As Sir Geoffrey Bowman reminded us, the advantage of an informal document produced by a department is that the cost would fall on the department’s budget rather than Parliament’s. Sir Geoffrey summarised his preferences as: “Of the three alternatives, I prefer the informal departmental document, then the Explanatory Notes and then the Keeling Schedules” (Q 357).
  95. Our preference is for the amended Act, or the relevant parts of the amended Act, to appear as part of the Explanatory Notes. Paragraph 31 of the Cabinet Office guidance already suggests that “where a Bill amends existing legislation, it can sometimes be helpful to attach extracts of the legislation as they will read after the changes made by the Bill”. There have been at least four occasions when Explanatory Notes have included Keeling-type material: the Rating Valuation Act 1999, the Water Act 1999, the Electronic

Communications Act 2000, and the Sexual Offences (Amendment) Act 2000 (Vol. II, p.109). These, we believe, constitute useful precedents. In each case, the relevant sections of the original Act (or Acts) were reproduced, showing (through the use of bold text, highlighting, or the crossing out of words) the effect of the amendments. None took up a great deal of space in the Notes, nor do we believe preparing them could have incurred significant cost.

96. We would like to see the use of such material extended as a matter of practice, with the Cabinet Office guidance being mandatory rather than permissive. Utilising informal Keeling-type Schedules ensures that Members can see the effect on the original Act at the same time as reading the explanation of what the bill seeks to achieve and how its provisions are designed to achieve its purpose. We thus envisage a substantial development in terms of the Explanatory Notes, including a purpose statement as well as, where the bill amends an earlier Act, an informal Keeling-type Schedule.
97. We recognise that incorporation in the Explanatory Notes will result in a larger document, and that there is a cost to this. However, the extension in size need not necessarily be substantial. The Explanatory Notes to the measures to which we have already referred, embodying Keeling-like material, were not especially large. Given that the informal Keeling-type material will have been drawn up by the sponsoring Department, the burden on the budget of the House authorities—essentially a production cost—should not therefore be excessive. The costs, both financial and in terms of labour intensity, of preparing an informal Keeling-type Schedule should, in any event, be reduced over time by advances in technology, enabling the changes to be tracked electronically rather than manually. This should be especially useful as a bill passes through Parliament, enabling changes to be made as a result of amendments to the bill. The task will be much simplified with the completion of the Statute Law Database. The benefits to both Houses in considering legislation we believe will be substantial.
98. **We recommend that where a bill amends an earlier Act, the effects of the bill on the Act should be shown in an informal print of the amended Act and that this should be included in the Explanatory Notes to the bill.**

### European legislation

99. There is one further change we would like to see incorporated in the Explanatory Notes. This relates to scrutiny undertaken by parliamentary committees of European Union legislation.
100. When bills implementing EU law are brought before Parliament, the Explanatory Notes do not provide information on the scrutiny undertaken at an earlier stage by the scrutiny committees in the two Houses, the European Scrutiny Committee in the Commons and the European Union Committee in the House of Lords. The European Union Committee suggested that the scrutiny history be included in the explanatory memorandum that accompanied Statutory Instruments laid before the House. Lord Grenfell, the Chairman of the EU Committee, told us:

“It seems sensible, therefore, to follow the same procedure for public bills. Where a public bill implements EU legislation, the scrutiny work done by the House at an earlier stage ought likewise to appear in the Explanatory Notes.

Government departments have already compiled and collated information on it, so it is not asking too much of them simply to transfer that to the Explanatory Note” (Q 465).

101. Lord Grenfell emphasised that he was not suggesting that all comments made during scrutiny should be transferred to the Explanatory Notes:

“... but I do think that it would be important for the Chamber to know whether or not the scrutiny committee had had serious problems with the proposal, what principal advice they had given to the Government department in the exchange of letters with the Minister concerned, and really to provide the highlights of anything that the scrutiny committee itself felt was important enough to appear on the Explanatory Notes” (Q 466).
102. We concur with Lord Grenfell that an important point of principle is involved, namely “that we should not be taking primary legislation through the House in ignorance of what had gone on before” (Q 467). This is very much in line with our preceding recommendations. The better the House is informed about the purpose and provisions of a bill, the greater the potential for effective scrutiny and ensuring that the measure is fit for purpose. We wish to see more, but clearly structured, material embodied in the Explanatory Notes, so that members have as full information as possible about a bill. For the reasons outlined in our introduction, we wish to improve the quality of scrutiny and hence reduce the potential for bad law getting on to the statute book. Lord Grenfell’s recommendation falls very much within the scope of what we wish to achieve.
103. **We recommend that the Explanatory Notes to all bills introduced to give effect to EU obligations should carry a section detailing the scrutiny history of the measure.**
104. These various changes will, we believe, improve significantly the information available to the House about each bill and enhance its capacity for informed and consistent scrutiny.

## Part 2: Scrutiny of Bills

105. Once bills are introduced to Parliament, they go through several stages in each House. We are not here concerned with those processes, but would note that the length of the process should not be confused with its quality. We have heard complaints that the process itself is too short, especially in the House of Commons, and that the quality of the scrutiny undertaken is often poor.

### Timetabling

106. The principal complaint about time is that some bills do not receive an adequate allocation for consideration in the Commons because control of the timetable lies in the hands of the executive.
107. Timetabling of bills in the House of Commons is, clearly, a matter for that House. For the purpose of comprehensiveness, since our purpose is to examine the legislative process, we simply record some of the points made to us, including those made by the Leader of the House of Commons.
108. Bills in the House of Commons may be subject to programme motions. Previously, bills were often subject to allocation of time motions—known colloquially as guillotine motions—once they had reached a certain stage and

the Government decided that it was necessary to limit the time available for the remaining stages. Whenever a guillotine motion was moved, the Leader of the House justified it as being necessary, given the way in which the Opposition was delaying matters; the Shadow Leader would attack the unnecessary fetter being imposed on parliamentary debate. Whichever party was in power did not appear to make much difference; the justification remained the same.

109. The haphazard nature of the timetabling of bills and the use of guillotine motions—67 bills were guillotined in the period from 1946 to 1997<sup>64</sup>—led to widespread calls for the more systematic timetabling of bills. In the light of this, both the Procedure Committee in the Commons<sup>65</sup> and the Select Committee on Sittings of the House (the Jopling Committee)<sup>66</sup> made proposals for timetabling of bills. None was implemented. In 1997, the Modernisation Committee recommended the use of programme motions, with such motions being moved after Second Reading and stipulating the out-date from committee and the amount of time for report and third reading (and, in some cases, provision for carry-over).<sup>67</sup> The report was accepted by the House of Commons in November 1997. Some subsequent changes were agreed and embodied in sessional orders.
110. Programme motions were initially agreed on a consensual basis among the parties. However, as programming of bills has become routine, the time allocated has become tighter and has not been agreed by the opposition parties, who now regularly vote against the motions. According to Peter Riddell, problems that have arisen have been as much to do with personalities as with the length of the bill. Ministers and their opposite number have failed to agree. “It seems to me that it is almost arbitrary as to which bills get all their clauses considered in Standing Committee and which do not” (Q 95).
111. There is clearly a case for engaging in some degree of timetabling. Alan Beith drew our attention to the rationale for programme motions:

“I believe there were two motives for the decision. One was, as part of modernisation, to bring to an end the practice of very late or all-night sittings on bills... That objective was achieved. The other objective was to achieve a more rational distribution of the time spent on bills, with a view to ensuring that all parts of it received scrutiny... So far as Report stages are concerned, it has not achieved the desired improvement in scrutiny. Even with the use of “internal guillotines” to sub-divide the time, there has been a tendency to use up the time on one or two early groups of amendments, leaving other amendments, including substantial Government amendments and new clauses, to be passed formally without any discussion or examination at all. This has increased the dependence on the Lords’ ability to scrutinise bills without limit of time” (Vol. II, p.46).

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<sup>64</sup> Programming of Bills, First Report from the Select Committee on Modernisation, Session 2002-3, HC 1222, minutes, p. 18.

<sup>65</sup> Public Bill Procedure, Second Report from the Select Committee on Procedure, Session 1983-85, HC 49; Allocation of Time to Government Bills in Standing Committee, Second Report from the Select Committee on Procedure, Session 1985-86, HC 234.

<sup>66</sup> Report from the Select Committee on Sittings of the House, Session 1991-92, HC 20.

<sup>67</sup> The Legislative Process, First Report from the Select Committee on Modernisation, Session 1997-98, HC 190.

112. The Modernisation Committee has looked at the effect on amendments and clauses not debated as a result of what are known as the internal knives falling in committee. In 2002-03, 23 Government bills were subject to a programme order in Standing Committee. In six cases, the committee ran ahead of the timetable, in nine cases the knives fell “in such a way as to leave a significant number of clauses or schedules undebated”; and in the remaining cases, some knives fell and some did not, “leaving only a few clauses or schedules undebated.”<sup>68</sup> Thus, seventeen bills had parts not considered in committee.
113. The Committee noted that the number of amendments and clauses which were not debated was not necessarily a reliable indicator of the extent to which a bill had or had not been properly considered. It also pointed out that of the nine bills which had gone through with significant parts undebated, three had been subject to pre-legislative scrutiny and another was re-committed and carried over. “Nonetheless”, it continued, “concern about the volume of legislation which passes undebated is entirely legitimate, whether the lack of scrutiny is the result of a programme order or the absence of a programme order.”<sup>69</sup>
114. The Committee made a number of suggestions to ensure that programming worked more effectively; these included ensuring that large amounts of new material were tabled in plenty of time to be taken into account by the programming sub-committee; that, in the case of lengthy bills, the programming sub-committee should not normally make detailed proposals until after several sittings of the Standing Committee; and that for some bills two or three days for Report stage might be necessary for proper scrutiny.
115. The case for some timetabling of bills appears generally to be accepted. However, there is no consensus on who should do the timetabling and what form it should take. How to resolve this problem in the House of Commons is not a matter for us, though how the matter is resolved does have implications for business in the House of Lords. As Alan Beith MP noted (paragraph 111 above), if sections of a bill remain undebated in the Commons, this places a particular burden on legislative scrutiny in the Lords.

### **Management of parliamentary business**

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.<sup>70</sup> It is common elsewhere for the legislature to have greater ownership of the timetable.<sup>71</sup> Research shows that

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<sup>68</sup> *Programming of Bills*, First Report of the Select Committee on the Modernisation of the House of Commons, Session 2002-03, HC 1222, para. 16.

<sup>69</sup> *Programming of Bills*, First Report of the Select Committee on the Modernisation of the House of Commons, Session 2002-03, HC 1222, para. 19.

<sup>70</sup> Evidence presented to the Norton Commission by Dr Thomas Saalfeld of the University of Kent. Commission to Strengthen Parliament, *Strengthening Parliament*, London: The Conservative Party, 2000, p. 28.

<sup>71</sup> Robin Cook, Q119. Hansard Society, *Issues in Lawmaking. 4: Programming of Legislation*, London: The Hansard Society, 2003, pp. 5-6.



handing over control of the timetable, or part of it, does not necessarily prevent the Government from getting its business.<sup>72</sup>

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 we undertook our 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 we noted in our 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.”<sup>73</sup>
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<sup>74</sup> as well of the later Hansard Society Commission, chaired by Lord Newton,<sup>75</sup> on Parliamentary Scrutiny.<sup>76</sup> 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.”<sup>77</sup> It was reiterated to us during our current inquiry by the representatives of Parliament First.<sup>78</sup> 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,

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<sup>72</sup> Strengthening Parliament, p. 28.

<sup>73</sup> Devolution: Inter-Institutional Relations in the United Kingdom, Session 2002-03, HL Paper 28, para. 146.

<sup>74</sup> *Making the Law*, paras. 518-9 and Annex B.

<sup>75</sup> The Rt Hon the Lord Newton of Braintree, OBE (cr 1997); Member of Parliament 1974-97; Leader of the House of Commons 1992-97.

<sup>76</sup> *The Challenge for Parliament: Making Parliament Accountable*, London: The Hansard Society, 2001.

<sup>77</sup> Parliament First, *Parliament’s Last Chance*, London: Parliament First, 2003, p. 69.

<sup>78</sup> For example, Mark Fisher MP, Q 286.

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” (Q119). As Leader of the House, he had been keen to float the idea of a business committee for the Commons, though, as he noted, “that did not command universal support from my colleagues in the Cabinet” (Q 119).

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. We can see 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, we reiterate what we said in our devolution report<sup>79</sup> that there is much to commend consideration of such committees at Westminster.
123. **We recommend that consideration be given to the establishment of business committees at Westminster.**

### The committee stage

124. One aspect of considering the timetable for legislation is the examination to be given to a bill in committee. There is the question not just of time but of the quality of scrutiny. Bills in the House of Commons are sent to Standing Committees as a matter of practice, though a number in each session is taken in Committee of the Whole House. Bills in the House of Lords are generally considered in Committee of the Whole House, though the House is increasingly utilising Grand Committees for consideration of bills in order to reduce pressure on the chamber.
125. Committee stage is designed for the detailed consideration of bills. The provisions of a bill can be discussed and subjected to close questioning. However, there is one notable feature lacking in committee consideration in both Houses. Neither routinely employs committees which have the capacity to take evidence. Consideration of a bill is confined to the words in the bill and members who wish to draw on the services of informed and affected bodies do so on a personal basis.
126. Both Houses do have provision for utilising evidence-taking committees—Special Standing Committees (SSCs) in the Commons and Special Public Bill Committees in the Lords, as well as the option of referring bills to Select Committees—but neither makes much use of such committees. Indeed, the use of evidence-taking committees is notably irregular. In recent years in the Commons, only one bill has been considered in a Special Standing Committee,<sup>80</sup> and four bills have been sent to Select Committees;<sup>81</sup> in the

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<sup>79</sup> Devolution: Inter-Institutional Relations in the United Kingdom, Session 2002-03, HL Paper 28, para. 147.

<sup>80</sup> Immigration and Asylum Bill 1999.

Lords, the Constitutional Reform Bill is the only Government bill to have been referred to a Select Committee in recent times (and that contrary to the Government's wishes), although Private Members Bills are often sometimes so referred.

127. The existing method of committee scrutiny has been subject to extensive criticism. As the Hansard Society noted, scrutiny is haphazard, "things are missed out, things are rushed through" (Q 443). The current operation of Standing Committees "leaves little room for real input from MPs and limits their capacity to develop and influence legislation" (Vol. II, p.127, para.5). In the words of Paul Tyler<sup>82</sup>, "Standing Committees... contribute little to the health of law-making in the UK and the process of scrutiny" (Vol. II, pp.81-83). These criticisms reflect those made over the years by commentators and members.
128. The Rippon Commission recommended that bills in the House of Commons should be referred as a matter of course to Special Standing Committees. That call has been reiterated in other subsequent reports, including the Norton Commission and the Parliament First publication, *Parliament's Last Chance*. The authors of the latter note that an SSC "could draw on the expertise of the relevant Select Committee to ensure that Bills received a much closer level of scrutiny than under the current system of Standing Committees"<sup>83</sup>.

### Evidence to assist scrutiny

129. Special Standing Committees are empowered to hold three evidence-taking sessions before reverting to the traditional Standing Committee format. Robin Cook advocated a more radical approach:
- "I personally think that there is a mistake in having two set categories: a Standing Committee, which proceeds normally, and a Special Standing Committee, which has the unique capacity to call witnesses. Frankly, I would just re-write the procedure book and let every Standing Committee call witnesses if they wish to, and leave that decision to Standing Committee" (Q 130).
130. A similar point was put to us by Sir Michael Wheeler-Booth, a former Clerk of the Parliaments, and Professor Vernon Bogdanor, Professor of Government at Oxford University:
- "The crucial requirement for effective scrutiny is that all parliamentary committees considering legislation, whether in draft or otherwise, should be given the power to hear evidence, and thereafter to amend the Bills in the light of that evidence, before returning the Bill to the floor of the House for the later stages" (Vol. II, p.186, para.1). This was a view shared by Michael Ryle<sup>84</sup> (Q 80).

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<sup>81</sup> In addition to the Armed Forces Bill 2001 (which is always considered in Select Committee), the Adoption and Children Bill 2001, the Capital Allowances Bill 2001, and the Income Tax (Earnings and Pensions) Bill 2002 were sent to Select Committee.

<sup>82</sup> Paul Tyler, CBE, MP, Liberal Democrat shadow leader of the House of Commons, member of "Parliament First" group.

<sup>83</sup> *Parliament's Last Chance*, London: Parliament First, 2003, p. 60.

<sup>84</sup> Mr Michael Ryle, former Clerk of Committees, House of Commons and Secretary to the Hansard Society Commission on the Legislative Process.

131. Another interesting proposal was put to us by Lord Carter. Speaking as a former Chief Whip, reflecting his experience as a business manager, he told us:
- “I also think there is a case, which is fairly radical, where a Departmental Committee is in existence in the Commons and is going to look at a bill, that some people from the Lords might even be invited to join the departmental committee for that purpose and have a sort of Joint Committee. Instead of having to through all the procedures of a Select Committee, you would find five or six peers and invite them to attend the meetings of that committee” (Q 184).
132. We have found these various proposals highly stimulating and they have contributed greatly to our own reflections. We have considered them in the context of the whole legislative process. Scrutiny at committee stage of bills cannot be taken in isolation from the rest of the process.
133. Looking at the legislative process as a whole, and taking the need to ensure effective parliamentary scrutiny as being paramount, we believe that every bill should be subject to some detailed scrutiny, with the taking of evidence from interested and informed bodies. Scrutiny should not take place in a parliamentary vacuum. 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.
134. For the reasons that we have discussed, there is particular value in such evidence-based scrutiny taking place at the pre-legislative stage, before Ministers’ views are fully formed. As we have argued, we believe there is a powerful case for the regular use of pre-legislative scrutiny. If a bill has received pre-legislative scrutiny, then there may be little need for further evidence taking at a later stage. However, it does not necessarily follow that there is no need for further evidence-based examination.
135. The Government does not necessarily have to accept recommendations made by pre-legislative committees. As we have seen, the experience has generally been positive, but not all recommendations have been taken on board. The pressure of time has also limited the committees engaged on pre-legislative scrutiny. Even if the Government accepts a point made by a committee, the way in which it chooses to interpret it and implement it may not be quite what the committee had in mind. And, it is important to note, the Government may bring in substantial amendments once a bill has been introduced and which, therefore, a pre-legislative committee has not had the opportunity to consider.
136. We therefore believe that there is a case for providing opportunities for evidence-based scrutiny when a bill is before Parliament. We are not recommending such scrutiny take place as a matter of course. Pre-legislative scrutiny may have produced a thorough examination, with a positive response by Government and with changes that meet the concern of informed bodies. In such cases, there may be no need for further evidence-based scrutiny. However, there is no reason why a committee should not have the discretion to check if the changes have met the concerns of experts and those affected by the bill.
137. We further believe it worth considering something along the lines recommended by Robin Cook. If a Standing Committee is empowered to take evidence, it can then decide whether it wishes to utilise that power. It

may decide, in the light of pre-legislative scrutiny, that there is no need to supplement what has already been done. It may decide to have one or two short evidence-taking sessions to satisfy itself that those who previously made representations are content with the bill as it now stands. Or it might decide to hold a number of evidence-taking sessions to examine the bill in some depth. This we would expect to be the case automatically where the bill has not been subject to pre-legislative scrutiny as well as in cases where pre-legislative scrutiny has occurred but the Government has added substantial new material to the bill.

138. Where substantial new material is added at Report stage, then there is a case for re-committing the bill to the Standing Committee. If this becomes standard procedure, then it may also have the effect of deterring Ministers from introducing new material late in the passage of the bill.
139. In the Lords, the equivalent procedure would be to refer a bill after Second Reading to a Select Committee. It would be up to the committee to determine whether there had already been detailed examination, be it by a pre-legislative committee or a Commons Standing Committee, which would render unnecessary further detailed examination. If the bill is first introduced in the Lords, then the work of the Select Committee may render unnecessary detailed examination by a Standing Committee in the Commons. There is thus a case for sharing out the work between the Houses to their mutual advantage.
140. An alternative in the Lords would be for a sessional committee—following our earlier recommendation, it could be a business committee—to examine each bill prior to Second Reading and to assess the extent to which the bill has already satisfied the criterion of detailed examination; and to make a recommendation accordingly as to whether or not it should be committed to a Select Committee.
141. We also take on board another point put to us by Robin Cook. “I have always found it slightly strange”, he told us, “that we have people who carry out pre-legislative scrutiny, and then we have a totally different committee, mostly of totally different people, who consider the bill in Standing Committee... We need to get more synergy between those who carry out the pre-legislative scrutiny and those who look at it in detail when it is there in formal draft” (Q 122). We can see the case for ensuring at least some overlap between the membership of a pre-legislative committee and the committee (or committees) subsequently responsible for the consideration of the bill. An overlap ensures that the knowledge and understanding gained by the pre-legislative committee is not lost and that the Standing Committee does not have to start from scratch in assessing the bill.
142. These considerations lead us to our recommendations, which cannot be seen independent of the other stages of the legislative process.
143. **We recommend that every bill should at some stage be subject to detailed examination by a committee empowered to take evidence.**
144. **We recommend that bills should normally be committed after Second Reading to a committee empowered to take evidence; though that requirement may be dispensed with if the House is satisfied that the bill in that form has already been subject to detailed evidence-taking examination in the other House.**

- 145. We recommend that the membership of a committee examining a bill should normally include some members who have been responsible for the pre-legislative scrutiny of the measure.**
146. We also believe that the proposal put to us by Lord Carter merits further consideration: that is, drawing on the expertise of members of both Houses. His idea was for some peers to be invited to sit in on Select Committees in the Commons. Another, less procedurally fraught, approach would be to invite a Joint Committee that has examined a draft bill to re-convene after the Bill has been introduced, as suggested by Jean Corston (Vol. II, pp164-167). It could then report on whether the points it made had been met. Indeed, were this practice to be developed (the same procedure could be adopted by Select Committees) it may reduce the need for detailed evidence-based consideration at committee stage.

### Forms of evidence-taking

147. We also believe that there is merit in looking at more informal means of considering the details of bills. Peter Riddell advocated moving away from the traditional method of evidence-taking:
- “Instead of having your couple of hours’ session when you talk to two or three people, a seminar with lots of people actually generates as much usefulness for you in reaching your reports ... and also reduces the amount of time you have to spend” (Q 108).
148. We note that the Public Administration Committee in the Commons has utilised the seminar-based approach, for example for drawing up a draft Civil Service Bill. Some of these seminars have drawn on one or two members of this committee; their experience is that it is a valuable means of soliciting material and sharing views. House of Lords committees have also used seminars on inquiries.
149. Utilising a seminar as part of the scrutiny process would supplement rather than supplant the traditional method of evidence-taking. It is a useful way of clarifying the main points at issue, and the sort of evidence that needs pursuing, prior to engaging in formal evidence-taking.
- 150. We commend to the House, and especially to committees appointed to examine bills (be it in draft or after formal introduction), the value of obtaining evidence through informal meetings and seminars.**

### Informal briefing

151. We also endorse the practice of Ministers and officials holding informal meetings to discuss bills once they are introduced. Lord Roper<sup>85</sup> commended to us the practice of Baroness Ashton of Upholland, until recently the Education Minister in the Lords, of holding regular meetings in the House on the days when her bills were being considered when any peer could meet her and her officials to talk about the afternoon’s amendments (Vol. II, pp.182-185). Various Ministers hold meetings to discuss bills and we think this is of considerable value, enabling interested Members to glean further information and possibly saving the time of the House by avoiding the need for probing amendments. Taken with more informal means, such as

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<sup>85</sup> The Lord Roper, Liberal Democrat Chief Whip in the House of Lords since 2001

seminars, then we believe that such practices can contribute towards a more constructive approach to legislation and help enhance the quality of legislation.

152. We recognise that developing legislative scrutiny in the way that we have recommended is not problem-free. Problems likely to be cited are those of procedure, attitudes, and time. We do not believe these are insuperable problems, especially given other changes recommended to the legislative process.

### Procedure

153. Procedure is a matter for each House and we see no insurmountable hurdles to implementing the proposals we have outlined. One problem that arises from the suggestion advanced by Robin Cook to remove the dividing line between Special Standing Committees and Standing Committees is the position of the chairman. Under the SSC procedure, the evidence-taking sessions have usually been chaired by the chairman of the appropriate Departmental Select Committee and the normal Standing Committee sessions by a member of the Chairmen's Panel. Whereas we understand that there was previously reluctance on the part of members of the Chairmen's Panel to chair evidence-taking sessions, our understanding is that this is no longer the case. No equivalent issue arises in the Lords.

### The adversarial culture

154. The attitude of Members towards change is clearly crucial. Partisanship remains a central feature of the legislative process. The clash between the parties is a basic and necessary feature of a healthy political system. A structured opposition is a beneficial feature of our parliamentary system, ensuring that all government proposals are subject to critical examination. Questioning by opposition parties is necessary to keep Ministers and officials alert to potential problems and to ensure they are able to justify their measures.
155. Partisanship, though, should not squeeze out the quest for informed and objective scrutiny. As Dr Lewis Moonie put it to us, the confrontational aspect of much parliamentary procedure does not lend itself to a process which strives to achieve agreement. "If members could be trusted to act purely for the public good, rather than for party advantage, more could be gained from pre-legislative scrutiny. I fear that this idealistic position is not practicable at present" (Vol. II, p.111, para. 2b).
156. George Cunningham has also pointed out that there is a tendency to ascribe to procedural defects weaknesses which are not procedural but behavioural. "A change in the behaviour of Members, a matter entirely within their own control, will do more for the effectiveness of parliament than any change in structures and procedures." However, as he points out, there is a relationship between behaviour and procedure. "Some structural reforms... affect the willingness of Members to exercise the powers they possess" (Vol. II, p.167, para.1). Achieving the ideal state alluded to by Dr Moonie may not be achievable through appeals to the public good, but it may be possible to nudge parliamentarians in that direction through modest procedural change. We note the experience of pre-legislative scrutiny in contributing to this process. Special Standing Committees in the Commons, when they have

been used, have often had a similar effect. We believe that building on the changes already made can have beneficial consequences.

### Carry-over

157. The final obstacle often identified is that of time. Ministers are keen to get their bills through. The sessional cut-off has been a particular problem. Given that, business managers have been reluctant to resort to Special Standing Committees, since each adds a month to the time it takes to consider a bill. As we have seen, this can also be a problem with pre-legislative scrutiny.
158. However, as we have already touched upon, time need not necessarily be an obstacle. The imperative is to ensure effective parliamentary scrutiny as a means to ensure the enactment of good legislation. There has been a tendency to allow time to take priority over effective scrutiny, contributing to bad legislation. Time therefore has to be found.
159. We have already identified the means for achieving this. Provision for carry-over of bills allows adequate time to be given to a bill. It enables the staggered introduction of bills and hence a rolling legislative programme. It also reduces the pressure on parliamentary counsel, who are fully stretched under existing arrangements. Indeed, Sir Geoffrey Bowman noted the effect of both carry-over and the publication of bills in draft: “The increased tendency to carry over Bills should lead to a more evening out of the workload and publishing more Bills in draft does tend to have the same effect” (Q 349).
160. Carry-over for bills needing more time was recommended by both the Rippon Commission<sup>86</sup> and the Norton Commission.<sup>87</sup> It was commended to us by Peter Hain, the Leader of the Commons, as well as by two former business managers, Lord Biffen<sup>88</sup> (Vol. II, p.161) and Lord Carter (Q 178); and by Dr Lewis Moonie (Q 390), Peter Riddell (Q 95), and Michael Ryle, who served as secretary to the Rippon Commission (Q 80). Mr Hain commended carry-over as a good thing in principle, delivering a number of potential benefits. In the context of a rolling legislative programme, it could allow for “more due process of time for people to pause and take breath as well as avoiding the situation just because the knife fell at the end of the session and a bill was lost or an opportunity was foregone” (Q 45).
161. Provision for carry-over was agreed by both Houses in 2002 but has been little employed. There appears to have been a reluctance to break out of the existing sessional mentality. In part, this may have been affected by fears of opposition parties that ending the sessional cut-off may limit their capacity to influence bills.<sup>89</sup> This concern was addressed by both the Norton Commission<sup>90</sup> and by Robin Cook, in his memorandum when Leader of the

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<sup>86</sup> *Making the Law*, para. 490.

<sup>87</sup> *Strengthening Parliament*, p. 42.

<sup>88</sup> The Rt Hon. Lord Biffen of Tanat, Member of Parliament 1961-1987; Leader of the House of Commons 1982-1987.

<sup>89</sup> See, for example, Douglas Hogg, Q 279.

<sup>90</sup> *Strengthening Parliament*, p. 42.



House of Commons.<sup>91</sup> Both advanced the case for having some stipulated cut-off point. As the Norton Commission reported:

“We have opted for fourteen rather than twelve months in order to accommodate major bills and also to allow for the additional time taken by Special Standing Committees. Having a fourteen-month limit will ensure some discipline. A clear limit, as with the existing sessional cut-off, will also allow the opposition some leverage in terms of the much vaunted (but only occasionally effective) power of delay.”<sup>92</sup>

162. When the House of Lords debated a carry-over provision, it made clear that it should normally apply to bills that have been subject to pre-legislative scrutiny. The then Leader of the House, Lord Williams of Mostyn, also expressed sympathy with an amendment to provide for a stipulated cut-off date. We believe that the principle of carry-over is persuasive but that steps should be taken to implement the provision for a stipulated cut-off period.
- 163. We support the principle of the carry-over for bills that have been subject to pre-legislative scrutiny, but believe that bills carried over should be subject to a stipulated cut-off period from the time of their introduction. We suggest that 14 months would be appropriate.**
164. Our recommendations are not designed to be comprehensive, but rather are designed to identify key areas that we believe require attention if the process of legislative scrutiny by Parliament is to be improved. Our recommendations are designed to ensure that Parliament is better able to render legislation fit for purpose. However, Parliament’s role does not end once a bill has been sent for Royal Assent. The process we have covered in this chapter is but one stage of the legislative process.

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<sup>91</sup> *Modernisation of the House of Commons: A Reform Programme for Consultation*. Memorandum submitted by the Leader of the House of Commons, Session 2002-02, HC 440, para. 21.

<sup>92</sup> *Strengthening Parliament*, p. 42.

## CHAPTER 5: POST-LEGISLATIVE SCRUTINY

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165. Post-legislative scrutiny appears to be similar to motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence.

### The importance of post-legislative scrutiny

166. The importance of post-legislative scrutiny was put in context in a thoughtful submission to us by Jean Corston MP, writing in her capacity as Chairman of the Joint Committee on Human Rights:

“As legislators, we need to pay as much attention to what happens after we have finished our specialised task of making the law as we do to the processes by which we achieve the law. The professional deformation against which we perhaps have to be most wary is supposing that legislating is the most effective way to achieve our ambitions, and that lawmaking is a precise science which can result in a perfect product. Our responsibility does not begin with a Bill’s introduction to Parliament or end with the royal assent. Improving the efficiency with which we process legislation is only a small part of improving our effectiveness” (Vol. II, pp.164-167).

167. We have stressed the importance of looking at the legislative process in its totality. As Sir Michael Wheeler-Booth and Professor Vernon Bogdanor put it, “all too often, Parliament forgets about legislation once it has reached the statute book” (Vol. II, p.187, para.10). There are occasions when some post-legislative scrutiny occurs but, as Peter Riddell told us, it is “patchy at best” (Vol. II, p.27, para.9). It tends to occur only because of a realisation that something has gone wrong. An obvious and much cited example is that of the Child Support Act 1990 setting up the Child Support Agency. Alan Beith also drew attention to a more recent example with the Constitutional Affairs Committee in the Commons:

“In our case it was the legislation which set up CAFCASS, the Children’s and Family Court Advisory and Support Service, which clearly was working very badly; indeed, we published an extremely critical report which led in the end to the dismissal of the entire board and a fresh start—quite a painful process, but undoubtedly a form of post-legislative scrutiny” (Q 146).

168. This example shows the potential of post-legislative scrutiny but also points to a flaw in its current usage: that is, its employment only when problems become apparent. There is rarely an attempt, and certainly no practice, of Parliament regularly reviewing legislation to ensure that it has achieved what was intended.
169. Legislation may not fulfil its intended purpose. That may come to Parliament’s attention if it has palpable negative consequences. It may not come to Parliament’s attention at all if it simply has no effect. In some cases, it has no effect for the simple reason that Ministers have not brought the provisions of Acts into force. It may have unintended consequences, but not of a nature to provoke groups or citizens to object.
170. There is, we believe, a strong case for regular post-legislative scrutiny to determine if legislation has achieved its purpose. As Peter Hain told us, “there is no point in passing legislation if it is not having the desired impact or it is having a different impact” (Q 57). Regular scrutiny will determine if

Acts have done what they were intended to achieve; if not, it may then be possible to identify alternative means of achieving those goals. Scrutiny may also have the effect of ensuring that those who are meant to be implementing the measures are, in fact, implementing them and in the way intended.

171. Such scrutiny may also impose a much greater discipline on Government. We have already touched upon the fact that Ministers often see achievement in terms of getting their “big bill” on to the statute book. They may engage in greater circumspection if they knew that in future the measure of their success was not so much getting a measure on to the statute book as the effect that it had.
172. As such, post-legislative scrutiny may improve the quality of Government. It may also contribute to improvement in the legislative process. Assumptions about the legislative process derive from observations and experience of the process itself up to royal assent. Margaret Beckett advocated post-legislative review “in order to illuminate and see what lessons can be learnt for the future handling of the legislative process” (Vol. II, pp.159-161). As Lord Grenfell noted, post-legislative scrutiny would be a means of assessing the utility of pre-legislative scrutiny (Q 486). We have stressed throughout this report the importance of ensuring that Parliament has mechanisms to ensure that bills are fit for purpose, but how does Parliament know that the bills, once enacted, have actually proved fit for purpose?
173. The case for greater post-legislative scrutiny is, we believe, compelling. It is one widely accepted by those who gave evidence to us.<sup>93</sup> The question then becomes not one of principle, but rather one of how to give effect to it. A problem with carrying out post-legislative scrutiny is, as several witnesses reminded us, one of resources.<sup>94</sup> Limited resources constrain the capacity for extensive post-legislative scrutiny and some witnesses advocated selective post-legislative scrutiny. “Post-legislative scrutiny is, in my view”, Lord Elis-Thomas told us, “best exercised selectively. I would not advocate any system of mandatory parliamentary post-legislative scrutiny for all Acts of Parliament” (Vol. II, p.170, para.5).

### Selecting measures for post-legislative scrutiny

174. The problem with selective post-legislative scrutiny is one of determining the method of selection. If left to Government, the danger is that there will be certain measures that it does not want to be scrutinised and where, arguably, the case for scrutiny may be particularly compelling. If left to Select Committees, there is the danger they will focus—as now—on the high-profile Acts that have gone wrong, a tendency that is understandable given limited resources and the need to prioritise workloads.
175. We believe that there is a case for regular, indeed standard, post-legislative scrutiny. We are conscious of the burdens already placed on Parliament. The

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<sup>93</sup> Peter Hain, Q 57; Baroness Amos, QQ22, 60; Margaret Beckett, Vol. II, pp.159-161; Lord Grenfell, Q 480; Robin Cook, Q 124; Douglas Hogg, Q 283; Paul Tyler, Vol. II, pp.81-83 and Q 283; Oliver Heald, Vol. II, pp.173-174; Dr Lewis Moonie, Vol. II, pp.111-112 and Q383; John Greenway, Q 383; Jean Corston, Vol. II, pp.164-167; Lord Roper, Vol. II, pp.182-185; Lord Elis-Thomas, Vol. II, pp.170-173; Hansard Society, Q 444; Michael Ryle, Q 81, 82; George Cunningham, Vol. II, pp.167-168; Peter Riddell, Q 92; Sir Michael Wheeler-Booth and Professor Vernon Bogdanor, Vol. II, pp.186-187; Sir Michael Davies, Vol. II, pp.168-170 ; David Millar, Q 240.

<sup>94</sup> Baroness Amos, Q 60; Lord Grenfell, Q 480; Lord Carter, Q 196; Sir Michael Davies, Vol. II, pp.168-170; Jean Corston, Vol. II, pp.164-167.

scrutiny that we propose, as we shall explain, need not necessarily be resource-intensive.

176. In terms of achieving a standard method of post-legislative scrutiny, we have already proposed the means for evaluating measures: that is, providing in the Explanatory Notes to a Bill the criteria by which to assess whether it has fulfilled its purpose. Which bodies, though, should engage in such scrutiny?
177. We have had various proposals put to us. John Greenway, for example, thought this scrutiny was something to which House of Commons Select Committees would be especially suited (Q 383). Dr Lewis Moonie said he would welcome scrutiny by Joint Committees (Vol. II, p.111, para.2(c)). The Hansard Society also saw the value of Joint Committees, bringing in different sets of expertise (Q 444). Paul Tyler considered that a Joint Committee would be appropriate “where it becomes apparent that legislation is so badly off the rails that it requires special attention” (Q 283). George Cunningham suggested that, given the demands already on Departmental Select Committees, there was a case for creating committees on a “twin basis”, operating in the same policy field but with different roles (Vol. II, p.168, para.4).
178. We have given considerable thought to the best way to achieve post-legislative scrutiny, not least given limited parliamentary resources. We recognise the burden that would be placed on Departmental Select Committees if they were vested with responsibility for engaging in extensive post-legislative scrutiny. We believe they should be the bodies for considering the effect of legislation but we believe this can be achieved without imposing an onerous burden.
179. In order to ensure the proper scrutiny of legislation, we believe that there should be a review within a set number of years—we suggest three years—after the provisions of the Act have been brought into effect. We also believe that there should be a set period following the passage of the Act when it should be reviewed. We think six years would be appropriate. This is in order to cover cases where a Minister may not have brought the provisions into force. A review would then force a Minister to explain why it had not been brought into effect. An alternative to this latter proposal would be to utilise—as some witnesses have recommended—“sunset clauses”, providing that the provisions would cease to have effect after a stipulated period.<sup>95</sup> We recognise there will be occasions when a review is premature, otiose—for example, if superseded by a later Act—or impractical.
180. **We recommend that most Acts, other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner.**
181. The periods we have recommended are maximum periods. Robin Cook thought that each Act should be reviewed a year after being passed by Parliament (Q 124). He thought this would have been useful in the case of measures such as the Child Support Act and the Dangerous Dogs Act. It would, of course, be open to committees to decide that an early review is necessary, either in the light of immediate negative responses—as from constituents—or because of the nature of the Act.

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<sup>95</sup> See, for example, Douglas Hogg, Q 301; Oliver Heald, Vol. II, p.174, para 18.

## Resources

182. Given the problem of resources, we believe that pressure on Parliament can be reduced in two ways, without undermining Parliament's ultimate responsibility. The first is by relying more on departmental reviews of legislation. Peter Hain told us that "Departments are frequently involved in assessing the effects of legislation and policy at pretty well all stages. Whether it is done sufficiently rigorously or consistently is another question" (Q 57). We believe that there should be consistent reviews. We see obvious value in departments undertaking a review, based on the criteria embodied in the Explanatory Notes. This, we think, will be of considerable value to Government in assessing the effect of its measures as well as providing a greater discipline in the preparation of legislation.
183. We recommend below that Government departments should review the effects of legislation. They should do so against the criteria they had previously set out in the Explanatory Notes to the measures, and within the time limits that we have identified.
184. The review of each Act need not necessarily be an extensive exercise. Some measures may be minor and have, and expected to have, limited consequences. Others may require more attention. In his evidence to us, one former Cabinet Minister, Douglas Hogg, suggested one way to undertake each review:

"... the department with charge of the Bill, once it is enacted, should for a period of time establish a group, a working party within the department, with a special remit for taking complaints about the working of the bill, and establish a report" (Q 283).
185. We believe that there is also a case for instituting a consultation exercise, similar to that which applies with pre-legislative consultation and with a similar period for responses. We believe that post-legislative consultation has much to commend it. This could be complemented by a working party, as recommended by Mr Hogg, which would be able to consider the responses. We would envisage that, as with pre-legislative consultation, guidelines would be established by the Cabinet Office.
186. Once a departmental review is completed, we believe that it should be deposited with the relevant Departmental Select Committee. It would then be for the committee to examine the report and to determine whether further review is necessary. Given the demands on Select Committees, we recognise that undertaking a major review of its own would be time-consuming and that there would be considerable opportunity costs. The recommendations we have made for pre-legislative scrutiny have significant implications for committee workloads. Given that, we believe there is a case for the Select Committees having ownership of the review process but not necessarily carrying out the review themselves.
187. Select Committees are empowered to appoint specialist advisers. There is also a research budget on which they can draw. To date, they have not been extensive users of that budget. Some years ago, Sir John Banham, in *The Anatomy of Change*, recommended that each Departmental Select Committee should have a budget of £2 million a year. Giving the committees a research budget would permit them to commission independent research on the effects of an Act. This would have two benefits. One is that it would save the time of the committee. It would not need to take time examining witnesses.

Another is that it would enable it to achieve an objective assessment. Witnesses appearing before committees are usually self-serving—understandably so—in what they say.

188. An alternative to commissioning independent research would be to invite a review by the National Audit Office or to expand the Scrutiny Unit so that it could engage in such an evaluation at the request of a committee. We also note the value of a practice we have commended earlier, and that is the use of seminars and other informal gatherings. A committee may find it useful to hold a seminar with those responsible for implementing, or affected by, an Act to explore whether problems have arisen and what issues, if any, deserve further investigation and evaluation.
189. **We recommend that each Government department undertakes a review of an Act, against the criteria it provided in the Explanatory Notes, within the time period that we have identified, and that copies of these reviews be deposited with the appropriate Departmental Select Committee.**
190. **We recommend that the reviews undertaken by departments include consultation with interested parties, similar to consultation at the pre-legislative stage.**
191. **We recommend that money should be made available from the parliamentary budget to allow Departmental Select and other Committees, if they elect to do so, to commission research on the effect of an Act.**
192. We believe that empowering committees to commission research will address the resource problems drawn to our attention. They and, through them, Parliament will remain in charge but without having to commit themselves to lengthy evidence-taking inquiry. **We accordingly further recommend that committees should retain the discretion to undertake such an inquiry themselves should they deem it necessary, either in light of the departmental review or the research that they have commissioned.**

### Conclusion

193. We attach great importance to our recommendations on this subject. Post-legislative scrutiny is widely accepted as desirable, but is notable for its dearth rather than its general application. Very few substantial reviews of legislation have been undertaken. The recent cases of the Terrorism Act 2000 and the Anti-terrorism, Crime and Security Act 2001 are the exceptions that prove the rule. Post-legislative scrutiny as we have described it should be a common feature. We have stressed the importance of Parliament being involved at all stages through which the laws of this country are generated, debated and enacted. There are, as we have seen, problems at each stage, but the biggest gap is to be found in post-legislative scrutiny.

## CHAPTER 6: CONNECTING WITH THE PUBLIC

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194. We have emphasised that Parliament does not act in a vacuum and that it is crucial that the views of informed opinion and those affected by a bill—categories that are not mutually exclusive—are heard when the measure is being considered, rather than simply after it has taken effect. The natural source for representing those views will continue to be Members of Parliament, alerted by constituents or bodies inside or outside their constituencies. Not all parliamentarians, though, will have the time or resources to pursue every matter drawn to their attention. Indeed, the more they are lobbied, the greater the difficulty in finding time to do justice to all the representations made to them. We believe that it is desirable to ensure that complementary means exist for citizens to be able to make their views known when a bill is being considered.
195. There is clearly a problem in terms of enabling citizens to be involved. As the Hansard Society reminded us, citizens, whether working individually or as part of a group or network, rarely participate in the process. There were, they suggested, various reasons for this lack of involvement. These included: very limited public knowledge of the lawmaking process; consultations are not well advertised; the language throughout the legislative process is often prohibitively obtuse and technical; and there is no established mechanism for public concerns to be placed on the parliamentary agenda (Vol. II, p.130, para.22).

### The consultation process

196. Some of the developments of recent years have gone some way to address some of these problems. The most notable change here has been in respect of consultation. Consultation is now much more extensive than before, with consultation papers written in clear English. Various attempts have been made to reach out to groups particularly affected. We have given the example of the Green Paper, *Every Child Matters*, as an exemplar of what is possible. We commend this development. The general public would also have a clearer idea of what is being proposed if they had access to the informal Keeling-type schedules we have recommended should be incorporated into Explanatory Notes.
197. However, we believe that much more can be done to ensure that citizens are aware of what is happening in the legislative process and that they have the opportunity to have some input into that process. We are conscious that we lag behind other bodies in this respect, including the Scottish Parliament. Barry Winetrobe<sup>96</sup> drew our attention to the “more integrated and comprehensive experience of the Scottish Parliament, where notions of public engagement are embodied into all its operations” (Vol. II, p.73, para.12). Emulating the Scottish Parliament would entail what he termed a twin-track strategy of informing the public about the legislative process and engaging the public in the legislative process.
198. We concur with this assessment. Many of the recommendations that we have made in this report will, we believe, contribute to this, especially in facilitating greater engagement with the legislative process. The extension of

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<sup>96</sup> Mr Barry Winetrobe, Lecturer in Public Law, University of Glasgow.

pre-legislative scrutiny, and greater time for committees to engage in that process, will open up the early stages of the process to those with a particular interest in the measure. Lord Roper drew attention to his experience of two bills, the Communications Bill 2003 and the Children Bill 2004, where information was received from interested groups. “One lesson of this experience is that the longer the parliamentary process on a piece of legislation is which has far reaching effects, the more people outside Parliament will study and comment on it” (Vol. II, p.184).

199. The provision for some evidence-taking inquiry at some point during a bill’s passage ensures that there is the opportunity for input from interested bodies. The use of seminars and other informal techniques also enables interested bodies to be drawn into the process.
200. However, there is still much more to be done, not least in informing the public as well as providing the means for engagement. The Modernisation Committee of the House of Commons has looked at the need to consider connecting Parliament with the public.<sup>97</sup> Here, our focus is the legislative process, but a number of our proposals overlap.
201. In terms of ensuring that citizens are aware of what is happening in terms of legislative proposals, pre-legislative consultation is obviously important. Consultation papers are sent to a range of interested parties. Once a committee is engaged in pre-legislative scrutiny, there is the potential to visit different parts of the country to take evidence. The Joint Committee on the Draft Gambling Bill left Westminster in order to discuss the bill and this is a practice that we commend. Ensuring adequate time for pre-legislative scrutiny enhances the opportunity to take evidence outside Westminster. The provision for evidence taking by committees once a bill is before the House also provides a similar opportunity. Standing Committees would have to be empowered to sit outside the Palace. If our earlier recommendations are accepted, then we would envisage committees more routinely taking evidence in different parts of the country.
202. **We recommend that evidence-taking committees, at pre-legislative and committee stage, make use wherever appropriate of the opportunity to take evidence outside Westminster.**

### **Dissemination of information**

203. There is also a need for information to be made available on a more pervasive basis. Coverage by the mass media has declined, especially in respect of parliamentary proceedings. There is the Parliamentary Channel to watch proceedings, and Radio 4 continues to broadcast the excellent *Today in Parliament*, but beyond that there is very little. As Peter Riddell reminded us, “essentially we do not have papers of record any longer” (Q 91). Lord Roper called attention to the virtual absence of reporters from the national press in the Lords gallery (Vol. II, p.184).
204. Peter Hain noted that the form of coverage has changed:

“I mean that politics is reported in the sense of who is up, who is down and who is having a go at each other, where the divisions are, where the scrapes are and all the rest of it. That is common fare in all the daily papers, but if

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<sup>97</sup> Modernisation Committee, *Connecting Parliament with the Public*, First Report, 2003-04, HC 368.



you ask the average interested citizen what is actually happening in Parliament this week they would not really have any idea, nor would they easily be able to find out” (Q 63).

205. However, just as coverage in the news media has declined, the opportunity for the greater dissemination of information has increased. Because of the Internet, the public now has more information available than ever before on Parliament and what goes on in Parliament (Q 91). Proceedings of committees are now webcast. Uncorrected transcripts of committee hearings are also speedily placed on the Internet. There is a mass of material on the Parliament website, not just covering parliamentary proceedings but also covering future proceedings. Anyone with access to the Internet—and most citizens now have access—can look at the text of bills before Parliament, the Explanatory Notes, and amendments tabled to the bills. They can look up the forthcoming business, including that provisionally scheduled. The Lords Government Whips’ website provides valuable information on business.
206. As Peter Riddell, among others, emphasised, the Internet has tremendous potential for linking Parliament with citizens. However, two caveats are in order. There is the danger of assuming that placing material on the Internet is sufficient as a means of enabling citizens to know what is happening in Parliament. It is necessary, but it is not sufficient. Putting material in the public domain is no guarantee that people are paying any attention to it. The form in which it is made available needs attention.
207. We note the excellent work being done already by the information offices in both Houses and commend the work of the Group on Information for the Public (GIP), which was established in January 2000 to improve public understanding and knowledge of the work undertaken by Parliament. (The Group is centred in the Commons, but has input from the Lords in the form of the Lords Information Office.) We note that the Group has made various recommendations for change on such matters as web casting and published information. The existing website is subject to continuing improvement: new facilities, including a trial email alerting system and an advanced search engine, will be available later this year. We welcome these developments and would stress the importance that must be attached to them. It is especially important that the Parliament website is user friendly and that citizens accessing it can find out quickly what is going on and, as appropriate, what consultation exercises are presently being undertaken. At the moment, one has to have some understanding of the website in order to navigate it to find out what committees are doing and what consultations are being undertaken.
208. **We recommend that both Houses give priority to ensuring that material about each House put in the public domain explains in clear and accessible manner what both Houses are doing and what consultation exercises are being undertaken in which comments from the public are invited.**

### **Moderating responses**

209. The second caveat relates to this second wing of the strategy—that is, inviting a response from the public. There are dangers in simply inviting a response from anyone who wishes to respond. The dangers are the same as presently exist with calls for evidence. As Dr Lewis Moonie told us:

“I am very suspicious of the general call for evidence because, by and large, the activists respond and the others do not. You may get a spuriously democratic response, which in fact is not, it is highly biased” (Q 393).

210. We are conscious of the problems of inviting a response that is not moderated. The answer, as various witnesses pointed out, is to utilise a moderated on-line consultation. This has been tried successfully on various but not numerous occasions. The Hansard Society now runs [www.tellparliament.net](http://www.tellparliament.net) and has conducted a number of consultations. These have included an on-line consultation for the Joint Committee on the Draft Communications Bill. As they reported to us: “Two of the recommendations of the Joint Committee came from the e-consultation so it is something that has proved its worth and was accepted by the Government” (Q 408). As Oliver Heald<sup>98</sup> recorded, Nick Toon, from ITV, reviewed the Communications Bill and its pre-legislative scrutiny. Mr Toon concluded that “the innovation of an online forum providing members of the public with direct access and an impact to the process of law making as it unfolded’ provided ‘a genuine opportunity for a broader public involvement” (Vol. II, p.173, para.7).
211. Another successful example, which we commend, is the Hansard Society consultation on domestic violence. This was not undertaken in respect of particular legislation but was carried out for the all-party group on domestic violence. As the Society recorded, “People who had been victims of domestic violence were often in refuges and so on, but with careful work with them and their organisations we managed to get their input and their direct experience of the situation onto the parliamentary agenda” (Q 409).
212. We thus recognise the value of on-line consultation, but—as Oliver Heald put it succinctly—“perhaps the best use of such forums is where they are well moderated and expertise is brought to bear on the draft proposals from interest groups and individuals affected” (Vol. II, p.173, para.9). Such on-line consultation should be but one of the tools at the disposal of committees for engaging in pre-legislative and legislative (and, indeed, post-legislative) scrutiny. Properly employed, it can be a very valuable asset to parliamentary scrutiny.
- 213. We recommend the greater use of e-consultation, but such consultation should be moderated and seen as only one of the tools available to parliamentary committees to consult the public and interested groups.**

### Assessing public opinion

214. E-communication can prove particularly useful, as with that on domestic violence, in obtaining input from members of particular groups who can offer information and insights that might not otherwise be available. However, as we have indicated, one has to be wary of treating them as a means of assessing public opinion; the danger is that one is assessing the views of particular activists who have exploited the website to bombard it with their opinions.
215. If committees are to assess public opinion, then one means of doing so is to commission opinion polls. Their use was advocated persuasively by Dr Lewis

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<sup>98</sup> Oliver Heald, MP, Shadow Leader of the House of Commons.

Moonie. He attached particular value to public opinion polling. “It does not have to be terribly expensive although it is not a cheap way of doing things. Done properly by experts, it is a useful way of identifying the public’s views on certain issues and something which we do extremely well” (Q 394).

216. We have said before that a committee does not necessarily have to be bound by public opinion. It must reach its own judgement and may be influenced by expert opinion that it receives. However, knowing what public opinion is, and the strength of it, can be important intelligence for the work of committees. Again, we view the capacity to commission an opinion poll as one of the tools available to committees, and it would be up to committees as and when it would be appropriate to employ it. The recommendation we have already made, for Select Committees to have research budgets, would provide the means for commissioning an opinion poll; we would expect this to apply also to Joint Committees appointed to engage in pre-legislative scrutiny.
217. **We recommend that committees consider commissioning public opinion polls where they believe it useful to have an awareness of public opinion on the bill in question.**

#### Alternative forms of consultation

218. We believe that these recommendations will enhance the capacity of Parliament to engage with the public. They complement the recommendations we have already made. They are not exhaustive. We see a case for spending more time looking at the communications strategies of other legislatures, including the Scottish Parliament,<sup>99</sup> which devotes proportionately more of its resources to such activity than the Westminster Parliament. We have taken evidence on the work of the petitions committee of the Scottish Parliament.<sup>100</sup> Petitions Committees are a feature of most West European legislatures.<sup>101</sup> Their use, though, has a wider relevance than the legislative process—though petitions can help inform Parliament about the strength of feeling on a measure—and are something that we may wish to return to separately.
219. We hope that implementation of our recommendations will ensure better inter-action between Parliament and citizens as part of improving the quality of the legislative process. We would envisage that the situation reported to us by John Greenway in respect of the Joint Committee on the Draft Gambling Bill will become the norm rather than the exception:
- “There was no one within the industry who was unaware of what we were doing and there was no one within the special interest groups who was unaware of what we were doing and what we were asking them to do. In fact, the main complaint was not that they did not know, the main complaint was that they had to get their evidence in with such a very short deadline and they would have liked longer and in fact we gave them longer in the end” (Q 93).
220. Our recommendations are designed to provide more time and to enable citizens to be aware of what changes to the law Parliament is considering and to have some input into that process. Even if they do not take advantage of

<sup>99</sup> See Barry Winetrobe, Vol. II, p.73, para.12.

<sup>100</sup> See, e.g. David Millar, Q 214-217; Alan Beith Q 164.

<sup>101</sup> See P. Norton (ed), *Parliaments and Citizens in Western Europe*, London: Frank Cass, 2002.

the opportunity, it is important that they are aware that the opportunity exists and that parliamentarians welcome their contribution.

## CHAPTER 7: CONCLUSION

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221. We have left to the end perhaps the most important point of all. That is, that quantity should not be confused with quality. There are imperatives within Government which have encouraged a significant growth in the volume of legislation.

### The growth of legislation

222. We have already touched upon the incentive for Ministers to get their “big bills” before Parliament. There is also, as Mark Fisher observed, the “something must be done”—and that the Government must be seen to have done something—mentality which also generates legislation.<sup>102</sup> He also argued that target setting by Government has a similar effect; it passes legislation so that “it can demonstrate that it has met its targets, that it has done things for all these different areas, which is disastrous” (Q 299).
223. It is not just Ministers who wish to get bills enacted. Departments are the biggest generators of bills, with most bills essentially falling in the category of what Ivor Burton and Gavin Drewry once described as “administration” as distinct from “policy” bills.<sup>103</sup> Departments have legislation lined up, often ready to go before the Legislative Programme Committee; if unsuccessful, they may join the list of hand-out bills ready for back-benchers successful in the ballot for Private Members’ Bills. The significant thing about such bills is not their number—they have not become more numerous over the years—but rather their volume. Bills, in Robin Cook’s words, are “getting much, much fatter” (Q 135). It was quite common before the 1990s for less than 1,500 pages of law to be enacted in a parliamentary session; nowadays, it is not unknown for the figure to be nearer 3,000.<sup>104</sup> Departments appear to want to make use of their limited legislative opportunities to cram in as much as possible. The move to greater regulation also encourages greater detail, though much of this is embodied in the growing volume of secondary legislation. This also points to another feature of the nature of legislation: it is not only getting much bigger, it is arguably becoming—as Paul Tyler noted—more complex (Q 295).
224. We are concerned that this growth has taken place without being matched adequately by Parliament’s capacity to scrutinise it effectively. There have been various changes, which we have welcomed, but not enough has been done to enable Parliament to cope with this burgeoning mass of law.
225. We are not concerned here to analyse and comment on the content of all the legislation brought before Parliament—a massive exercise in itself—but we do share the concerns expressed by some witnesses as to the need for such a mass of legislation. This concern was expressed in various ways, some idealistic, some more practical. Mark Fisher told us: “A Parliament of quiet would be, I think, for the public good but I think it is wholly unrealistic to expect it to come about” (Q 299).<sup>105</sup> Douglas Hogg was keen to limit the size of bills and for them to focus on particular problems rather than try to cover

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<sup>102</sup> Q 299; see also Sir Geoffrey Bowman Q 324).

<sup>103</sup> I. Burton and G. Drewry, *Legislation and Public Policy*, London: Macmillan, 1981.

<sup>104</sup> See also the quantum change identified in evidence by Paul Tyler (Q 295).

<sup>105</sup> See also Dr Lewis Moonie, Vol. II, pp.111-112.

the subject in its entirety (QQ 298, 303). Various witnesses, as we have already mentioned, commended the use of “sunset” clauses to limit the life of legislative provisions.

### A “culture of justification”

226. We share with Mark Fisher the view that, whatever the ideal, it is not likely to be achieved in practice. However, we do believe that the recommendations we have advanced will serve, if not to stem the flow of rushed and overweight legislation, at least to inject greater cause for reflection. We hope that our proposals will help engender the culture shift achieved by the Joint Committee on Human Rights. As Jean Corston MP told us, “we have had some success in engendering a *culture of justification* within Government, rather than a tradition of assertion” (Vol. II, pp. 164-167 [emphasis in the original]). We would like to see this become a feature of Government. The discipline of thinking more rigorously about the purpose of legislation and the criteria by which to assess its effectiveness, by subjecting proposals to more rigorous pre-legislative, legislative and post-legislative scrutiny will, we believe, help concentrate the minds of Ministers and officials.
227. As we have suggested, Ministers may think twice about introducing a bill if they are to be assessed not on the basis of what they got on to the statute book but, instead, its effectiveness. If, as a result of considered reflection, they decide to proceed, then the measures themselves are likely to benefit from the parliamentary scrutiny that we have recommended and the input from citizens with an interest in the measure.
228. We would hope that our proposals will make a modest contribution to limiting at least some measures from being brought forward—especially those characterised by Dr Moonie as the “act in haste, repent at leisure” bills (Q 383)—and, more pervasively, ensure that those brought forward are fit for purpose. Law, as we have stressed in opening, affects everyone. It is vital that parliamentary scrutiny of legislation is itself fit for purpose. None of our witnesses was convinced that it is. We agree with them.

## APPENDIX 1: MEMBERSHIP OF THE COMMITTEE

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The Members of the Committee which conducted this inquiry were:

Lord Acton  
 Lord Elton  
 Lord Fellowes  
 Baroness Gould of Potternewton  
 Lord Holme of Cheltenham  
 Baroness Howells of St Davids  
 Lord Jauncey of Tullichettle  
 Lord Lang of Monkton  
 Lord MacGregor of Pulham Market  
 Earl of Mar and Kellie  
 Lord Morgan  
 Lord Norton of Louth (Chairman)

### Declarations of Interest:

Lord Acton  
*Patron of the Hansard Society*

Lord Elton

Lord Fellowes

Baroness Gould of Potternewton  
*Council Member and Executive Member of the Hansard Society and Patron of the Constitution Unit.*

Lord Holme of Cheltenham  
*Chairman of the Hansard Society; Advisory Council of the Constitution Unit.*

Baroness Howells of St Davids

Lord Jauncey of Tullichettle

Lord MacGregor of Pulham Market

Lord Lang of Monkton

Earl of Mar and Kellie

Lord Morgan

Lord Norton of Louth (Chairman)  
*Chairman, Conservative Party Commission to Strengthen Parliament (2000); Member of the Council of the Hansard Society and Director of Studies; Member of the Council of the Constitution Unit; Member of the Study of Parliament Group.*

## APPENDIX 2: LIST OF WITNESSES

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The following witnesses gave evidence. Those marked with \* gave oral evidence. Their submissions can be found in Volume II (HL Paper 173).

Rt Hon the Baroness Amos \*

Rt Hon Margaret Beckett, MP

Rt Hon Alan Beith, MP \*

Rt Hon, the Lord Biffen of Tanat, DL

Professor Robert Blackburn

Professor Vernon Bogdanor

Sir Geoffrey Bowman \*

Mr Simon Burton \*

Rt Hon the Lord Carter \*

Rt Hon Robin Cook, MP \*

Rt Hon Jean Corston, MP

The Lord Craig of Radley

Mr George Cunningham

Sir Michael Davies

Rt Hon the Lord Elis-Thomas, AM

Mr John Greenway, MP \*

The Lord Grenfell \*

Rt Hon Peter Hain, MP \*

Hansard Society (Mr Alex Brazier and Dr Paul Seaward) \*

Mr Oliver Heald, MP

Professor John McEldowney

Professor David Miers

Mr David Millar \*

Dr Lewis Moonie, MP \*

Parliament First (Mr Mark Fisher, MP, Mr Paul Tyler, MP and the Rt Hon Douglas Hogg QC, MP)

Mr Peter Riddell \*

The Lord Roper \*

Dr Meg Russell \*

Mr Michael Ryle \*

Mr Jake Vaughan \*

Rt Hon the Lord Waddington

Rt Hon the Lord Wakeham

Sir Michael Wheeler-Booth



Mr Barry K Winetrobe \*

Sir Nicholas Winterton, MP \*

The following evidence has not been printed, but is available for inspection at the House of Lords Record Office (020 7219 5314)

Andrew Kennon, Head of Scrutiny Unit, Committee Office, House of Commons

Professor Dawn Oliver, Professor of Constitutional Law, University College, London

### APPENDIX 3: CALL FOR EVIDENCE

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The Constitution Committee have been appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”.

The Committee have decided to conduct an inquiry into *Parliament and the Legislative Process*. The Committee invites evidence that analyses the role of Parliament and the relationship of Parliament to citizens in the legislative process, and identifies where change needs to be made.

The Committee especially welcomes submissions that:

- (1) Assess Parliament’s capacity to affect outcomes in one or more of the three basic stages of pre-legislative, legislative, and post-legislative scrutiny;
  - (a) What advances have been achieved over the past decade?
  - (b) To what extent and why is Parliament unable to affect the content of public Bills?
  - (c) To what extent should and does it engage in post-legislative scrutiny?
- (2) Address the relationship between the two Houses of Parliament;
  - (d) Has the use of Joint Committees to examine draft Bills enhanced Parliament’s capacity to influence the content of measures?
  - (e) Should Joint Committees be employed on a regular basis?
  - (f) Could more be done to utilise the combined strengths of the two Houses?
- (3) Consider the relationship between legislative scrutiny and citizens. Studies of legislative scrutiny frequently consider legislative—executive relations to the neglect of legislative—citizen relations.
  - (g) To what extent is it possible for citizens, as individuals or operating collectively as groups, to have some input into parliamentary consideration of legislative measures?
  - (h) Should there be more consultation and structured forms of input?

The Committee will also draw on existing studies of the legislative process. The Committee is working to a tight timetable and the inquiry is confined to primary public legislation.

#### Background

Legislative scrutiny is fundamental to the work of Parliament. Acts of Parliament constitute the law of the land. Parliament alone has the constitutional authority to give assent to such measures. Subjecting those measures to rigorous scrutiny is an essential responsibility of both Houses of Parliament if bad law is to be avoided.

There has been a recognition for many years that the legislative scrutiny undertaken by Parliament has not been as effective as it could and should be. As far back as 1947, L. S. Amery declared that Parliament ‘has become an overworked legislation factory’. In 1993, the Hansard Society Commission on the Legislative Process, chaired by Lord Rippon of Hexham, published a seminal

report, *Making the Law*, identifying deficiencies in the legislative process and making proposals for reform.

How much has been achieved in the period since that report was published? As the volume of legislation increases, has the capacity of Parliament to subject legislation to effective scrutiny increased or has it been overshadowed by greater executive control and measures that are too long and complex to be scrutinized effectively within existing resources? What needs to be done to ensure effective parliamentary scrutiny of legislation?

The Committee will consider primarily the role of the Westminster Parliament in the legislative process, but is happy to receive evidence which draws on experience of other Parliaments and Assemblies.