

**Time for a New Convention:
Parliamentary Scrutiny of
Constitutional Bills 1997–2005**

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Executive Summary

- In the UK, changing the constitution is a simple matter of changing the law. This is subject to only one procedural safeguard: the convention that ‘bills of first class constitutional importance’ take their committee stage on the floor of the House of Commons in a Committee of the Whole House (CWH).
- This briefing assesses the value of this convention by examining the scrutiny of all constitutional bills passed between 1997 and 2005. It identifies 55 bills on constitutional topics in this period, of which 32 took their committee stage on the floor. But bills can also go to CWH if they are very short, or urgent bills. When these categories are taken out, 20 bills are left which went to CWH as bills of first class constitutional importance.
- Of these 20 bills, six were devolution bills; four to authorise referendums; four on elections; and three on the EU. But these categories are not definitive: lesser bills on devolution, elections and the EU were taken in standing committee.
- There is no clear classification of what is a constitutional bill and what is not, and with our unwritten constitution it is impossible to devise one. Whether a bill is deemed to be constitutional is decided only in part by reference to a set of principled criteria. The decision is made not by the Speaker, but by the business managers in the House of Commons, in consultation with the Opposition.
- To minimise the amount of time which constitutional bills take up on the floor, the government tried (unsuccessfully) to split the committee stage of the Government of Wales Bill 1998; but did manage to split the committee stage of three other constitutional bills, with the detailed provisions being taken in standing committee.
- The main benefit of taking bills in CWH is that on average twice as many MPs can speak in the committee stage. The disadvantage is the shorter time available, and much fewer number of amendments moved. Debate in CWH tends to be a continuation of the Second Reading debate, staying with the general principles rather than engaging in detailed scrutiny.
- The CWH is an archaic procedure which adds little by way of serious scrutiny. It should be replaced by a new set of conventions for constitutional bills: preparation in a Green or White Paper; publication of the bill in draft, with pre-legislative scrutiny; detailed scrutiny of the bill by a committee empowered to take evidence; and checklists to ensure more systematic scrutiny.

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Glossary of Parliamentary Committees

House of Lords Committees

HLCC	House of Lords Constitution Committee
HLDPC	House of Lords Delegated Powers and Regulatory Reform Committee
HLEUC	House of Lords European Union Committee
HLPSC	House of Lords Select Committee on Privileges

Joint parliamentary Committees

JCHR	Joint Committee on Human Rights
JCC&B	Joint Committee on Consolidation and Bills

House of Commons Committees

CAC	Constitutional Affairs Committee
ESC	European Scrutiny Committee
FAC	Foreign Affairs Committee
HAC	Home Affairs Committee
NIAC	Northern Ireland Affairs Committee
PASC	Public Administration Select Committee
SAC	Scottish Affairs Committee
WAC	Welsh Affairs Committee

Introduction

Legislation is not the only mechanism of constitutional change, but in quantitative terms it is the most important single source of constitutional law in the United Kingdom. And, at its simplest, changing the constitution is a simple matter of changing the law. Other countries typically require special legislative majorities, referendums or other additional safeguards to ensure that constitutional change is not unduly partisan or rushed. In the United Kingdom the constitution can be changed by a simple Act of Parliament. This is subject to only one procedural safeguard: the convention that “bills of first class constitutional importance” take their committee stage on the floor of the House of Commons.

The purpose of this article is to review the adequacy of the procedural safeguards in the process of constitutional change, by examining the scrutiny of all constitutional Bills passed between 1997 and 2005. It examines first what counts as a “first class” constitutional Bill, measured by the test of taking its committee stage on the floor of the Commons. Are there any conventions as to what counts as a Bill of first class constitutional importance? What are the criteria for deciding? Who decides, and how do they decide? Next, the article looks at the difference made by taking the Commons committee stage on the floor of the House. What value is added in scrutiny terms? How does it compare with the value added by the other specialist committees which now scrutinise Bills in both Houses? The article concludes with some proposals for a new set of conventions to safeguard the process of constitutional change, building on recent improvements to the legislative process more generally.

Bills of “First Class Constitutional Importance”

Until 1997 Erskine May stated that “it is the regular practice for Government bills of first class constitutional importance to be committed to a Committee of the Whole House”.¹ Subsequent editions have modified the convention, saying that it is “common practice”, and adding: “although there is no invariable rule to that effect, nor any settled definition of what ‘first class’ constitutional importance should be taken to mean”.²

The origins of this convention go back to 1945, and the Attlee government’s substantial post-war legislative programme.³ Anticipating that the task of post-war reconstruction would require a heavy legislative programme, the wartime coalition government’s Machinery of Government Committee had recommended that in future all Bills should go to Standing Committee upstairs. But they recognised that: “An exception would have to be made if any Bill of first class constitutional importance were introduced, of the order, for instance, of the Parliament Act 1911 or the Statute of Westminster 1931”.⁴ This sentence was repeated in the post-war Labour government’s memorandum to the 1945–46 Procedure Committee, which also recognised that in addition to the “great measures of the Session”, it had been the

¹ *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st edn, Butterworths, London, 1989), p.479.

² *ibid.* (22nd edn, Butterworths, London, 1997), p.511; *ibid.* (23rd edn, LexisNexis, London, 2004), p.591.

³ This historical section draws on J. Seaton and B. Winetrobe, “The passage of constitutional bills in Parliament” (1998) 4 *Journal of Legislative Studies* 33.

⁴ Machinery of Government Committee, Memorandum circulated to War Cabinet on August 18, 1944, para.5.

practice to retain on the floor of the House short Bills which were unlikely to require a detailed committee stage, and urgent Bills which needed to be passed in a few days.⁵ The Procedure Committee approved the proposal to refer substantially all Bills to Standing Committee, and approved the government's proposed exceptions of short Bills, urgent Bills and Bills of "first class constitutional importance". That is how the convention emerged that Bills of first class constitutional importance should take their committee stage on the floor. After 1997 the convention was challenged by the new Labour government, which attempted to split the committee stage (discussed further below).

From the outset it proved difficult to define exactly which Bills were of "first class constitutional importance", and which were not. The Leader of the House, Herbert Morrison, was pressed about the definition when he gave evidence to the Procedure Committee in 1945, and repeated the two examples of the Parliament Act 1911 and the Statute of Westminster 1931. He went on to add:

"I personally would say that certainly the Emergency Powers Act of 1930 is another. I should have thought . . . that the big Franchise Bill, before the general election of 1929, was another. A big Redistribution Bill would be another . . . The kind of thing I mean is something that will make a material change in the constitution . . . You cannot play about with the British Constitution in a Committee upstairs, to put it colloquially."⁶

In a House of Commons Research Paper of 1997, Seaton and Winetrobe identified some 35 constitutional Bills which took their committee stage on the floor of the House of Commons between 1945 and 1997: an average of just under one constitutional Bill per annum.⁷ They include eight Bills on the European Communities, six Bills on Northern Ireland, four on elections and the franchise, and four on reform of the House of Lords. Attempting to summarise what counts as a constitutional Bill, they suggest that: "Any proposed legislation relating to the basic existence of the United Kingdom as a political and geographical entity (such as Northern Ireland or devolution legislation); the structure, operation and powers of Parliament and the Crown (in its political, official and monarchical contexts; elections and the franchise; emergency powers; innovations such as referendums or bills of rights), and major issues of foreign affairs (for example EU treaties) would generally be regarded as *prima facie* constitutional matters."⁸

In more recent times, what has counted as a "first class constitutional measure"? The analysis behind this article begins by drawing up a long list of Bills passed between 1997 and 2005 which *prima facie* could be regarded as constitutional. Following Seaton and Winetrobe, our initial criteria were to include those measures affecting the system of government (parliament, the executive, the judiciary, the monarchy); the structure of the state (devolution, local government); elections and the franchise; nationality and immigration; human rights and civil liberties; international and EU relations; emergency powers. The result is the long

⁵ Procedure Committee, First Report (1945–46 HC 9), Government Memorandum para.5.

⁶ *ibid.*, pp.22–3.

⁷ *The Commons committee stage of "constitutional bills"* (HC Research Paper 97/53), App. Of "constitutional bills" since 1945.

⁸ Seaton and Winetrobe, fn.3 above, p.35.

list of 55 Bills to be found in Table 1, which records the nature and amount of parliamentary scrutiny devoted to each Bill. This was a period of unprecedented constitutional change, which offers part of the explanation why the list is so long.

The table shows the total time taken before each Bill was passed (col.2); the total time devoted to debating the Bill on the floor of the House of Commons (including all stages), and whether committee stage was taken on the floor or in Standing Committee (col.3); whether the Bill was subject to a guillotine or programme (timetabling) motion (col.5); the nature of the Commons committee stage, the range of speakers, number of amendments moved, and committee sitting hours (col.6); the time devoted to debating the Bill in the Lords, and whether the committee stage there was taken on the floor or in Grand Committee (col.4); the other specialist committees which scrutinized the Bill (col.7); the policy objectives of the Bill, including whether the Bill was implementing a treaty or international agreement (col.8). Table 2, which appears further on, records the public and pre-legislative scrutiny devoted to each measure before its introduction into Parliament.

Two categories between them account for half the total list of 55 Bills which appear in Table 1. There are 14 Bills on Northern Ireland, and 15 on elections (of which five cover electoral matters in Northern Ireland). Nine of the Bills cover devolution in the rest of the United Kingdom (Scotland, Wales, English regions, London). Six are on the European Union (of which three give effect to Treaty amendments). Four provide for referendums, and four are on emergency powers.

Column 3 in Table 1 indicates whether a Bill took its Commons committee stage on the floor in a Committee of the Whole House (“CWH”), or was referred upstairs to Standing Committee (“SC”). There are 32 Bills in the list which took their committee stage on the floor (of which three were split, taking part of the committee stage on the floor, and part upstairs). Again, Northern Ireland (eight Bills) and elections (nine, of which four were on elections in Northern Ireland) each account for a quarter of the total of CWH Bills. Devolution in Great Britain (seven Bills) accounts for another quarter, and five Bills on Europe took their committee stage on the floor.

Not all these Bills necessarily took their committee stage on the floor because they were counted as “first class constitutional measures”. As already noted, there are two other recognised grounds on which a Bill can remain on the floor for its committee stage: because it is urgent, or because it is so short that it does not require detailed scrutiny. The reasons why a Bill remains on the floor are not always explained in the record of parliamentary proceedings, but it can be surmised that half a dozen Bills took their committee stage on the floor mainly because they were short Bills.⁹ Most EU Treaty changes are made by short Bills, but they can be big in constitutional substance. EU (Finance) Bills are also short, but may sometimes be controversial; they have all taken their committee stage on the floor since the first such Bill in 1985.

⁹ Disqualifications Act 2000 (five clauses), European Communities (Finance) Act 2001 (two clauses), House of Commons (Removal of Clergy Disqualification) Act 2001 (two clauses), Northern Ireland Arms Decommissioning (Amendment) Act 2002 (two clauses), European Union (Accessions) Act 2003 (three clauses), Scottish Parliament (Constituencies) Act 2004 (four clauses).

The number of Bills which stayed on the floor for the committee stage on grounds of urgency is rather longer, with 10 Bills which were passed in a matter of weeks not months. The average time for non-urgent Bills listed in Table 1 to complete their passage is seven months (see col.2). The 10 urgent Bills were passed within one to four weeks.¹⁰ These urgent measures fall into three categories. First, Northern Ireland has seen much urgent legislation in recent years. This includes the urgent measures to authorise the referendum and first elections to the Assembly immediately after the Belfast Agreement in 1998; to suspend the Assembly in the Northern Ireland Act 2000; to postpone the forthcoming Assembly elections in two separate Acts of 2003; and to help get the peace process back on track in the Monitoring Commission Act of the same year. A further reason why Northern Ireland Bills are taken on the floor of the House is that they are rarely controversial between government and opposition, and any Standing Committee can provide little outlet for Northern Ireland M.P.s to take part.

The second category amongst urgent Bills is other emergency legislation on elections, seen in the run-up to the general elections of both 2001 and 2005, as well as the emergency legislation on elections in Northern Ireland. Third, there are emergency measures to control terrorism, in the 2001 Act rushed through after the terrorist attacks in New York of September 11, and the 2005 Act rushed through in response to the judgement of the House of Lords in *A v Home Secretary*.¹¹ But an emergency measure can also be an important measure, and in the list below there are included four urgent measures Northern Ireland (Elections) Act 1998, Northern Ireland Act 2000, and the two Anti-Terrorism Acts of 2001 and 2005) in the list of Bills which can be considered to be of first-class constitutional importance.

When the short Bills and the urgent Bills are taken out, there is left the following list of 20 Bills which we can be reasonably confident took their committee stage on the floor of the House because they were deemed to be measures of first class constitutional importance. They are grouped into broad categories: some Bills (such as the Northern Ireland (Elections) Act, which authorised the referendum on the Belfast Agreement as well as the first Assembly elections), appear in more than one category.

Devolution

- Scotland Act 1998
- Government of Wales Act 1998
- Northern Ireland (Elections) Act 1998
- Northern Ireland Act 1998
- Greater London Authority Act 1998
- Northern Ireland Act 2000

¹⁰ Northern Ireland (Elections) Act 1998 (17 days); Northern Ireland Act 2000 (7 days); Election Publications Act 2001 (15 days); Elections Act 2001 (7 days); Anti-Terrorism, Crime and Security Act 2001 (32 days); Northern Ireland Assembly Elections Act 2003 (8 days); Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003 (9 days); Northern Ireland (Monitoring Commission) Act 2003 (11 days); Electoral Registration (Northern Ireland) Act 2003 (16 days); Prevention of Terrorism Act 2005 (19 days).

¹¹ [2004] UKHL 56; [2005] 2 A.C. 68.

Table 1 PARLIAMENTARY SCRUTINY OF CONSTITUTIONAL BILLS 1997-2005

Bill	Total time taken ^a	Total hours of debate ^b / Nature of committee stage		Guillotine or Programme Motion ^c	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Referendum (Scotland and Wales) Act 1997	78 days	26 CWH	27 CWH	GM	46 speakers (20 English, 13 Scottish, 13 Welsh), 4 amendments moved. 2 sittings: 8 hrs 15 mins	HLDPC <i>1st Report 97-98</i>	Authorise pre-legislative referendums in Scotland and Wales
Northern Ireland (Emergency Provisions) Act 1998	160 days	16 SC A	5 CWH	/	11 speakers (7 English 4 NI), no amendments moved. 1 sitting,: 9 hrs.	HLDPC <i>10th Report 97-98</i>	Postpone expiry of Northern Ireland (Emergency Provisions) Act 1996
Scotland Act 1998	353 days	92 CWH	107 CWH	PM	71 speakers (50 English, 18 Scottish, 2 Welsh, 1 NI), 51 amendments moved. 8 sittings: 47 hrs 35mins	HLDPC <i>18th, 24th Reports 97-98</i>	Establish Scottish Parliament
Govt of Wales Act 1998	249 days	81 CWH	56 CWH	PM	53 speakers (22 English, 5 Scottish, 26 Welsh), 30 amendments moved. 7 sittings: 39 hrs 35 mins	HLDPC <i>Special Report (18.11.98), 18th, 24th Reports 97-98 WASC 1st, 3rd Reports, 2nd Special Report, 97-98</i>	Establish Welsh Assembly
Northern Ireland (Elections) Act 1998	17 days	6 CWH	4 CWH	PM	18 speakers (8 English, 9 NI, 1 Scottish), 6 amendments moved. 1 sitting: 3 hrs 3 mins	HLDPC <i>17th Report 97-98</i>	Authorise referendum and first elections to Northern Ireland Assembly
Northern Ireland Act 1998	128 days	26 PM CWH	36 CWH	PM	36 speakers (17 English, 6 Scottish, 1 Welsh, 12 NI), 31 amendments moved. 6 sittings: 21 hrs 31 mins	HLDPC <i>32nd, 33rd Reports 97-98</i>	Establish Northern Ireland Assembly Belfast Agreement 1998
Human Rights Act 1998 [HL]	383 days	41 CWH	40 CWH	PM	58 speakers (50 English, 5 Scottish, 2 Welsh, 1 NI), 18 amendments moved. 5 sittings: 26 hrs 2 mins	HLDPC <i>6th, 33rd Reports 97-98</i>	Incorporate ECHR into UK law
European Communities (Amendment) Act 1998	225 days	38 CWH	46 CWH	GM	66 speakers (62 English, 1 Scottish, 3 Welsh), 8 amendments moved. 5 sittings: 26 hrs 16mins	HLDPC <i>11th Report 97-98</i> HLEU <i>3rd Report 97-98</i> HLEU <i>10th Report 97-98</i> , FAC, <i>1st Report 97-98</i>	Incorporate Treaty of Amsterdam October 1997

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Bank of England Act 1998	178 days	38 SC D	14 GC	--	18 speakers (15 English, 3 Scottish), 49 amendments moved 11 sittings: 24 hrs 8 mins	HLDPC 11 th Report 97-98 Treasury Committee <i>Accountability of Bank of England</i> 1 st Report (HC 282) <i>Minutes of Evidence</i> , 5 November (HC 309)	Constitution and monetary independence of Bank of England
GLA Referendum Act 1998	118 days	28 CWH	11 CWH	--	33 speakers (19 London, 3 SW, 5 SE, 3 EE, 2 NW, 1 WM), 8 amendments moved. 2 sittings: 12 hrs 28 mins	HLDPC 9 th Report 97-98	Authorise referendum on GLA
GLA Act 1998	345 days	142.5 SC A CWH	104 CWH	PM/GM	CWH: 29 speakers (24 London, 2 NW, 3 EE), 9 amendments moved. 2 sittings: 9 hrs 30 mins SC: 25 speakers (23 London, 1 Welsh, 1 WM), 203 amendments moved 26 sittings: 102 hrs 35 mins	HLDPC 16 th Report 97-98	Establish Greater London Authority
Data Protection Act 1998	183 days	25 SC D	16 CWH	--	13 speakers (13 English), 98 amendments moved. 12 sittings: 22 hrs	HLDPC 11 th Report, 97-97	Give effect to EC Data Protection Directive (95/46/EC)
Registration of Political Parties Act 1998	191 days	9 SC	6 CWH	--	8 speakers (8 English), 15 amendments moved. 3 sittings: 5 hrs	HLDPC 29 th Report 97-98 HAC 4 th Report 97-98	Provision for legal recognition of political parties
European Parliamentary Elections Act 1999	81 days	17 CWH	8 CWH	GM	58 speakers (51 English, 5 Scottish, 2 NI), 12 amendments moved. 4 sittings: 17 hrs	HLDPC 15 th Report 97-98 JCC&B, 1 st Report 01-02	Change voting system to regional list PR
Access to Justice Act 1999	238 days	43 SC E	26 CWH	--	17 speakers (16 English, 1 Welsh), 44 amendments moved. 8 sittings: 26 hrs	HLDPC 5 th , 29 th Reports 98-99	Establish Legal Service Commission, reform legal aid, rights of audience, family court reform

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
House of Lords Act 1999	297 days	40 CWH	103 CWH	--	72 speakers (66 English, 4 Scottish, 2 Welsh), 6 amendments moved. 4 sittings: 20 hrs 29 mins	HLPSC 1 st , 2 nd Reports 98-99 HLDPC 10 th Report 98-99	Remove hereditary peers
Disqualifications Act 2000	344 days	32 CWH	8 CWH	GM	71 speakers: (62 English, 7 NI, 2 Scottish), 15 amendments moved. 5 sittings: 26 hrs.	None	Allows members of the Irish parliament to sit in the House of Commons and the devolved assemblies
Northern Ireland Act 2000	7 days	7 CWH/RS	1 CWH	--	15 speakers (8 English, 5 NI, 1 Scottish, 1 Welsh), 2 amendments moved. 1 sitting: 34 mins	HLDPC 2 nd , 3 rd , 12 th Reports 99-00	To provide for suspension of devolved government in Northern Ireland
Local Government Act 2000 [HL]	247 days	64 SC A	22 CWH	PM	15 speakers (1 NE, 3 SE, 2 SW, 2 NW, 1 Y&H, 1 EM, 2 EE, 1 WM, 1 London, 1 Welsh), 119 amendments moved. 16 sittings: 27 hrs	HLDPC 2 nd , 3 rd Reports 99-00	Elected Mayors, separate executives
Police (Northern Ireland) Act 2000	192 days	65 SC B	13 CWH	--	8 speakers (1 English, 4 NI, 2 Scottish, 1 Welsh), 51 amendments moved. 11 sittings: 45 hrs	HLDPC 27 th Report 00-01	To improve policing and its regulation in Northern Ireland
Freedom of Information Act 2000	377 days	85 SC B	17 CWH	GM	17 speakers (16 English, 1 Scottish), 82 amendments moved. 14 sittings: 47 hrs	PASC 3 rd Report 97-98, 3 rd , 5 th Reports 98-99, 1 st Report 99-00. HLDPC 14 th Report HL <i>ad hoc</i> Select Committee special report 29 July 1999	To create new statutory right of access to information
Political Parties, Elections and Referendums Act 2000	337 days	68 SC G CWH	61 CWH	GM	<u>CWH</u> : 32 speakers (27 English, 5 Scottish), 23 amendments moved. 2 sittings: 5 hrs 36 mins <u>SC</u> : 17 speakers (16 English, 1 Scottish), 66 amendments moved. 17 sittings: 33 hrs	HLDPC 11 th Report	Establish Electoral Commission

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Terrorism Act 2000	232 days	37 SC D	22 CWH	--	11 speakers (9 English, 1 Scottish, 1 NI), 57 amendments moved. 9 sittings: 19 hrs	HLDPC 12 th , 13 th Reports 99-00 CSPL, 5 th Report	Amend and extend existing counter-terrorism legislation
Representation of the People Act 2000	112 days	34 CWH	17 CWH	PM	47 speakers (41 English, 3 Scottish, 1 Welsh, 2 NI), 16 amendments moved 3 sittings: 17 hrs	HAC 4 th Report 97-98 'Electoral Law and Administration', September 1998	Introduce rolling voter registration and experiments in new voting methods to make voting easier
Election Publications Act 2001 [HL]	15 days	1 CWH	1 No Cttee stage debate in HL	GM	No speakers, no amendments moved	HLDPC 18 th Report 00-01	To postpone the operation of requirements introduced by PPERA 2000
House of Commons (Removal of Clergy Disqualification) Act 2001	78 days	10 CWH	2.5 CWH	PM	17 speakers (16 English, 1 Scottish), 16 amendments moved. 1 sitting: 3 hrs 30 mins	None	Removes the disqualification of clergymen from membership of the House of Commons
Elections Act 2001	7 days	3 CWH/RS	3 CWH	GM	No speakers, no amendments moved. Negligible CWH hrs	HLDPC 18 th Report 00-01	To defer local govt elections to coincide with general election on 5 May 2001
European Communities (Finance) Act 2001	167 days	9 CWH	1 No cttee stage debate in HL	PM	4 speakers (2 English, 2 Scottish), No amendments moved. 1 sitting: 1 hr	JCHR 9 th Report 01-02 ^d HLEU 36 th Report 99-00	To reduce Member State VAT contributions following Council of Ministers decision Sept 2000
Anti-Terrorism, Crime and Security Act 2001	32 days	27 CWH	27 CWH	PM	77 speakers (68 English, 4 Scottish, 5 Welsh), 16 amendments moved. 2 sittings: 15 hrs	JCHR, 2 nd and 5 th Reports 01-02 HLDPC, 1 st Report 01-02 HAC 1 st Report 01-02	Series of anti-terrorism measures

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Northern Ireland Arms Decommissioning (Amendment) Act 2002	82 days	12 CWH/RS	1 CWH	--	21 speakers (13 English, 1 Welsh, 7 NI), 1 amendment moved. 1 sitting: 5 hrs	JCHR, <i>9th Report 01-02</i>	To extend the period of amnesty
European Communities (Amendment) Act 2002	251 days	30 CWH	7 CWH	--	47 speakers (37 English, 6 Scottish, 3 Welsh, 1 NI), 9 amendments moved. 3 sittings: 17 hrs	JCHR, <i>9th Report 01-02</i> HLDPC <i>3rd Report 01-02</i> , <i>8th Report 99-00</i> FAC, <i>3rd Report, Session 98-99</i> , <i>6th Report 99-00</i> , <i>5th Report 00-01</i>	To ratify the Treaty of Nice signed by UK govt in Feb 2001
Electoral Fraud (Northern Ireland) Act 2002	308 days	29 SC D	1 CWH	PM	16 speakers (12 English, 3 NI, 1 Welsh), 12 amendments moved. 4 sittings: 18 hrs	JCHR, <i>9th Report 01-02</i> NIAC 'Electoral Malpractice in Northern Ireland' 97-98	Additional safeguards against electoral fraud
Justice (Northern Ireland) Act 2002	219 days	67 SC F	14 CWH	PM	23 speakers (18 English, 3 NI, 1 Welsh, 1 Scottish), 70 amendments moved. 12 sittings: 34 hrs	JCHR <i>16th Report 01-02</i> HLCC <i>5th Report 01-02</i> HLDPC <i>16th Report 01-02</i>	Changes in Northern Ireland criminal justice system
Nationality, Immigration and Asylum Act 2002	178 days	56.5 SC E	66 CWH	PM	16 speakers (16 English), 108 amendments moved. 10 sittings: 29 hrs.	HLDPC <i>24th, 26th, 28th Reports 01-02</i> HLCC <i>6th, 7th Reports 01-02</i> JCHR <i>16th, 17th, 21st Reports 01-02</i>	Makes provision about nationality, immigration and asylum
Sex Discrimination (Election Candidates) Act 2002	122 days	9.5 SC A	3 No cttee stage debate in HL	PM	14 speakers (12 English, 1 Scottish, 1 Welsh), 10 amendments moved. 2 sittings: 3 hrs 30 mins	HLDPC <i>6th Report 01-02</i> HLCC <i>3rd Report 01-02</i> JCHR <i>4th 9th Report 01-02</i>	Excludes from the Sex Discrimination Act 1975 certain matters relating to selection of candidates by political parties

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Northern Ireland Assembly Elections Act 2003	8 days	4 CWH	1 CWH	PM	2 speakers (1 NI, 1 Scottish), 1 amendment moved. 1 sitting: 20 mins	JCHR, 7 th Report 02-03	To postpone election date for 2003 NI Assembly elections
Police (Northern Ireland) Act 2003 [HL]	125 days	38 PSC SC E	5 Grand Committee	--	20 speakers (12 English, 3 NI, 3 Scottish, 2 Welsh), 21 amendments moved 9 sittings: 22 hrs	HLDPC 20 th Report 97-98 NIAC 2 nd Report 02-03 JCHR, 3 rd Report 02-03	To implement more fully the recommendations of the Patten Report
Regional Assemblies (Preparation) Act 2003	155 days	62 PSC SC A CWH	22 CWH	PM	<u>CWH</u> : 28 speakers (7 NE, 6 NW, 4 SW, 3 SE, 2 London, 1 Y&H, 1 EM, 2 WM, 2 EE), 4 amendments moved 1 sitting: 5 hrs 34 mins <u>SC</u> : 13 speakers (4 SW, 3 SE, 2 NW, 1 NE, 1 Y&H, 1 WM, 1 London), 31 amendments moved. 9 sittings: 40 hrs	HLCC 4 th Report 02-03 JCHR, 1 st Report 02-03	Authorise referendums on Regional Assemblies in English regions
European Parliament (Representation) Act 2003	138 days	31 PSC SC A	2 Grand Committee	PM	14 speakers (3 WM, 4 NW, 4 NE, 1 SW, 1 EE, 1 London), 25 amendments moved. 6 sittings: 19 hrs	HLCC 5 th Report 02-03 HLDPC 11 th report 02-03 HLEU 21 st Report 98-99 FAC 3 rd Report 98-99 JCHR, 1 st Report 02-03	Reduce number of UK seats in European Part from 87 to 78, and enfranchise Gibraltar
Northern Ireland Assembly (Elections and Periods of Suspension) Act 2003	9 days	5 CWH/RS	1 CWH	GM	No speakers – clauses passed without debate, no amendments moved 1 sitting: 34 mins	HLDPC 20 th Report 02-03 JCHR, 12 th Report 02-03	Urgent legislation to postpone Assembly elections indefinitely
Northern Ireland (Monitoring Commission) Act 2003 [HL]	11 days	2 CWH /RS	2 CWH	--	14 speakers (3 English, 2 Scottish, 1 Welsh, 8 NI), 2 amendments moved. 1 sitting: 2 hrs	HLDPC 23 rd Report 02-03 JCHR 17 th Report 02-03	To implement agreement between UK and Irish governments
European Union (Accessions) Act 2003	198 days	3 CWH/RS	1 CWH	PM	15 speakers (8 English, 2 Scottish, 4 Welsh, 1 NI), 1 amendment moved. 1 sitting: 3 hrs	HLEU 10 th Report 97-98 JCHR, 12 th Report 02-03	To give effect in UK law to EU enlargement, increasing EU from 15 to 25 member states

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Courts Act 2003 [HL]	358 days	24 SC D	46 CWH	--	12 speakers (11 English, 1 Welsh), 45 amendments moved. 7 sittings: 13 hrs	CAC, 1st Report 02-03 JCHR, 1 st , 4 th Reports 02-03	To modernise criminal justice system through unified courts system
Asylum and Immigration (Treatment of Claimants) Act 2004	237 days	46.25 SC B	41 CWH	PM	18 speakers (14 English, 2 Scottish, 2 Welsh), 52 amendments moved. 12 sittings: 29 hrs 15 mins.	HLDPD 12 th , 15 th , 17 th , 19 th Reports 03-04 JCHR 3 rd , 5 th , 13 th , 14 th , 17 th Reports 03-04 HAC 1 st , 2 nd Reports 03-04	Makes provision about asylum and immigration
European Parliamentary and Local Elections (Pilots) Act 2004	197 days	21 SC B	7 Grand Committee	PM	20 speakers (14 English, 5 Scottish, 1 Welsh), 17 amendments moved. 5 sittings: 10 hrs	HLDPD 4 th Report 03-04 HLCC 1 st Report 03-04 JCHR 17 th Report 02-03, 8 th Report 03-04	Enable experiments with more flexible methods of voting
Scottish Parliament (Constituencies) Act 2004	238 days	5 CWH/RS	2 CWH	PM	29 speakers (25 Scottish, 2 English, 2 Welsh), 3 amendments moved. 1 sitting: 4 hrs 55 mins	SAC, 1 st Report 03-04 (HC 77) JCHR, 8 th Report 03-04	Maintain Scottish Parliament at 129 members
Justice (N. Ireland) Act 2004 [HL]	161 days	20 SC D RS	4 CWH	PM	19 speakers (12 English, 3 Welsh, 2 NI, 2 Scottish), 19 amendments moved. 4 sittings: 10 hrs	JCHR 4 th Report 03-04 HLCC 4 th Report 03-04	Implement commitments of the Joint Declaration between UK and Ireland, May 2003
Civil Contingencies Act 2004	141 days	29 SC F	34 CWH	PM	15 speakers (12 English, 2 Scottish, 1 Welsh), 41 amendments moved. 8 sittings: 26 hrs	Defence Cttee 7 th Report, 02-03 HLCC 8 th Report 03-04 HLDPD 25 th Report 03-04 JCHR 4 th and 8 th Reports 03-04	Provide for unified executive control in a state of emergency
Public Audit (Wales) Act 2004 [HL]	295 days	7 SC D	10 CWH	--	14 speakers (8 Welsh, 5 English, 1 Scottish), 22 amendments moved. 2 sittings: 5 hrs	WAC 5 th Report 02-03 Welsh Assembly (several sittings) JCHR, 3 rd Report 03-04	To consolidate the audit arrangements for public bodies in Wales

Bill	Total time taken	Total hours of debate / Nature of committee stage		Guillotine or Programme Motion	Commons committee stage: range of speakers, number of amendments moved, and sitting hours	Specialist committee scrutiny	Policy objective
		House of Commons (CWH or SC)	House of Lords (CWH or GC)				
Constitutional Reform Act 2005 [HL]	396 days	24 CWH	15 CWH	PM	32 speakers (27 English, 3 Scottish, 2 NI), 9 amendments moved. 3 sittings: 18 hrs	HLCC <i>11th Report 03-04</i> HLDPC <i>5th Report 04-05</i> JCHR <i>23rd Report 03-04, 7th and 13th Reports 04-05</i> CAC, <i>2nd Report 02-03, 1st Report 03-04, 3rd Report 04-05</i> HL ad hoc select committee	Abolish office of Lord Chancellor, establish new Supreme Court, Judicial Appointments Commission
Electoral Registration (Northern Ireland) Act [HL] 2005	16 days	3 CWH/RS	3 CWH/RS	PM	7 speakers (3 English., 3 NI, 1 Welsh), 2 amendments moved. 1 sitting: 1hr	NIAC, <i>1st Report 04-05</i> (HC 131) JCHR, <i>8th Report 04-05</i>	Allow those who failed to register in Dec 2004 to be carried into register
Public Services Ombudsman (Wales) Act 2005 [HL]	134 days	1.5 CWH	6.5 Grand Committee	PM	4 speakers (2 English, 2 Welsh), 2 amendments moved. 1 sitting: 30 mins.	HLDPC <i>4th Report 04-05</i> WAC 3rd Report 04-05 JCHR <i>13th Report 04-05</i>	Establishes Public Services Ombudsman for Wales
Prevention of Terrorism Act 2005	18 days	22 CWH	29 CWH	PM	45 speakers (37 English, 6 Scottish 2 Welsh), 1 amendment moved. 1 sitting: 6 hrs	HLCC <i>3rd Report 04-05</i> HLDPC, <i>12th, 13th Reports 04-05</i> JCHR <i>9th, 10th Reports 04-05</i> CAC, Government memoranda, HC323-II, 2004-05 Session	Introduce control orders to restrict suspected terrorists who cannot be deported
Inquiries Act 2005 [HL]	133 days	14 PM SC B	9.5 GC	PM	10 speakers (8 English, 2 Scottish), 10 amendments moved. 3 sittings: 7 hrs	PASC <i>1st Report 04-5</i> JCHR, <i>4th, 8th Reports 04-05</i>	Statutory framework for operation of government inquiries

Notes:

^a Total time taken is calculated from the date of the Bill's introduction and first reading until date of Royal Assent.

^b Total hours of debate is the sum of all debate time spent at every stage of the Bill's progress through each House; second reading, committee stages (whether CWH or SC) report stage, third reading, and consideration of amendments from the other House.

^c Most Bills are subject to either a Programme Motion (PM) or a Guillotine Motion (GM) which control the amount of time spent in debate, although some bills do experience both.

Referendums

- Northern Ireland (Elections) Act 1998
- Referendums (Scotland and Wales) Act 1997
- Greater London Authority (Referendum) Act 1998
- Regional Assemblies (Preparations) Act 2003

Elections

- Northern Ireland (Elections) Act 1998
- European Parliamentary Elections Act 1999
- Political Parties, Elections and Referendums Act 2000
- Representation of the People Act 2000

Europe

- European Communities (Amendment) Act 1998
- European Communities (Amendment) Act 2002
- European Union (Accessions) Act 2003

Human rights

- Human Rights Act 1998

Lords reform

- House of Lords Act 1999

New Supreme Court, Lord Chancellor

- Constitutional Reform Act 2005

Emergency legislation

- Anti-Terrorism, Crime and Security Act 2001
- Prevention of Terrorism Act 2005

Devolution accounts for one-third of the Bills in the list; or if one includes the four referendum Bills, all on devolution, it accounts for one-half. Four Bills were on the regulation of elections, three were implementing EU treaties (Amsterdam, Nice and Athens), and two were emergency legislation. But even in a time of unprecedented constitutional change, 20 Bills of “first class constitutional importance” in the space of eight years is a surprisingly large number. It is hard to resist the inference that the definition may have become diluted over the years. Or if it has not, it is worth asking whether some of the more frequent kinds of constitutional reform (such as referendums, or the regular legislation on Europe) should not now be treated in a more routine way.

Few other countries change their constitutions two and a half times a year, and not all these Bills can be said to equate in importance to the Parliament Act 1911 or the Statute of Westminster 1931. If those two Acts provide the yardstick, there are only six Bills which can properly be said to be of “first class constitutional importance”, and which would be recognised as fundamental constitutional changes in other countries. These are the three big devolution Bills, to Scotland, Wales and Northern Ireland, which created quasi-federal structures in those parts of the United Kingdom; the Human Rights Act, which introduced a directly enforceable Bill of Rights; the House of Lords Act, which removed half the members of the second chamber; and the Constitutional Reform Act,

which created the new Supreme Court and introduced greater separation of powers between the executive and the judiciary.

What are the criteria for deciding what now counts as a constitutional Bill?

Looking at the long list of 55 Bills in Table 1, are there any patterns discernible which might indicate by subject-matter which Bills are likely to take their committee stage on the floor, and which are likely to be referred to Standing Committee upstairs? There are some strong patterns, reflecting the categories mentioned above, but other cases are less clear-cut. The patterns are illustrated in Figure 1, which shows the categories falling into three broad groups.

Figure 1: Categories of Bill taken in Committee of the Whole House and referred to Standing Committee

Category of Bill	Committee of the Whole House	CWH Urgent Bills	CWH Short Bills	Standing Committee
First class constitutional				
Devolution	●●●●●●●●●●		●	●●●
Referendums	●●●●			
EU	●●●●●		●●	●
Parliament	●●●			
Human Rights	●			
Some first class, some not				
Elections	●●●●●●●●	●●●●●●		●●●●●●
Northern Ireland	●●●●●●●●	●●●●●●	●	●●●●●●
Emergencies	●●	●●		●●●
Not first class constitutional				
Courts	●			●●●●●
Watchdogs	●			●●●
Immigration and Asylum				●●
FOI and DP				●●

*Note: some Bills are scored more than once. Devolution legislation for Northern Ireland is scored under Devolution and Northern Ireland. Electoral legislation for Northern Ireland is scored under Elections and Northern Ireland. Urgent Bills and Short Bills have also been counted under CWH. Bills whose committee stage was split are counted under CWH and SC.

The first group are Bills of “first class” constitutional importance with a strong presumption to have their committee stage on the floor. All the devolution legislation was taken on the floor, with the exception only of regional government in England.¹⁰ All the devolution referendum Bills were also taken on the floor. All the Bills changing the composition of Parliament were taken on the floor, as was the Human Rights Bill. Most of the legislation on the European Union has also been taken on the floor of the House.

¹⁰ The Regional Development Agencies Act 1998 was referred to standing committee, and the Regional Assemblies (Preparations) Act 2003 was split. The government’s attempt to split the Government of Wales Bill 1998 was not carried through.

The second group comprising legislation on elections, Northern Ireland, and emergencies, appears to comprise almost equal numbers of “first class” and “second class” constitutional Bills. But most of the Bills taken in CWH were also urgent Bills (Figure 1, col.3). If urgency was the reason for most of them staying on the floor, then the normal presumption in these three categories would appear to be in favour of Standing Committee. Non-urgent legislation on elections, Northern Ireland and emergencies would appear generally not to be of first class constitutional importance.

With the third group, at the bottom of the table, the presumption is strongly against their counting as “first class” constitutional Bills. Legislation on the court system, on nationality, immigration and asylum, and on freedom of information and data protection was all referred to Standing Committee. The only exceptions taken in CWH were the Constitutional Reform Act, creating the new Supreme Court, and the Act creating the new Public Services Ombudsman in Wales.

A final point to make is how difficult it is to deduce any reliable rules. There is no clear classification of what is a constitutional Bill and what is not, and with our unwritten constitution it is impossible to devise one. Electoral matters *per se* are not necessarily constitutional. The Freedom of Information Act was not counted as of first class constitutional importance; nor was the Act conferring independence on the Bank of England. Whether a Bill is deemed to be constitutional is decided only in part by reference to a set of principled criteria, because the decision is made by the business managers in the House of Commons.

Who decides what counts as a constitutional Bill, and how?

In theory it is a matter for the House of Commons to decide, at the close of the Second Reading debate, whether to refer a Bill upstairs to Standing Committee or to take the committee stage on the floor. In practice it is the government’s business managers who decide, in negotiation with the opposition through the usual channels. The default option is that a Bill is referred to Standing Committee, and it is for the government to propose any other outcome. If the House divides on the issue, the government’s majority generally ensures that the government’s view prevails. That Parliament has no formal role independent of the government can be seen in the ruling given by the Speaker in relation to the British Nationality Bill 1981. When asked to give a ruling on whether the Bill was a constitutional Bill, he declined to do so, saying:

“The rules of the House contain no definition of what is, or what is not, a constitutional Bill, nor do they lay down any special procedures for the Chair to enforce in relation to such Bills.”¹¹

The government’s main concern is to minimise the amount of time which Bills spend on the floor of the House, which is prime parliamentary time. Just how much of this prime parliamentary time can be consumed in a CWH can be seen in the number of sitting days devoted to the committee stage of some of the major constitutional Bills in the past, especially when the government had a slender majority. Crossman’s attempt to reform the House of Lords in the Parliament (No.2) Bill 1968–69 took up 11 days in CWH before the Bill was abandoned. The Scotland and Wales Bill 1976–77 took up 11 days in

¹¹ *Hansard*, HC Vol.996, col.750 (January 12, 1981).

committee on the floor before it too was withdrawn. After the Bill was divided, the Scotland Bill 1978 took 14 days in committee, and the Wales Bill 1978 nine days. Mindful of these past difficulties, the Constitution Unit in a 1996 report recommended splitting the committee stage of constitutional Bills, taking a few of the main clauses of principle on the floor, but leaving most of the detailed scrutiny to a committee upstairs.¹²

Splitting the committee stage of constitutional Bills

The new Labour government tried in 1997 to split the committee stage of the first devolution Bill, which was the Government of Wales Bill. At the close of Second Reading the government moved that the Bill be partially taken in a CWH, proposing that six clauses be scrutinised on the floor, with the remainder referred to Standing Committee.¹³ The debate provoked a fierce exchange between government and opposition about breaching the convention:

“Win Griffiths: From the outset, it was the Government’s proposition that consideration of the Bill would be split between a Committee of the whole House and Standing Committee. My right hon. Friend the Secretary of State made it clear yesterday that we intended that the clauses which raised key points of principle would be debated by a Committee of the whole House. That remains our position . . .

Michael Ancram: The Government of Wales Bill is the first constitutional Bill ever to be divided in such a way. Such division is a very serious breach of constitutional convention. It casts aside the main check that we have in this Parliament on constitutional legislation. Where other legislatures have weighted votes or referendums with thresholds, in this House we have always taken such Bills in Committee on the Floor of the House so that they could be properly scrutinised.”¹⁴

All the parties represented in Wales (Labour, Liberal Democrats and Plaid Cymru) were in favour of splitting the Bill. On a division the Government’s motion to split the committee stage was easily carried, but the Government subsequently relented in return for an informal agreement with the Conservatives to take the whole of the committee stage on the floor in just seven days.

That set the pattern for subsequent constitutional Bills. The government’s primary concern was to get its Bill through. It mattered less where the committee stage was taken, so long as it did not consume inordinate time on the floor. A month later the next devolution Bill, the Scotland Bill, was made subject to a programme motion, agreed with the Opposition, to timetable each stage of the Bill. The committee stage of the Scotland Bill took eight days on the floor. The Northern Ireland Act 1998 took six days; the Human Rights Act 1998 five days; and in the next session the committee stage of the House of Lords Act 1999 took four days on the floor. All the Bills were passed within a single session, and these Bills were probably passed more quickly than if the committee stage had been split.

¹² N. Smith and K. Donnelly, *Delivering Constitutional Reform* (Constitution Unit, London, 1996), paras 100–104.

¹³ *Hansard*, HC col.253 (January 13, 1998).

¹⁴ *Hansard*, HC cols 901–903 (December 9, 1997).

Nevertheless the government did not wholly abandon the idea of splitting constitutional Bills at their committee stage. The Greater London Authority Bill 1998 was the first to be split, being a huge Bill, with masses of detail which required over 100 hours in Standing Committee.¹⁵ It was followed by the Political Parties, Elections and Referendums Bill 2000, and the Regional Assemblies (Preparations) Bill 2003.¹⁶ The government also made a determined attempt to split the committee stage of the Constitutional Reform Bill 2005, but eventually agreed to the whole committee stage being taken on the floor, adding a third day at the request of the opposition.¹⁷ The opposition devoted two days to debating the changes in the role of the Lord Chancellor, with the Judicial Appointments Commission undergoing no scrutiny at committee stage.

One of the main reasons why the government has not been too concerned about so many Bills taking their committee stage on the floor has been the size of its majority, which has enabled it to exercise tight control over the timetable for constitutional Bills (Table 1, col.5). Over the eight years since 1997, government control of the timetable for individual Bills has grown steadily tighter. Programme (timetabling) motions were initially characterized by consensus, and the first programme motion, moved in January 1998 for the Scotland Bill, was hailed as the “first ever all-party programme motion”.¹⁸ This phase ended towards the end of the 1997–2001 Parliament because the opposition parties grew increasingly unhappy with the way programming was working, coming to regard it as a mechanism which enabled the government to get its legislation through rather than one to facilitate proper scrutiny.

This explains the steady increase in the number of divisions at the end of Second Reading on the motion to commit the Bill to Standing Committee or CWH. Increasingly the opposition have been dividing the House, not to express dissent with the committal decision, but to register their protest at the allocation of time for subsequent stages. Taking the list of Bills in Table 1 as a sample, the proportion of such divisions in 1997–98 was only 7 per cent; in 1998–99, 33 per cent; in 1999–2000, 30 per cent; and in 2000–01, 33 per cent. In the 2001 Parliament the proportion rises sharply, with divisions on the committal motion at end of Second Reading for 100 per cent of the Bills in Table 1 in 2001–02; 50 per cent in 2002–03; 80 per cent in 2003–04; and 100 per cent in 2004–05. Since 2001 programme motions have become normal for all government Bills, and opposition to them has become automatic and token. As far as the opposition parties are concerned, programmes simply represent the government’s decision on how long the committee stage should take, and the original intention, that programming should represent the outcome of negotiation between the parties, has been abandoned.

It may be in consequence that the government has become less concerned about the time taken by constitutional Bills in CWH, because ultimately the government controls the allocation of time. The government has tried to modify the convention by splitting the committee stage of constitutional Bills, with limited success, but if the whole

¹⁵ The GLA Bill had two sittings in CWH (9 hours, 30 mins), and 26 sittings in SC (102 hours, 35 mins).

¹⁶ The Political Parties, Elections and Referendums Bill had two committee days on the floor of the House (5 hours, 36 mins), and 17 sittings (33 hours) in SC; the Regional Assemblies (Preparations) Bill one committee day on the floor (5 hours, 34 mins) and nine sittings in committee upstairs (40 hours).

¹⁷ The government had offered two days on the floor and eight sessions in SC. The opposition traded the latter for an additional day (equivalent to two sessions in SC) in order to preserve the principle of taking the whole of the committee stage on the floor.

¹⁸ Cabinet Office Press Notice, January 13, 1998.

committee stage ends up being taken on the floor, the government knows it can still get its Bill through in reasonable time.

Difference made by Committee of the Whole House in the Commons

The next question to be addressed is what value is added by taking the committee stage of a constitutional Bill on the floor, rather than in Standing Committee upstairs. The main benefit is the significant increase in the number of M.P.s who can take part in the committee stage. In the Bills listed in Table 1, an average of 18 M.P.s spoke in the committee stage of Bills referred to Standing Committee, compared with 36 M.P.s who spoke when the committee stage was taken on the floor.¹⁹ On the big devolution Bills many more M.P.s spoke than would have been accommodated in a normal-sized Standing Committee: 71 spoke in the CWH on the Scotland Bill, 53 on the Government of Wales Bill, and 36 on the Northern Ireland Bill. Similarly with the Human Rights Bill, with 58 M.P.s speaking in the committee stage; House of Lords Bill (72 speakers); and the European Communities (Amendment) Bills (66 speakers in 1998, 47 speakers in 2002). Even in the rushed passage of the Anti-Terrorism, Crime and Security Bill 2001, 70 M.P.s were able to speak during the two days in committee, and 45 M.P.s spoke in the single day of the committee stage on the Prevention of Terrorism Bill 2005.

The second benefit, linked to the first, is the increase in the range of M.P.s who can take part in the committee stage. 18 Scottish M.P.s were able to speak in committee on the Scotland Bill, 26 Welsh M.P.s on the Government of Wales Bill, and 12 Northern Ireland M.P.s on the Northern Ireland Bill. Of the 27 M.P.s who spoke in the committee stage of the Scottish Parliament (Constituencies) Bill 2004, 25 represented Scottish constituencies. Regional over-representation of those most directly affected was also evident in the Regional Assemblies (Preparations) Bill, which had a split committee stage. M.P.s from the North West and North East were marginalised (relatively speaking) in the composition of the Standing Committee, but in the CWH a majority of the speakers came from those two regions.²⁰

Set against this are some significant disadvantages from taking the committee stage on the floor. First is the curtailment of time. Because time on the floor is prime parliamentary time, this is inevitably in more scarce supply than when the committee stage is taken upstairs. The figures in Table 1 bring home the difference. For constitutional Bills taken in CWH, the committee stage lasted on average 15 hours. For Bills referred to Standing Committee, the average committee stage lasted 25 hours.²¹

Linked to the limited time is the limited number of amendments moved. For Bills taken in CWH, an average of 10 amendments were debated during the committee stage. In Standing Committee the number was five times higher, with an average of 51 amendments moved to each Bill. This supports the contention that debate in a CWH tends to be a continuation of the Second Reading debate, staying with the general

¹⁹ See Table 1, col.5. Excluded from this analysis are the 10 urgent Bills taken in CWH, which would distort the CWH figures because of their truncated proceedings. So the statistical comparison made in this section is between the remaining 21 non-urgent CWH Bills, and 26 Bills referred to SC. For the three Bills whose committee stage was split, figures were fed into both the CWH and SC analysis.

²⁰ See Table 1, col.6 for the regional breakdowns.

²¹ Urgent bills taken in CWH are excluded from the analysis: see fn.21 above.

principles of the Bill rather than engaging in detailed scrutiny. Measured simply by number of amendments, the intensity of detailed scrutiny would appear to be a lot greater when a Bill is referred to Standing Committee.

It is hard to resist the conclusion that the CWH procedure has become a dignified part of the constitution, while the more efficient work of scrutiny is done in Standing Committee or in Select Committees of each House. This was also the conclusion of the Constitution Unit's 1996 report on *Delivering Constitutional Reform*:

“The theoretical justification for taking a Bill in committee of the whole House is that it allows all Members to participate; thus it is a more appropriate forum in which to deal with particularly significant measures. It is debatable how far this reflects reality. In practice, attention is focused on broader political questions (effectively providing a continuation of the second reading debate by other means) and there is little opportunity to consider details or more practical questions . . .”²²

Time to modify the Convention

There are two ways in which the committee stage of constitutional Bills might be improved without losing the wider participation which the CWH brings. The first would be to split the committee stage, as the government has tried to do, debating the clauses of principle on the floor but scrutinising the detail upstairs. Not all Bills need be split: some constitutional Bills (such as the two Disqualification Bills) are about a principle, with no detail worth scrutinising. But most Bills combine a point or points of principle with a lot of detail, which goes largely unscrutinised when the whole committee stage is taken on the floor. The opposition cling to the sanctity of the convention, but it is hard to see what would be lost by taking the detailed parts of the Bill upstairs; and in terms of effective scrutiny, much would be gained.

The second modification would enable wider participation to continue by referring the Bill to a larger Standing Committee. Most Bill committees tend to have 16–22 members, but SO86(1) allows a Standing Committee to have up to 50 members. Alternatively other M.P.s could be allowed to attend and speak in the committee but not vote. That would require a change to Standing Orders, but no great breach of principle: non-members are already allowed to attend the Standing Committees which scrutinise delegated legislation and EU legislation.

Value added by other parliamentary committees, and by the House of Lords

Before leaving this analysis of the committee stage of constitutional Bills, it is worth mentioning two other factors which have transformed the picture since 1945. The first is the growth in the number of specialist committees, in both Houses. Column 7 of Table 1 records that a dozen different committees now contribute their expert scrutiny to the general scrutiny of constitutional Bills. Almost every Bill underwent scrutiny from at least one specialist committee, and half of them were the subject of reports from two or more such committees. The most important are two new committees: the Joint Committee on

²² *Delivering Constitutional Reform*, fn.14 above, para.86.

Human Rights (“JCHR”), and the Lords Constitution Committee. With the help of their legal advisers these committees now scrutinise every Bill: the first for compliance with the European Convention on Human Rights and the United Kingdom’s other international human rights obligations, the second for points of constitutional importance. Their contribution is understated in Table 1 because the committees were not created until late 2001. Since then the JCHR has issued reports on every single Bill, and the Constitution Committee has reported on eight of the Bills listed in Table 1.

Other committees active in the House of Lords are the European Union Committee, which reported on four Bills in Table 1; and the Delegated Powers Committee, which polices the boundary between primary and secondary legislation (and reported on 40 Bills). In the Commons eight Select Committees contributed to the scrutiny of constitutional Bills or the legislative proposals that preceded them.²³

The three territorial Select Committees all played a part in scrutinising some of the lesser legislation on devolution.²⁴ The Foreign Affairs Committee reported on constitutional Bills concerned with Europe, as did the Commons EU Committee. The Home Affairs Committee reported on Bills on electoral matters, and terrorism. The Public Administration Committee reported on freedom of information, Lords reform, and public inquiries. A latecomer is the Constitutional Affairs Committee, hived off from the Home Affairs Committee in early 2003. This can be expected to scrutinize constitutional legislation emanating from the Department for Constitutional Affairs, and made a strong start with its three reports on the Constitutional Reform Bill.²⁵

The second respect in which the scrutiny of constitutional Bills has been transformed since 1945 is the more active part played by the House of Lords. The Lords take seriously the business of legislative scrutiny. They no longer feel so illegitimate, following the departure of most of the hereditary peers, and have fewer inhibitions about defeating the government’s legislative proposals. In its first eight years the Blair government never lost a single vote in the House of Commons. In the Lords, the government is defeated in 25–30 per cent of all divisions on Bills. In the last session, 2004–05, more than half the divisions resulted in a government defeat.

The Lords also take a special interest in the constitution. The House of Lords Bill 1999 was significantly amended in the Lords, to retain 10 per cent of the hereditary peers. In the case of four other constitutional Bills, the Lords entered into serious disagreement with the House of Commons. These were the (first) European Parliamentary Elections Bill in 1998, when the Lords protested at the use of closed lists; the European Parliamentary and Local Elections (Pilots) Bill in 2004, when the Lords objected to the rushed introduction of all-postal voting in four regions, rather than in two as recommended by the Electoral Commission; the Constitutional Reform Bill in 2005, when the Lords wanted the Lord Chancellor to remain a lord and a lawyer; and the Prevention of Terrorism Act 2005, when the Lords objected to the new control orders. In the first three cases the Lords eventually dropped their objections after fierce rounds of ping pong at the end of the session. On prevention of terrorism, the government introduced a judicial element into control orders, and gave undertakings that they would come back to Parliament with new proposals within a year.

²³ For the full list see the glossary to Table 1.

²⁴ The fast track for the main devolution bills in 1997–98 did not allow time for any Select Committee inquiry.

²⁵ In 2002–03 it was known as the Lord Chancellor’s Department Select Committee.

In the Lords almost all Bills take their committee stage in a CWH. But increasingly the Lords are referring some Bills to Grand Committee, to get them off the floor. Their committee stage is then taken in the Moses Room, but all peers can take part. It is sometimes believed that only non-controversial Bills undergo the Moses Room procedure, but of the six Bills in Table 1 which were referred to Grand Committee, three were controversial: the Bank of England Bill 1998, the European Parliamentary and Local Elections (Pilots) Bill 2004 and the Inquiries Bill 2005.

Recent Improvements to the Legislative Process

This article has focused on the CWH procedure for constitutional Bills, because that is the only formal check known to the British constitution before introducing major constitutional change. It is time now to take a step back and look at the wider legislative process, to see what other checks might be introduced at other stages in the process to guard against unduly rushed or partisan constitutional change. In the main these are checks at earlier stages in the process: most suggestions for improving the legislative process focus on improving legislative proposals before they are formally introduced into Parliament, by more rigorous procedures for expert and public consultation. There is a checklist of such measures in the 1996 Constitution Unit report *Delivering Constitutional Reform*, which identified three broad categories of consultation:

- **building political consensus:** through cross-party talks, a Speaker's Conference, constituent assembly or constitutional convention;
- **calling in the experts:** through a Royal Commission or expert commission;
- **public consultation:** through manifesto commitments endorsed at a general election, referendums, consultation on Green and White Papers and draft Bills.

All three forms of consultation have been used as part of the preparation for some of the big constitutional changes introduced in recent years.²⁶ Table 2 tries to summarise the extent to which each of the constitutional Bills listed in Table 1 was subject to expert and public consultation before its introduction. In terms of public endorsement, it records whether the proposals were the subject of a manifesto commitment (col.2), and whether they were put to referendum (col.3). The next column records whether the proposals were considered by an expert commission or in cross-party talks. Finally the table shows whether there was consultation on a Green Paper, White Paper or draft Bill.

The table includes examples of all three categories of consultation listed above. As an example of building political consensus, the Scotland Bill derived from plans for a Scottish Parliament developed by the Scottish Constitutional Convention, which included Labour and the Liberal Democrats as well as representatives of civil society. The Northern Ireland Bill followed the talks between all the parties in Northern Ireland which resulted in the 1998 Belfast Agreement. Cross-party talks between Labour and the Liberal Democrats produced a detailed report in March 1997 on their shared

²⁶ In evidence to the Constitution Committee Lord Irvine offered a simplified schema of the process for preparing constitutional bills, laying particular emphasis on the Cabinet Committees which had collectively agreed the policies on devolution and Lords reform. Lords Constitution Committee, *Changing the Constitution: The Process of Constitutional Change* (2001–02 HL 69): Supplementary Memorandum by the Lord Chancellor, Evidence pp.10–11.

commitments to constitutional reform,²⁷ and after the 1997 election a joint Cabinet Committee was formed with the Liberal Democrats to help implement those reforms. A final example of talks which included all the main parties at Westminster would be the joint parliamentary committee which tried to reach a consensus on the next steps for Lords reform in 2002–03.

The second form of consultation, calling in the experts, can be illustrated by several examples. The ground was laid for the second stage of Lords reform by the Royal Commission on Reform of the House of Lords chaired by Lord Wakeham. Other examples include the Jenkins Committee on the Voting System, which reported in 1998 on alternative voting systems for the House of Commons; and the Richard Commission which reported in 2004 on extending the powers of the Welsh Assembly.

Table 2 gives numerous examples of seeking public support for constitutional changes through manifesto commitments or through specific endorsement by referendum. The major constitutional changes introduced during the 1997 Parliament were all mentioned in Labour's 1997 manifesto (Table 2, col.2). The devolution proposals were subsequently confirmed in pre-legislative referendums in Scotland and Wales in 1997, and in Northern Ireland and Greater London in 1998. The government's plans to establish regional assemblies in England, proposed in the 1997 and 2001 Labour manifestos, were tested and rejected in the referendum held in the North East in 2004.

Finally Table 2 gives numerous examples of consultation documents and White Papers as part of the normal process of consultation in preparing legislative proposals: almost half the Bills were preceded by a Green and/or White Paper. Far less frequent is the use of draft Bills: only three out of the 55 Bills (the Freedom of Information Bill, Civil Contingencies Bill and Public Audit (Wales) Bill) were preceded by a draft Bill which was subject to pre-legislative scrutiny.²⁸ It is true that the first rush of constitutional legislation allowed no time for draft Bills. But their absence subsequently is particularly striking given the growing emphasis placed by government and Parliament on the use of draft Bills as part of good legislative practice. The Commons Modernisation Committee has repeatedly commended the publication of Bills in draft, to help shape legislative proposals while in their formative stages.²⁹ The government has responded positively, with a gradual increase each year so that around a quarter of Bills are now published in draft. In their 2004 report on the Legislative Process, the Lords Constitution Committee recommended that publication of Bills in draft should become the norm.³⁰ It is the more striking that with constitutional Bills, publication in draft appears to be such a rare exception.

²⁷ Report of the Joint Consultative Committee on Constitutional Reform (March 1997). The joint chairmen Robin Cook and Robert Maclennan reviewed the agreement in R. Cook and R. Maclennan, *Looking Back, Looking Forward: the Cook-Maclennan Agreement Eight Years On* (New Politics Network, London, 2005).

²⁸ The first two Bills were published in draft because they did not initially make it into the legislative programme. Publication in draft was a sop rather than a deliberate plan for pre-legislative scrutiny.

²⁹ Commons Modernisation Committee, *The Legislative Process* (1997–98 HC 190). Modernisation of the House of Commons: A Reform Programme (2001–02 HC 1168-I).

³⁰ Select Committee on the Constitution, *Parliament and the Legislative Process* (2003–04 HL 173-I), Ch.3. The government in its response did not feel it would be possible to sustain the recent year-on-year increase indefinitely, but did commit to seeking to maintain the proportion of Bills published in draft (about a quarter of all Bills): *Parliament and the Legislative Process: The Government's Response* (2004–05 HL 114), para.11.

Table 2 PUBLIC and PRE-LEGISLATIVE SCRUTINY OF CONSTITUTIONAL BILLS

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention or cross party talks	Green Paper or Consultation Paper	White Paper
Referendum (Scotland and Wales) Act 1997	Authorise pre-legislative referendums in Scotland and Wales	1997	Sep 1997	Joint Consultative Committee with Liberal Democrats March 1997	N/A	<i>Scotland's Parliament; A Voice for Wales</i> July 1997
Northern Ireland (Emergency Provisions) Act 1998	To postpone the expiry of and amend the Northern Ireland (Emergency Provisions) Act 1996	N/A	None	N/A	N/A	N/A
Scotland Act 1998	Establish Scottish Parliament	1997	Sep 1997	Kilbrandon Commission 1973, Scottish Constitutional Convention 1989-1995	N/A	<i>Scotland's Parliament: A Voice for Scotland</i> July 1997
Government of Wales Act 1998	Establish Welsh Assembly	1997	Sep 1997	Kilbrandon Commission 1973	N/A	<i>A Voice for Wales</i> July 1997
Northern Ireland (Elections) Act 1998	Authorise referendum and first elections to NI Assembly	N/A	June 1998	Belfast Agreement April 1998	N/A	None
Northern Ireland Act 1998	Establish NI Assembly	1997	June 1998 in Northern Ireland and Republic of Ireland	Belfast Agreement April 1998	N/A	N/A
Human Rights Act 1998 [HL]	Incorporate ECHR into UK law	1997	None	Joint Cabinet Committee with Liberal Democrats	N/A	<i>Rights Brought Home</i> Oct 1997
European Communities (Amendment) Act 1998	Incorporate Treaty of Amsterdam Oct 1997	1997 broad commitment	None (but referendums held in Ireland and Denmark)	N/A	N/A	N/A
Regional Development Agencies Act 1998	Establish RDAs. Designation of Regional Chambers	1997	None	Regional Policy Commission chaired by Bruce Millan June 1996	<i>RDAs: Issues for Discussion</i> June 1997	<i>Building Partnerships for Prosperity</i> , Dec 1997
Bank of England Act 1998	Constitution and monetary independence of Bank of England	N/A	N/A	N/A	N/A	N/A
GLA Referendum Act 1998	Authorise referendum on GLA	1997	May 1998	N/A	<i>New Leadership for London</i> July 1997	<i>Mayor and Assembly for London</i> March 1998

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
GLA Act 1998	Establish Greater London Authority	1997	May 1998	N/A	<i>New Leadership for London</i> July 1997	<i>Mayor and Assembly for London</i> March 1998
Data Protection Act 1998	Give effect to the EC Data Protection Directive	N/A	N/A	N/A	N/A	<i>Data Protection: The Government's Proposals</i> July 1997
Registration of Political Parties Act 1998	Provision for legal recognition of political parties to facilitate changes in electoral law and practice	1997 impliedly	N/A	N/A	N/A	N/A
European Parliamentary Elections Act 1999	Change voting system to regional list PR	March 1997 Joint Consult Committee with Liberal Democrats	N/A	Joint Cabinet Committee with Liberal Democrats	N/A	N/A
Access to Justice Act 1999	Establish Legal Service Commission, reform civil and criminal legal aid, reform rights of audience, family court reform	N/A	N/A	Woolf Commission on Access to Justice (1996)	N/A	<i>Modernising Justice</i> December 1998
House of Lords Act 1999	Remove hereditary peers	1997	N/A	Joint Cabinet Committee with Liberal Democrats	N/A	<i>Modernising Parliament</i> Jan 1999
Lords Reform Part II	Implement Wakeham, remove last hereditaries	2001	N/A	Wakeham Royal Commission, <i>A House for the Future</i> Jan 2000	<i>Next Steps for the House of Lords</i> Sep 2003	<i>House of Lords: Completing the Reform</i> Nov 2001
Disqualifications Act 2000	Allows members of the Irish legislature to sit in the House of Commons and the devolved Parliaments.	N/A	None	N/A	N/A	N/A
Northern Ireland Act 2000	To provide for suspension of devolved government in N. Ireland	N/A	N/A	N/A	N/A	N/A

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
Local Government Act 2000 [HL]	Elected Mayors, separate executives	1997	30 local referendums held in 2002 which resulted in 11 elected mayors	N/A	<i>Referendum on Local Mayors ODPM May 2000</i>	Modernising Local Government: improving local services March 1999
Police (Northern Ireland) Act 2000	To improve policing and its regulation in N. Ireland	N/A	N/A	Patten Commission	<i>A New Beginning: Policing in Northern Ireland</i> 9 Sep 1999	N/A
Freedom of Information Act 2000	To create new statutory right of access to information	1997	N/A	N/A	24 May 1999: draft bill published as part of consultation paper	<i>Your Right to Know</i> Dec 1997
Political Parties, Elections and Referendums Act 2000	Establish Electoral Commission	1997 (controls on party funding)	N/A	Committee on Standards in Public Life, Oct 1998	N/A	<i>The Funding of Political Parties in the United Kingdom</i> July 1999
Terrorism Act 2000	Amended and extended existing counter-terrorist legislation	N/A	N/A	N/A	<i>Legislation Against Terrorism</i> , December 1998	N/A
Representation of the People Act 2000	Introduce rolling voter registration and experiments in new voting methods to make voting easier	1997	N/A	Howarth Report <i>Working Party on Electoral Procedures</i> August 1998	<i>Modernising Local Government: Local Democracy and Community Leadership</i> , February 1999	N/A
Election Publications Act 2001 [HL]	To postpone the operation of requirements introduced by the Political Parties, Elections and Refs Act 2000	N/A	N/A	N/A	N/A	N/A
House of Commons (Removal of Clergy Disqualification) Act 2001	Removes the disqualification of clergymen from membership of the House of Commons	N/A	None	N/A	N/A	N/A

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
Elections Act 2001	To defer Local Government Elections to coincide with general election 5 May 2001	N/A	N/A	N/A	N/A	N/A
European Communities (Finance) Act 2001	To reduce member-state VAT contributions and increase GNP based contributions	N/A	N/A	European Commission <i>For a Stronger and Wider Union</i> (Com 97 2000)	N/A	N/A
Anti-Terrorism, Crime and Security Act 2001	Series of anti-terrorism measures including internment without trial of suspected terrorists, money laundering, law enforcement powers, asylum and extradition	N/A	N/A	N/A	<i>The Law on Extradition</i> Home Office 8 June 2001	N/A
Northern Ireland Arms Decommissioning (Amendment) Act 2002	To extend the period during which an amnesty may be provided for in decommissioning scheme	N/A	N/A	N/A	N/A	N/A
European Communities (Amendment) Act 2002	To ratify the Treaty of Nice signed by UK Government 26 Feb 2001	N/A	None. Referendums held in Ireland and France	N/A	Command paper reproducing Treaty of Nice 2001	N/A
Electoral Fraud (Northern Ireland) Act 2002	To allow additional safeguards against electoral fraud in N. Ireland	N/A	N/A	Northern Ireland Forum Committee on Electoral Malpractice (report October 1997 HC 316)	<i>Administering Elections in Northern Ireland</i> NIO (Cm 4081)	<i>Combating Electoral Fraud in N. Ireland</i> , March 2001
Justice (N. Ireland) Act 2002	To implement changes in N. Ireland criminal justice system	N/A	N/A	N/A	Criminal Justice Review Group March 2000	<i>Review of the Criminal Justice System in Northern Ireland</i> , March 2000
Sex Discrimination (Election Candidates) Act 2002	Excludes from the Sex Discrimination Act 1975 certain matters relating to selection of candidates by political parties.	N/A	N/A	N/A	N/A	N/A

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
Nationality, Immigration and Asylum Act 2002	Makes provision about nationality, immigration and asylum	N/A	N/A	N/A	N/A	<i>Secure borders, safe haven</i> , February 2002
N. Ireland Assembly Elections Act 2003	To postpone election poll date for N. Ireland Assembly elections 2003	N/A	N/A	N/A	N/A	N/A
Police (N. Ireland) Act 2003 [HL]	To implement more fully the recommendations of the 'Patten Report'	N/A	N/A	Patten Commission	Updated Implementation Plan for the Patten Report, August 2001	N/A
Regional Assemblies (Preparation) Act 2003	Authorize referendums in English regions	1997, 2001	November 2004 in North East	Regional Policy Commission 1996	N/A	<i>Your Region, Your Choice</i> , May 2002
European Parliament (Representation) Act 2003	Reduce no. of UK seats in EP from 87 to 78, including Gibraltar enfranchisement	N/A	N/A	Electoral Commission Consultation Paper (April 2002)	N/A	N/A
N. Ireland Assembly (Elections and Periods of Suspension) Act 2003	To enable postponement of N. Ireland Assembly election and to provide mechanism for setting date of next poll	N/A	N/A	N/A	N/A	N/A
N. Ireland (Monitoring Commission) Act 2003 [HL]	To implement agreement between UK and Irish Governments	N/A	N/A	N/A	N/A	N/A
European Union (Accession) Act 2003	To give effect in UK law to the Accession Treaty, April 2003, increasing EU from 15 to 25 member states	2001	N/A	N/A	Regulatory Impact Assessment April 2003 <i>Explanatory memorandum on the Accession Treaty</i> , Home Office 1/4/03	N/A

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
Courts Act 2003	To modernise the criminal justice system through a unified courts system	1997, 2001	N/A	N/A	Regulatory Impact Assessments <i>Proposals to improve fine enforcement</i> July 2003 <i>Power to Order Periodical Payments for Future Loss</i> Nov 2002	N/A
Asylum and Immigration (Treatment of Claimants) Act 2004	Makes provision about asylum and immigration	N/A	None	N/A	<i>New Legislative Proposals on Asylum Reform.</i> Oct 2003	N/A
European Parliamentary and Local Elections (Pilots) Act 2004	Enable experimentation with more flexible methods of voting	N/A	N/A	Electoral Commission <i>The Shape of Things to Come</i> Sep 2003 <i>Modernising Elections: A Strategic Evaluation of the 2002 Election Scheme</i> Aug 2002	<i>Election Pilots at the EP and local elections</i> Sept 2003	N/A
Scottish Parliament (Constituencies) Act 2004	Maintain Scottish Parliament at 129 MSPs and break link with Westminster constituencies	N/A	N/A	Parliamentary Boundary Commission <i>Proposals for Revised Parliamentary Constituency Boundaries in Scotland</i> 7 Feb 2002	<i>The Size of the Scottish Parliament: a Consultation</i> Dec 2001	N/A
Justice (N. Ireland) Act 2004 [HL]	To make provision for the commitments of the Joint Declaration May 2003	N/A	N/A	N/A	Implementation Plan for the Criminal Justice review, 18 June 2003	<i>Review of the Criminal Justice System in Northern Ireland</i> , March 2000
Civil Contingencies Act 2004	Provides for unified executive control in a state of emergency	N/A	N/A	Joint Committee of both Houses scrutinised draft bill Nov 2003	The Governments Response to the Public Consultation on the Draft Civil Contingencies Bill	N/A
Public Audit (Wales) Act 2004	To consolidate the audit arrangements for public bodies in Wales	N/A	N/A	Derived from Welsh Assembly consultation	N/A	N/A

Bill	Policy Objective	Manifesto Commitment	Referendum	Expert/Royal Commission or Const. Convention	Green Paper or Consultation Paper	White Paper
Constitutional Reform Act 2005 [HL]	Abolish LC, establish Supreme Court, Judicial Appts Commission	N/A	N/A	N/A	July 2003 (1) <i>A Supreme Court for the UK</i> (2) <i>A new way of Appointing Judges</i> (3) <i>Reforming the Office of the Lord Chancellor</i>	N/A
Electoral Registration (Northern Ireland) Act 2005 [HL]	To allow those who failed to register to vote in Dec 2004 to be carried into register	N/A	N/A	Northern Ireland Forum Committee on Electoral Malpractice (<i>report published 31 October 1997 HC 316</i>) Electoral Commission December 2003	<i>Administering Elections in Northern Ireland</i> NIO (Cm 4081)	<i>Combating Electoral Fraud in N. Ireland</i> March 2001
Public Services Ombudsman (Wales) Act 2005 [HL]	Establishes and makes provision about the office and functions of Public Services Ombudsman for Wales	N/A	None	N/A	<i>Ombudsman's Services in Wales: Time for Change</i> , Nov 2002 <i>And Public Services Ombudsman for Wales, Powers and Jurisdiction</i> , Oct 2003	N/A
Prevention of Terrorism Act 2005	Enables Secretary of State to make 'control orders' to restrict suspected terrorists who cannot others be deported due to ECHR commitments	N/A	N/A	N/A	(1) <i>The Threat</i> , (2) <i>The UK's counter-terrorism strategy</i> , (3) <i>Reconciling liberty and security</i> , (4) <i>Protect and Prepare</i> 2005	N/A
Inquiries Act 2005	Statutory framework for operation of governmental inquiries	N/A	N/A		<i>Effective Inquiries</i> May 2004 <i>Response to Public Administration Committee Government by Inquiry</i> 10 March 2004	N/A

Another striking feature of Table 2 is the variation in practice. A recent example of seriously bad practice by the government is the Constitutional Reform Bill, whose proposals (abolition of the office of Lord Chancellor, creation of the new Supreme Court and Judicial Appointments Commission) were announced with no consultation by Downing Street press release in June 2003. The new Department for Constitutional Affairs struggled to make up for the lack of consultation, rushing out three consultation papers in July, and Parliament went into overdrive to scrutinise the proposals. The Constitutional Affairs Committee issued three reports, the Joint Committee on Human Rights three reports (see Table 1, col.7), and when the Bill was introduced the Lords took the extraordinary step of referring it (against the wishes of the government) to an ad hoc Select Committee. Through the evidence-taking sessions of the Select Committee the Lords were in effect supplying what should have happened at an earlier stage, namely pre-legislative scrutiny of a draft Bill.³⁰

There are also plenty of examples of good practice. The preparation for the second stage of Lords reform is a model of good practice, with a Royal Commission, White Paper, Green Paper, and scrutiny by the Public Administration Committee and a joint parliamentary committee. The government has not yet built the consensus it needs to move forward, but one cannot fault the process. Other less high profile examples of good practice are the preparation for the Regional Development Agencies Act 1998, the Greater London Authority Act 1999, the Representation of the People Act 2000, the Electoral Fraud (Northern Ireland) Act 2002 and the Scottish Parliament (Constituencies) Act 2004. Despite tight time pressures, most of these measures saw an orderly sequence of expert commission followed by Green and/or White Papers as the government sought to develop and refine its proposals and prepare the ground for the Bill.

Time for a new set of conventions to safeguard constitutional change

These examples of good practice point the way forward to a new set of conventions to ensure that constitutional Bills are properly prepared and scrutinised. The CWH is an archaic procedure from a previous era which adds little by way of serious scrutiny. The performance data presented earlier about the limited sitting hours and number of amendments moved provide evidence of that; and the three empty days spent in committee on the Constitutional Reform Bill on the floor of the House of Commons offer a vivid recent reminder. The legislative process has undergone steady improvement in recent years, with more to come, and it is time for the process for constitutional Bills to catch up.³¹ More Bills are published in draft, there is a growing array of specialist parliamentary committees to scrutinise them, and growing recognition that most serious scrutiny takes place in committee, and not on the floor of the House.

This emphasis on the role of committees can be seen in the 2004 report of the Lords Constitution Committee on *Parliament and the Legislative Process*, whose recommendations included the following:

³⁰ See further Lord Windlesham, "The Constitutional Reform Act 2005: the politics of Constitutional Reform" [2006] P.L. 35.

³¹ The Commons Modernisation Committee announced a new inquiry into the Legislative Process on November 9, 2005.

- publication of Bills in draft should become the norm, not the exception;
- Bills should be committed after Second Reading to a committee;
- empowered to take evidence from interested and informed parties;
- checklists should be employed by legislative committees, to ensure more systematic scrutiny.³²

Building on the proposals in the Constitution Committee's report, we can seek to develop a new set of conventions for the preparation and scrutiny of constitutional Bills. In terms of their preparation, all legislative proposals should be preceded by a Green Paper and/or White Paper setting out the government's proposals. This in turn may need to be preceded by an expert commission, cross-party talks, consultation with the devolved administrations, and with the judiciary. Once the Bill is drafted constitutional Bills should seek not merely to follow but to lead best practice in terms of modern legislative process.

Publication of Bill in draft

This is the single most important change. The current practice, under which almost no constitutional Bills are published in draft, should be reversed. The convention should be that all constitutional Bills are published in draft, unless urgency prevents it. Proper time should then be allowed for pre-legislative scrutiny by the appropriate departmental Select Committee in the Commons, and the Lords Constitution Committee. In some cases it may be necessary to set up an ad hoc committee or a joint committee.

Committee stage in House of Commons

Here too current practice should be reversed, with constitutional Bills in future being referred to Standing Committee for detailed scrutiny. Bill committees should be empowered to take evidence. The possibility can be left open of leaving the committee stage on the floor, for short or urgent Bills. For big or controversial Bills there may be a case for splitting the committee stage, to allow debate on the floor on the clauses of principle; but detailed scrutiny should always take place in committee upstairs, with evidence-taking sessions if the committee feels the need.

Checklists for more systematic scrutiny

The Lords Constitution Committee recommended the use of checklists by legislative scrutiny committees to ensure a more systematic approach.³³ Dawn Oliver has since shown how checklists of scrutiny standards are used in Australia and New Zealand to ensure observance of legal and constitutional principles, and recommended their adoption in the United Kingdom.³⁴ The committee which is best placed to develop a set of scrutiny standards for constitutional Bills is the Lords Constitution Committee.

These three steps would lead to far greater improvement in the process of constitutional change than the old convention about taking the Commons committee stage on the floor. But they leave two questions hanging in the air. First, can we define those constitutional Bills which should be subject to this best practice procedure? Secondly, who can ensure that best practice is followed? The answers to these final questions are interlinked.

³² Parliament and the Legislative Process, fn.32 above.

³³ *ibid.*, paras 54, 57.

³⁴ D. Oliver, "Improving the Scrutiny of Bills: The Case for Standards and Checklists" [2006] P.L.000.

Sadly, it is not possible to define a “constitutional” Bill with sufficient precision to identify confidently what is constitutional (or even “first class” constitutional) and what is not. That was the interim conclusion reached after the analysis of the Bills set out in Figure 1. We know the really first class measures when we see them, and few would dissent from the recent examples cited by Laws L.J. in *Thoburn* (European Communities Act 1972, Human Rights Act 1998, Scotland Act 1998, Government of Wales Act 1998). But his definition of constitutional statutes as being those which “condition the relationship between citizen and State in some general, overarching manner” is too broad and general to be of much assistance when applied to harder, more borderline cases.³⁵ Readers left in doubt are invited to apply it to the list of Bills in Table 1 and see how far they get.

Fortunately, this is not fatal to the enterprise. For what matters is not constitutional Bills but constitutional principles. And constitutional principles can be raised by Bills which are not on their face constitutional. Two of the biggest cries of “constitutional outrage” in recent years have arisen in connection with the Asylum and Immigration (Treatment of Claimants) Act 2004 with its ouster clause, and the Prevention of Terrorism Act 2005 which introduced control orders. Neither Bill was self-evidently constitutional in terms of its primary subject matter, but both raised important constitutional issues about separation of powers, the proper role of judges and the protection of human rights. (It is worth adding that having a written constitution makes little difference: similar issues and concerns were raised in the United States under the Patriot Act, and in Australia with their recent anti-terrorism legislation, but in neither country did the legislation violate the constitution.)

If what matters is constitutional principles, the next question is, how can those principles best be identified? There is no clearly articulated list of constitutional principles in the United Kingdom, but a start is slowly being made. The Lords Constitution Committee is required to report on the constitutional implications of all public Bills. Dawn Oliver has shown how they might pull together their recommendations more systematically, and learn from experience overseas. In time this might lead to the development of a set of legal and constitutional principles similar to those developed by the Legislation Advisory Committee in New Zealand, and their application in a detailed scrutiny standards checklist.³⁶

The final question is who should be the institutional guardian and defender of those principles. Here there is a central role to be played by the House of Lords. It is a classic role for second chambers, and the Wakeham Commission specifically recommended that the House of Lords should act as guardians of the constitution.³⁷ The Lords showed their mettle in the way they scrutinized the Constitutional Reform Bill. They have shown the value of systematic scrutiny through their contribution to the JCHR. They have not yet achieved similar impact through the work of the Lords Constitution Committee, but the potential is there.

³⁵ The full definition has a second limb, “(b) enlarges or diminishes the scope of what we would now regard as fundamental and constitutional rights” *Thoburn v Sunderland City Council* [2002] EWHC 195; [2003] Q.B. 151, at [64]. The definition overall is too focused on individual rights to capture the full range of constitutional Bills. But in any event the court’s purpose was different, being applied ex post to distinguish those statutes which cannot easily be impliedly repealed. Government and Parliament would need a more robust and comprehensive definition to decide ex ante which legislative changes need extra special scrutiny in Parliament because they are constitutional, and which do not.

³⁶ See further, Oliver, fn.37 above.

³⁷ Royal Commission on Reform of the House of Lords, *A House for the Future*, Cm.4534 (2000), Ch.5.

Within the Lords the Constitution Committee is best placed to articulate a set of constitutional principles, and then to be their guardian. It has recently conducted a major inquiry into the legislative process, in which it recognized the value of more systematic scrutiny, and commended the use of checklists. Building on that, it could conduct a further inquiry into the legislative process for constitutional Bills, and the defence of constitutional principles, and lay down some guidelines which over time could develop into a new set of conventions.

The Constitution Committee is already required to examine the constitutional implications of all public Bills, so that it is well placed to police its own guidelines, and to develop and refine them in the light of experience. If the committee is serious in its approach to the task, and systematic and consistent in applying its guidelines, it will soon find its guidance reflected in the Cabinet Office *Guide to Legislative Procedure* and in the practice of lead departments like the Department for Constitutional Affairs. A new set of conventions will have emerged. The House of Lords should be their guardian, and the Constitution Committee should be their guide.