

Parliamentary Scrutiny of Draft Legislation 1997-1999

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Executive summary

- The use of draft bills for consultation is widely regarded as an effective way of improving the quality of legislation. It allows outside experts to comment on the detail of a bill so that it can be amended before it is presented to Parliament. The Labour government elected in 1997 promised to increase the amount of draft legislation and give Parliament a specific role in the scrutiny of draft bills.
- This study looks at Parliamentary scrutiny of four draft bills. Parliamentary scrutiny added a new dimension to the consultation process, which had up to then been carried out solely by Government departments. The newly-established Committee on the Modernisation of the House of Commons in May 1997, in their first report (HC 190) set out a series of objectives for Parliamentary pre-legislative scrutiny (PLS). Yet the report failed to address certain key issues and offered few guidelines for those carrying out PLS.
- This lack of clarity was a problem for departments, committees and witnesses. The committees were not clear whether they should challenge the underlying policy or concentrate on the technical detail. Nor were they clear how their own investigation fitted in with that of the department or with the subsequent legislative process in Parliament.
- Scrutiny of the four draft bills therefore varied according to committee and subject. This meant that, for Government, the potential costs and benefits of consultation were not predictable. Although the Government hope that consultation will improve legislation and give it greater legitimacy, it also has the potential to provide a focus for resistance. For example, whereas the Social Security Committee validated the concept of the Pension Sharing on Divorce bill, the Committee on Public Administration challenged the main tenets of the Freedom of Information bill, and undermined the legitimacy of Government policy.
- Each of the participants should be clear about the purpose of PLS. The interests of Executive and legislature are not identical. Government and Parliament both seek better legislation, but their means of achieving this are likely to differ.
- Whereas a departmental consultation will focus on the bill's technical detail, Parliament's scrutiny is a more political process. Committees should acknowledge this, and aim to provide a political judgement of each draft bill by clarifying the purpose of the Bill to Parliament and providing a handbook for the subsequent Parliamentary stages.
- To be effective PLS requires greater co-ordination of resources and timing. With this first set of bills all of the committees had problems relating to either resources or the amount of time available. The process needs a greater degree of political leadership, from the Leader of the House.
- Few draft bills have been published since the initial flurry. Many are now concerned that Government is drawing back from its initial commitment. Yet PLS has the potential to benefit

Government and Parliament. If the process falls into disuse it will not be because it is fundamentally detrimental to Government, but because it is poorly managed.

Introduction

The purpose of this report is to examine some of the implications of scrutinising draft legislation, and to assess where PLS is most effective and where improvements might be made. The report is specifically concerned with the role of Parliament in the process and what Parliamentary scrutiny adds to the government's own consultation on draft legislation.

The report is based on a sample of four Bills - Pension Sharing on Divorce, Limited Liability Partnerships, Food Standards, and Freedom of Information, all of which were examined by Parliamentary committees of one sort or another. The lessons to be drawn from such a small study are obviously limited, but it is hoped that this report will provide some indication of those areas in need of attention and where scope exists for further research. The one omission from the study is a draft bill which was examined by an ad hoc joint committee of both Houses. However, this will be the subject of a review in autumn 2000 conducted by the Hansard Society and chaired by Lord Burns.

The paper is based largely on the publications from Government departments and reports of the relevant select committees as well as on interviews with officials from the department, Government ministers, committee members and officials, and witnesses. The paper does not go into much detail on the subject of the Bills but is primarily concerned with the procedures involved and attempts a preliminary assessment of the effectiveness of those procedures and of the committees' work. It seeks to examine the differences and similarities in each case, highlight areas of best practice and assess the long-term implications of PLS for parliamentary scrutiny of legislation.

I am grateful to all those who agreed to be interviewed as part of this paper - Ministers, civil servants, MPs, committee staff and witnesses. I am also grateful to those who commented on earlier drafts of the paper, and especially to Wilfred Hyde who researched the draft Food Standards bill and whose advice throughout has been extremely helpful.

Greg Power, July 2000

List of acronyms

PLS - Pre-legislative scrutiny (*This is used throughout to refer to the parliamentary process, as distinct from the departmental consultation.*)

CPA - Committee on Public Administration

FSA - Food Standards Agency

LLP - Limited Liability Partnerships

PSD - Pension Sharing on Divorce

FOI - Freedom of Information

CSA - Child Support Act

DSS - Department of Social Security

DTI - Department of Trade and Industry

MAFF - Ministry of Agriculture, Fisheries and Food

1 - A pre-history of pre-legislative scrutiny

It is widely accepted that Parliament does not scrutinise legislation as effectively as it might. Criticism has tended to focus on the Standing Committees that are responsible, in theory, for the line-by-line scrutiny of legislation. Successive reports¹ have pointed to the adversarial atmosphere and the influence of the party Whips as significant factors in the quality of scrutiny. According to one ex-MP the Government's primary concern is to "get the Bill through that stage as quickly as possible unaltered by the Opposition", and "give away nothing which would bring credit to the Opposition."²

Hansard Society Commission: Making the Law

Evidence given to the Hansard Society Commission on the Legislative Process from numerous organisations and published in *Making the Law*³ reinforced the concerns about the quality of legislative scrutiny. The submission from the BBC, illustrating its experience of the 1990 Broadcasting Act, is typical of many contributions,

Our general experience of the consultation process was one of considerable public debate prior to the preparation of the Bill but once the Bill had been introduced such consultation that took place was often too late, gave insufficient time for a considered response and many of the observations we made were ignored. It was another example of a Bill prepared in haste, policy not properly thought through and it became a question of getting the policy right during the passage of the Bill rather than improving and refining it. In some areas the Bill demonstrated little understanding of broadcasting and our impression was that little was being sought.

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The Commission's report recommended that more Bills should be published in draft form as a way of alleviating these problems. *Making the Law* highlighted the work of the Law Commission, which regularly publishes draft legislation for consultation, and seeks to simplify and modernise the law. It also noted that previous Governments had used this practice to good effect and drew attention to a number of bills which had been published in draft. These tended to be highly complex pieces of legislation (particularly tax legislation or Finance Bills) where the Government had benefited by seeking advice from outside bodies on the detail of legislation. Because the bills were in draft the Government could revise them before they were presented to

¹ See in particular the Procedure Committee Reports, (1984-85) *Second Report* and (1989-90) *Second Report*; Hansard Society Commission on the Legislative Process, (1992), *Making the Law*, Hansard Society: London; Garrett, J (1992), *Westminster: Does Parliament Work?*, Gollancz: London

² Garrett, J, *op cit*, p. 50

³ Hansard Society Commission on the Legislative Process, *Making the Law*, 1992

⁴ *ibid*, Memoranda 11, pp.179-81

Parliament and reduce the need for substantial amendment during their passage. This is the principal way in which draft bills improve the quality of legislation.

The evidence submitted to the Commission was overwhelmingly positive in respect of draft legislation. Organisations such as the Association of British Insurers, BBC, British Medical Association, Confederation of British Industry, Consumers' Association and Institute of Directors recommended greater consultation on Bills before they were presented to Parliament. There was a general sense that the time in Parliament could be used more effectively if some of the potential problems could be ironed out at an earlier stage.

The BBC contrasted its experience of the Broadcasting Act 1990 with that of the Copyright Designs and Patents Act 1988. The latter Bill had 'an unusually long gestation period' which started in 1973 with a Committee taking evidence, there followed two Green Papers (in 1981 and 1985) and,

the DTI made a draft Bill available to interested parties before first reading and consultation continued virtually throughout the Bill's passage through Parliament. A significant number of the BBC's comments on the legislation were taken into account. There was, as far as the BBC could judge, little interest in the Bill at ministerial or Cabinet level.

We would recommend that Bills be published well in advance of introduction and that a special Committee is set up to hear evidence from interested persons and experts in any technical area affected by the Bill. This would have the advantage of ensuring that the Bill in its draft form is properly considered prior to introduction.⁵

The Association of British Insurers came to a similar conclusion:

it is only when proposals are transformed into draft legislation that many of the difficulties emerge. For example, it could be helpful if Select Committees were given the chance to consult widely on complex Bills, take evidence and suggest amendments, leaving the actual process of amendment to the Parliamentary procedures.⁶

Overall, the evidence to the Commission reflected a concern that traditional forms of government consultation did not concentrate enough on the detail. The development of policy into legislation requires a level of technical detail that is rarely included in Government Green and White Papers. The final form of any bill is the result of a lengthy process of negotiation between government department and the draftsmen in Parliamentary Counsel. The process can often be tortuous, throwing up new problems and even contradictions in a department's policy aspirations. If at this vital stage, which determines how policy is implemented, there is little

⁵ *ibid*

⁶ *ibid*, M. 3, pp.154-60

outside consultation with experts, any flaws in the technical detail of the Bill tend not to manifest themselves until the legislation is introduced to Parliament. By which time it is often too late to constructively amend the legislation.

Although the Commission acknowledged that publication in draft was not suitable for all bills it recommended that, in general, the Government should encourage departments to follow best practice, stating that “in principle, there should be as full consultation as is practicable on draft Bills and clauses”, that “departments should offer more consultations on draft texts, especially in so far as they relate to practical questions of the implementation and enforcement of legislation”, and “where there is no great urgency for a Bill, the whole Bill might sometimes be published in draft in a Green Paper, as the basis for further consultation and possibly parliamentary scrutiny.”⁷

The Labour Government and pre-legislative scrutiny

By the early 1990s a number of high-profile policy failures such as the poll tax, the Dangerous Dogs Act and the Child Support Act, as well as reports such as that of the Hansard Society, meant that there was considerable pressure on government to improve the quality of legislation. Under John Major the Conservative Government did publish a number of Bills in draft for consultation.⁸ However, it was a tentative and unsystematic approach with bills on Sunday Trading, Reserve Forces, Arbitration and Chemical Weapons.

The Labour Party picked up on this concern in Opposition. In a lecture on constitutional reform in 1996 Tony Blair floated the possibility of greater consultation, stating,

we still need to update our legislative procedures to improve the effectiveness of Parliament. There is also a case for effective consultation to produce better quality legislation. And it does not help produce good government when almost every change in every clause of a Bill is interpreted as a defeat for the government.⁹

In March 1997 the party made a specific commitment to “improve the quality of legislation by better pre-legislative consultation”¹⁰ in the report of the Joint Committee on Constitutional Reform, published by Labour with the Liberal Democrats. Labour thus entered Government with a stated commitment to greater pre-legislative scrutiny and in the Queen’s Speech of May 1997 announced its intention to publish seven bills in draft. Three weeks later, in a government-

⁷ *ibid*, para. 140

⁸ A list of draft bills published since 1992 is included as an appendix.

⁹ John Smith Memorial Lecture, 7 Feb 1996

¹⁰ Report of the Joint Committee on Constitutional Reform, March 1997

initiated debate on modernisation of the Commons, Ann Taylor, Leader of the House of Commons, elucidated the Government's intention,

There is scope for considering to what extent we would gain by having more Bills published in draft and, possibly, by having pre-legislative Committees to examine draft Bills or White Papers or – it is not the method that I would prefer – using departmental Select Committees. The use of such Committees is still worthy of consideration.¹¹

A new Committee on Modernisation of the House of Commons was appointed on 4 June 1997 and its first report *The Legislative Process* (HC 190 1997-8) published on 23 July 1997. The report outlines the 'perceived defects in the present system' noting the criticisms made of parliamentary procedures, the pattern and timing of scrutiny, the poor levels of consultation and the culture of scrutiny which means that "Once Bills are formally introduced they are largely set in concrete."¹²

The purpose of PLS is set out most vividly in paragraph 20 which states,

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

The report emphasises the role that should be played by Parliament in scrutiny of draft legislation, and sets out four options "which could easily be incorporated into existing practices", namely using the existing departmentally-related Select Committees; a new permanent structure of legislative Committees; ad hoc Select Committees of this House; or Joint Committees of both Houses for individual draft Bills.¹³

¹¹ HC Deb, Vol. 294, Col. 905, 22 May 1997

¹² Select Committee on Modernisation of the House of Commons, *First Report - The Legislative Process, 1997-8*, HC 190, para. 7

¹³ *ibid*, paras 19-21

Objectives – The purpose of pre-legislative scrutiny

The distinctive feature of Labour's approach to consultation was not so much that it was promising to publish more bills in draft but that it regarded Parliamentary scrutiny as integral to the process. The impetus appears to have come from Ann Taylor who clearly felt Parliament should play a role. The report of the Modernisation Committee, at that time chaired by Taylor as Leader of the House, states, "In recent years some draft Bills have been produced for prior consultation ... [but] The House itself has however made no attempt to undertake any systematic consideration of such draft Bills." In the light of the Government's commitment to publish a greater number of draft bills this "provides a real chance for the House to exercise its powers of pre-legislative scrutiny in an effective way."¹⁴

This was a new development. Although linked with the Parliamentary process the publication of bills in draft had been used as a way of overcoming the problems inherent in Parliament's scrutiny of legislation. The reason for consulting experts and practitioners in a policy area on the detail of legislation was to provide an expertise not available inside Westminster or Whitehall. Its primary purpose was thus to refine and amend legislation *before* it was presented to Parliament. The process does not predicate any parliamentary involvement, rather, it could be said it bypasses Parliament by going directly to the experts. (It is significant that *Making the Law* does not specifically recommend Parliamentary scrutiny of draft legislation, but instead refers to it only as a possibility.¹⁵)

Therefore, although the value of consulting on draft legislation was clear, there was some ambiguity as to what the Government hoped Parliamentary scrutiny would add to the consultation process. The conclusions of the Modernisation Committee are that the process should a) allow MPs 'a real input' into the form of the final legislation, b) mean that Ministers will be more receptive to suggestions for change, c) open up Parliament to those outside affected by legislation, d) save time at later stages in the Parliamentary process and e) overall, it should lead to better legislation.

Yet there is little in the report's conclusions which specifies the unique role of Parliament. Much of the above could have been achieved through a Government department's consultation. Questions relating to Parliament's role, what sort of Committee should undertake the work, what sort of issues PLS should cover and, most importantly, how it should complement the departmental consultation were left vague. The committees that scrutinised the first few draft bills did so with few clear objectives and little official guidance.

¹⁴ *ibid*, para. 5

¹⁵ see footnote 7

Structure of the Report

The source of this ambiguity relates to the fact that the approach to scrutiny of draft legislation fails to draw a distinction between the interests of Government and the interests of Parliament. Publishing a bill in draft serves a purpose for Government. The relevant department will have a clear idea of what the consultation exercise should achieve, and largely controls the process through the timing of publication and by identifying the key issues. Parliament may not share the same objectives toward a particular piece of legislation and may wish to focus on other issues. As such, draft legislation and its scrutiny by Parliament create a number of potential costs and benefits (for Government and Parliament) which the Modernisation Committee report fails to address.

This paper will use four draft bills as case studies to assess these costs and benefits. It starts by separating the objectives of Government from those of Parliament. Chapter two examines the Government's approach to draft legislation and starts with a cost-benefit analysis of departmental consultation on draft bills. Publication of draft legislation is a government-driven exercise and, in this context, the chapter examines the pressures on the legislative timetable and seeks to determine why the Government sought to publish certain bills in draft form.

The third chapter focuses on Parliamentary scrutiny of draft legislation. Given that Parliament may well have different objectives to Government in scrutinising a piece of legislation the chapter examines how far the Government sought to influence the process. It also assesses the specific costs and benefits for Parliament in responding to the Government initiative and how the various committees coped with their task.

One of the key objectives of pre-legislative scrutiny as set out in the Modernisation Committee report was that it 'should save time at later stages'. The fourth chapter examines the effect of scrutiny on the rest of the legislative process by looking at the influence of MPs, the impact of outside evidence, the amendments to legislation and the passage of the bills through Parliament. It attempts to distinguish between the effects of publishing a bill in draft and the parliamentary scrutiny of that draft bill.

The final chapter provides an overview on the advantages and disadvantages of pre-legislative scrutiny. It examines the success of the process from the Government's perspective and from Parliament's perspective. It concludes with recommendations for reform on the need to clarify the objectives of the process, to improve the timing and resources available and to provide greater leadership and co-ordination.

2 – The role of Government: The choice of legislation

The Government's perspective on legislation is distinct from that of Parliament. The Government sets the legislative timetable to which Parliament must respond. It controls the number of bills published each year, their content and the order in which they will be presented to Parliament. However, the Government is subject to enormous internal pressure (from Ministers and their departments) and external pressure (from pressure groups and professional bodies) to introduce legislation across a broad range of policy areas. Given the limited amount of Parliamentary time for considering legislation there are always more bids for legislative slots than there are slots available. The choice of legislation for any particular year is therefore a careful process of negotiation between the Cabinet Office, Government business managers and departments. The final content of the Queen's Speech must balance these pressures and, in the light of the Government's long-term objectives weigh the relative costs and benefits of legislating in a particular area.

The publication of draft bills therefore has a number of attractions for the Government. In the first place it offers the prospect of better legislation. In theory it allows policy to be developed more thoroughly, over a longer period, by departments and allows Parliamentary Counsel more time to draft the bill. The department can consult outside opinion on the detail of the bill and therefore have access to expertise not available in Whitehall. At the same time it has a political value, offering some solace to Ministers who did not get a legislative slot, presenting the hope of a full bill the following year and deflecting pressure to legislate by showing signs of government activity.

However, the publication of draft bills effectively creates an extra stage in the legislative process. It inevitably creates extra work for the departmental officials and for Parliamentary Counsel, both of whom have to assimilate this extra work into their existing duties. Moreover, the potential gains from publishing draft legislation are uncertain. There is no guarantee that a draft bill will get a full legislative slot, the consultation process might highlight flaws in Government thinking and the draft bill might simply attract unwanted and unnecessary criticism.

This chapter begins with an analysis of the potential costs and benefits for the Government of consulting on draft legislation. It examines the extent to which the choice of draft legislation requires a similar balancing of priorities to that for the normal choice of legislation. The second section explains the background to the four bills in this study and the reasons why they were chosen for draft publication. The final section assesses the factors that determine the suitability of bills for draft publication.

A Government cost-benefit analysis of draft legislation

The final decision on the legislative programme involves balancing a number of competing priorities and anticipating the possible repercussions of including, or excluding, specific pieces of legislation. The content of the Queen’s Speech should show that the Government is fulfilling its manifesto commitments, but it also often reflects public pressure to act in certain areas and contains technical bills, such as where the government is obliged to legislate. At the same time the business managers must ensure that the legislation can be delivered through Parliament within the allotted time. Any unforeseen problems with bills have a knock-on effect for the rest of the Government’s legislation.

Although consultation on draft legislation has tended to be regarded as almost entirely beneficial for Government it too carries a number of potential advantages and disadvantages. The choice of draft bills therefore involves a similar process of balancing several competing objectives. Reflecting this, the Cabinet Office issued a guidance paper for departments in 1999 on the costs and benefits of all forms of government consultation.

Figure 1 - Cabinet Office guidance to departments¹⁶

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| <p>Benefits</p> <p>Consultation can:</p> <ul style="list-style-type: none">• enhance the quality and effectiveness of policymaking by providing insights that are otherwise difficult to obtain – such as differing cultural perspectives, hidden costs and risks, likely winners and losers and the factors shaping entrenched positions on particular initiatives• strengthen the legitimacy of final decisions• increase the responsiveness of citizens and build the confidence of communities or interest groups in dealing with particular issues |
| <p>Pitfalls</p> <p>Consultation can:</p> <ul style="list-style-type: none">• create delay and administrative overload. Identifying and informing interest groups, seeking views, building the results into analysis and feeding back are all time-consuming and costly activities which can lead to policy makers being overwhelmed by the sheer volume of information generated• provide a focus for resistance, creating difficult public presentation issues, especially if the scale of the challenge is greater than expected or comes from unforeseen quarters• raise expectations amongst those consulted that their views will be taken into account even though decisions cannot possibly reflect every opinion expressed• produce unrepresentative views – well-organised lobby groups and sectoral interests can dominate a consultation giving a distorted view of relevant opinion |

¹⁶ Taken from *Professional Policy Making in the Twenty First Century*, published by the Cabinet Office and available at www.cabinet-office.gov.uk/moderngov/1999/policy/policy.pdf

Some of these factors have more relevance than others, as consultation on draft legislation, compared with that for a Green or White Paper, is much more specialised and technical. In the first instance, the department publishing will seek comment on the detail of the legislation rather than on the principles of the bill. By the time a draft bill is published all of the main policy issues should have been settled. As such, the primary purpose is to target those who can provide an expertise not available inside the department, such as academics, professionals or technicians. The audience is therefore limited by the scope of the consultation.

However, the three potential benefits highlighted by the Cabinet Office paper apply to the draft legislation consultation. Given that the individuals and organisations commenting on the draft legislation are often likely to be those who will have to implement it, the importance of getting their expertise and support is crucial. The value of the process, as expressed by a government business manager, is that it allows the Government to neutralise outside opposition (in the shape of professional bodies or pressure groups) at an early stage. In his view much opposition can be dampened by allowing these groups into the department's policy-making process. Their involvement effectively co-opts them into the formation of policy, and they thus become responsible for the outcome. Moreover, the legitimacy of the legislation is assured if it has the backing of the key organisations in the field.

The specialised nature of the consultation means that the risks associated with publishing a draft bill are less than compared with other, more general, Government consultations. The process is limited in its scope and therefore the likelihood of unrepresentative views or major controversy is small (particularly if the expert and professional interests have informed the policy process). This is not to say that risks do not exist. It may not be possible to assuage all the concerns of interest groups or ensue their 'co-option'. As such, the danger of raising, but not being able to meet, expectations is a real one. Problems are likely to arise where the policy underlying a bill is not clear, where the professional or expert community is in opposition to any of the basic tenets of the bill or where a bill has been badly drafted. These factors are considered below in relation to the four bills in this study.

Overload and delay

The factor that is common across Government is the amount of work created for departmental officials and Parliamentary Counsel (the department responsible for drafting legislation) by the publication of bills in draft. Draft legislation introduces an extra stage into the preparation of legislation.

Legislation to be included in the Queen's Speech is usually confirmed to the relevant Departments in May. They give instructions to the draftsmen and there is then a lengthy process of negotiation between Parliamentary Counsel and departmental officials. The

legislation should, in theory, be ready by the time of the Queen's Speech, but negotiations continue until the bill is published, which can be as late as February or March of the following year. Once the bill has been published the draftsmen track the bill through Parliament and draft any amendments. The resources of Parliamentary Counsel are thus stretched taut across the legislative year with the preparation of government bills and the revision of those bills as they are amended during their passage.

Given the other pressures faced by Parliamentary Counsel it is not surprising that the preparation of draft legislation is a secondary concern. In theory counsel has longer to develop draft bills. Approval for draft bills is given in about May of year one in the hope that they will be introduced to Parliament in October of year two. This is the same time that bills to be included in the Queen's Speech of year one are given approval. However, departments are not obliged to provide detailed instructions for those draft bills until the end of January in year two, some eight months later. Despite the early approval of advance drafting there is little spare capacity within Parliamentary Counsel for the production of 'extra' bills.

As it is, all the four bills in this study were subject to considerable delay as were the others promised in the May 1997 Queen's Speech. Of the bills promised in the first session only two (Pension Sharing on Divorce and Financial Services and Markets) - were published by the summer of 1998. Limited Liability Partnerships appeared in September 1998, Food Standards in February 1999, Local Government in March 1999 and Freedom of Information was published in May 1999. The promised bill on tobacco advertising was not published at all.

It is hoped that the draft bill process will, in the longer term, ease the amount of work. If bills published in draft are subsequently introduced to Parliament, most of the preparation will have been done the previous year. Whether this works in practice remains to be seen. However, if it is not going to 'save time', but rather create extra work, the decision to publish in draft suggests that the Government believes the other potential benefits are worth the extra work. For example, as well as those outlined in the Cabinet Office guide there is political motivation for publishing certain draft bills. These factors are examined in relation to the individual bills.

The choice of bills in the first session

The choice of bills in the first session was not subject to the normal process of Government departments bidding for legislation. The five months normally allowed to decide the legislative programme were compressed into as many days. The decision as to which bills would be published in draft was taken by a small number of people working under great pressure. Yet they would have had to weigh the merits of each particular bill, and the analysis below reveals the factors that determined their choice.

Pension-sharing on divorce (PSD)

One of the most important motivations for consulting on draft legislation is the desire to improve the quality of the legislation. In this respect the Child Support Act (CSA) casts an extremely long shadow. The CSA aimed to ensure that absent fathers contributed sufficiently to the welfare of their children. It was a highly technical and mainly non-contentious piece of legislation where there was broad cross party agreement on the bill's basic principles. Although driven through by well-meaning Parliamentarians, the cross-party consensus hid some of the bill's flaws. The detail of the legislation was not adequately scrutinised during its passage and it proved to be unworkable when implemented. Many MPs now cite the CSA as the single largest cause of constituency casework.¹⁷

The draft legislation on Pension-Sharing on Divorce had many similarities to the CSA. Both came under the jurisdiction of the Department for Social Security, and like the CSA, pension-sharing is a highly technical issue whose general principles had a high degree of cross-party support. The CSA therefore loomed particularly large over the DSS and Social Security Select Committee. It was mentioned by almost every participant when interviewed in relation to the draft bill process. One Minister commented, "MPs know from their constituency casework what can happen if a Bill that everybody agrees on in principle is poorly scrutinised", whilst another said "we didn't want the genuine consensus over the political objective to cloud the detail of how we met that objective." PLS, it was believed, would highlight any potential problems at an early stage. It was important therefore for the department to hear from those in the legal, financial and pensions professions (who would ultimately have to implement the legislation) and draw on their expertise.

Of equal importance was that the issue had already been subject to considerable consultation. The Conservative Government published a Green Paper in July 1996, followed by a White Paper in February 1997, stating their intention to introduce legislation by Spring 1999. The new Labour Government built on this work by announcing it would consult on a draft bill. By this stage there was a high level of agreement between the department and the professional community over the content of the bill, and therefore any consultation on the draft bill would necessarily focus on the detail of the legislation. In addition, the department had been working on pension-sharing, on and off, since 1985 but especially so since the 1995 Pensions Act. The civil servants responsible regarded it as a relatively self-contained issue and Ministers were told that, given the work going on behind the scenes, a draft Bill could be produced within a year.

There were, though, undoubted political benefits from publishing this legislation in draft. As one senior Minister commented, the Government was keen to act on modernising pensions as soon as possible, this particular bill was attractive because it related to both women and

¹⁷ See Power, G. (1998), *Representatives of the People?*, Fabian Society: London

pensions, and was a sign of the government's intention. Another Minister acknowledged that the department had bid for a legislative slot in the first year but had been unsuccessful, and the draft bill was the next best thing. Moreover, by publishing the bill in draft it increased the chances of it being included in the following Queen's Speech.

The combination of public consultation, professional agreement, departmental preparation and political suitability meant that it was regarded as a suitable candidate for piloting the PLS process. *Pension sharing on divorce: reforming pensions for a fairer future* was published on 8 June 1998 by the Department of Social Security.¹⁸

Limited Liability Partnerships (LLP)

The second bill to be published in draft, that pertaining to Limited Liability Partnerships (LLPs), had a similar history. The issue of liability had been touched upon in previous government consultations but was forced onto the political agenda in 1995 when two large accountancy firms raised the prospect of large professional partnerships registering in Jersey or other offshore locations to avoid British liability law. As a result in 1996 the President of the Board of Trade undertook to introduce legislation at the 'earliest opportunity' to bring UK law relating to LLP into line with that of Jersey and the USA.

A first consultation paper was published by the DTI in February 1997 which set out the Government's proposals and contained detailed legislative drafts. The new Government confirmed their intention of proceeding with the legislation and promised to publish a draft Bill. The motivation for draft publication was partly due to the highly technical nature of the legislation (reflected in the fact that although the draft Bill contained only 17 clauses the attached regulations were contained in five schedules which ran to 75 pages). However, as with the pension-sharing legislation, there was also a great deal of professional interest in the Bill from lawyers and city accountants, and the DTI believed it was important that their advice (and, to a large extent, their agreement) was sought on the technical detail of the legislation. As such the publication of the draft bill in September 1998 was the culmination of a lengthy process of consultation and, again, reflected a high level of consensus between government and private sector on the bill's objectives.

Although the LLP legislation would not find a wide political audience, it had a deep significance to the business and legal community. A number of witnesses to the select committee mentioned a 'confusing' reference to LLP legislation in the Labour Party's business manifesto. The draft bill therefore allowed the way of responding to the expectations and political pressure from the professional community.

¹⁸ It was published without a Command paper number, a decision that was criticised by the Social Security Select Committee in its report.

Food Standards

The genesis of the draft bill on Food Standards, which would set up the Food Standards Agency, like the previous two draft bills straddled the election, although its history is shorter. The Labour Party had commissioned a report from an independent expert, Professor Philip James about the possible establishment of a Food Standards Agency (FSA) before the election. The Government was keen to legislate quickly in this area and the draft legislation followed closely the recommendations made in Professor James' report.

The bill was unusual in that it cut across the work of the Department of Health and the Ministry of Agriculture, Fisheries and Food. There was some strong resistance within MAFF to the idea of the FSA, and some feeling in that department that it should be solely responsible for the FSA. The civil servants who formed the bill team were drawn from both departments, although day to day leadership of the bill was held by a Minister in MAFF.

The bill may appear to be an odd choice because of the lower level of preparation and the potential for political controversy. The high level of political and professional agreement which characterise the first two bills were not matched in the case of the FSA. There was a danger that the consultation process could have highlighted a number of politically sensitive issues rather than focusing solely on the detail of the legislation. However, one can only assume that the business managers believed that the political benefits outweighed these concerns. According to Ministers and officials, the bill had been a 'first reserve' in the first session. The Government had a desire to be seen to be acting in this area, was under pressure from outside interests and the draft bill increased the likelihood of the legislation finding a legislative slot in the second session.

Freedom of Information (FOI)

The Freedom of Information draft Bill, in contrast to the others, was seen as a landmark Labour policy and although a highly technical piece of legislation it was far more controversial than the other bills. Freedom of Information had been Labour Party policy since the 1970s but there had been little preparation of the bill's detail. The previous Government opposed a statutory FOI act and therefore consultation began when the Government published the White Paper *Your Right to Know*¹⁹ in December 1997. The White Paper committed the Government to publishing a draft Bill in 1998. At the time it was expected that the Bill would be published in the Spring of 1998 and legislation included in the 1998 Queen's Speech. In July 1998 David Clark was sacked from the Cabinet and responsibility for the Bill moved from the Cabinet Office to the Home Office.

¹⁹ Cm 3818

The switch of responsibility to the Home Office and the slippage on the original timetable led many to believe that the White Paper's proposals would be watered down. Jack Straw was known to be less inclined towards a wide-ranging Freedom of Information Act than David Clark and in the period between July 1998 and publication of the draft Bill in May 1999 there were numerous press stories about disagreements in Cabinet about the scope of the proposed Freedom of Information legislation. Such stories were given validity when the draft Bill was published. Not only had the scope of the Bill diminished but also the 'harm' tests for disclosure of information had been altered so that it would be more difficult to secure certain types of information than was implied by the White Paper. Organisations such as the Campaign for Freedom of Information were deeply critical of the Bill and its perceived deficiencies generated a good deal of press coverage, with the *Guardian* newspaper launching a campaign calling for greater freedom of information than was contained in the draft Bill.

The political motivations for publishing FOI in draft were perhaps greater than with the other bills. As with other draft legislation there was a vocal community outside of government pressing for action, but there was also tremendous pressure for FOI from Ministers inside government, especially so from David Clark when Chancellor of the Duchy of Lancaster. The transition of responsibility to the Home Office may have dampened some of that internal pressure but there was growing restlessness on the Labour backbenches in Parliament about the lack of activity and also from the Select Committee on Public Administration. The commitment to publish in draft was made by the Cabinet Office and it is perhaps significant that none of the Home Office officials interviewed were entirely sure why the bill had been selected, suggesting that the decision was more to do with factors other than a clear desire to consult on specific aspects of the bill.

Conclusion: Factors determining the suitability of draft legislation

It is evident just from the four bills above that the reasons a particular piece of legislation is chosen for draft publication will vary according to the bill at hand. From these bills it appears that there are six factors which influence the choice of legislation and the PLS process.

1. The complexity of the legislation

The belief that legislation can be improved by consulting on a draft bill is probably the Government's overriding consideration. However, it is not possible or desirable to publish every bill in draft form. The limited number of draft bills published before 1997 often related to taxation legislation or Finance Bills, or to other highly technical issues. Publishing a draft bill assumes that the detail of the legislation can be improved by consulting and that the department will benefit by utilising this external expertise.

For all four bills in this study ‘the devil is in the detail’. Each is a highly complex piece of legislation and the success or failure of the bill would rest, in part, on whether the bill was well-drafted. As one official in the DTI commented, “If you’re looking to do a very technical measure it is sensible to give it the widest exposure possible. We are lucky in that the people who are interested in this measure are lawyers and city accountants, and we are getting their advice for free.”

2. The level of preparation

For legislation to be published in draft the underlying policy objectives must be clear. This implies a lengthy process of gestation within the department and lengthy negotiations between Ministers, departmental officials and draftsmen. This internal agreement is essential so that the department is clear about what should be achieved through the consultation process. If the objectives of the process are not clear to the participants, the consultation may drift from the detail of the legislation to the underlying principles of the bill, thus threatening the bill in its entirety. This factor is closely linked with the third;

3. The degree of political and professional agreement on content of bill

Part of the department’s consultation prior to publishing a draft bill should have identified any opposition to the bill. By bringing the key organisations and experts into the policy making process and securing their support the Government should minimise the possibility of opposition to the bill, or at the very least anticipate any possible objections. If the Government knows it is publishing a bill which has the support of the key organisations and experts the chances are that the consultation will focus on the detail rather than the principle.

The lengthy preparation, professional agreement and relatively non-contentious nature of the pension-sharing (PSD) and limited liability (LLP) bills ensured that the debate would be largely limited to matters of detail. Food Standards (FSA) and Freedom of Information (FOI) were potentially more controversial. The Home Office, for example, when it published FOI in draft did not have any agreement on the main tenets of the bill, instead it had a range of academics, experts and commentators directly opposed to many of its central principles.

As the Cabinet Office guidance makes clear, one of the benefits of external consultation is that it can ensure greater legitimacy for the policy. FOI shows that, if badly handled, consultation can undermine any legitimacy and provide a focus for opposition.

4. Political pressure on Government to legislate

Political pressure alone is unlikely to force the Government into publishing a draft bill. A consideration of the first three factors in this list is likely to determine whether the bill is suitable for draft publication. If it is deemed suitable then the amount of political pressure for Government action will be an influential factor in the business managers’ thinking.

On all the four bills in this study there was a degree of political pressure. For PSD and LLP the pressure was primarily from the business and legal communities. FSA and FOI were higher profile manifesto commitments, which had raised the expectations of interest groups, and the Government, in these cases, perhaps felt a greater pressure to act. On FOI in particular the pressure not only came from outside organisations but from a growing restlessness on the Labour backbenches.

5. Increasing the chances of inclusion in the Queen's Speech

Internal pressure may also influence the decision on whether to publish in draft. Where a Minister has unsuccessfully bid for inclusion, as was the case with PSD and FSA, the publication of a draft bill is often the next best thing. Moreover, the preparation that has gone into the bill make it a likely candidate for the following session of Parliament.

6. An assessment of how much extra work it will create and how much time can be saved at later stages

All of the above factors will influence this assessment. However, the creation of extra work for the departments or for Parliamentary Counsel does not appear to have been an overbearing concern for the business managers who would have determined the choice of bills. The role of the business managers is to ensure that the Government's legislation successfully completes its passage through Parliament, ideally with as few amendments as possible. The appeal of draft legislation is that the most contentious issues should be solved before the bill is presented to Parliament and, if problems do remain, the business managers will be aware of them in advance. As such, the subsequent passage of the legislation through Parliament should be relatively smooth. Whether this worked in practice is the subject of the next two chapters.

3 – The role of Parliament: Scrutiny of draft legislation

Consultation on draft bills is initiated by Government. It decides on the choice of bills, their content and the timing of their publication. Parliament, in contrast, as Griffith and Ryle point out, performs a responsive rather than an initiating function.²⁰ It can only react to the policy decisions made by Government. As such Parliament and Executive have distinct perspectives on the process of scrutinising draft legislation.

For Government scrutiny by Parliament introduces an additional set of costs and benefits which should inform their decisions on the choice of draft legislation. Whereas a Government department will determine its own consultation process, a separate consultation by a Parliamentary Committee is largely beyond their influence. The Committee may choose to focus on new issues or question the underlying policy. In addition, their Committee hearings are more likely to generate media interest than the departmental consultation. However, a select committee report which supports the legislation is likely to improve its legitimacy in Parliament and have a considerable effect on the subsequent passage of the bill.

For Parliament the scrutiny of draft bills provides a different set of opportunities and costs. Scrutiny of a draft bill provides the opportunity to directly influence the government's policy making process. Yet its work is framed by decisions made by Government, it prevents the departmental committees from undertaking other work and the possibility of extra scrutiny is matched by the danger of co-option into the policy process.

The Labour Government's desire to increase the number of draft bills and also to ensure that Parliament played a greater role in the scrutiny of such bills appeared not to recognise the distinct interests of Parliament and Executive. Although there was little clear guidance on the role of the Committees, in the first Session at least, government business managers helped to establish and advise the various Parliamentary committees charged with pre-legislative scrutiny (PLS). However, this may have been motivated more by a desire on the part of the Leader of the House to ensure that parliamentary scrutiny was successful, than a desire to control the activity of those committees.

This chapter examines the role of the Parliamentary committees in scrutinising draft legislation. It assesses the extent to which parliamentary scrutiny of draft bills was influenced by the Government, the costs and benefits for Parliament in responding to the initiative and how the Committees coped with the task.

²⁰ Griffith, J.A.G. & Ryle, M., (1989) *Parliament: Procedure, Function and Practice*, London: Sweet and Maxwell, p.5

Establishing the scrutiny committees

The Leader of the House and the Cabinet Office played an important role in encouraging committees and determining what sort of committee scrutinised the draft bills. These decisions inevitably involved a degree of political guile. A Cabinet Office official involved in business management noted that the level of trust the business managers had in a particular committee chair would be a factor in whether that committee got the draft bill. Other factors, such as whether the creation of ad hoc Committees might allow the business managers to keep potentially troublesome politicians occupied also informed their thinking.

| <i>Draft Bill</i> | <i>Type of Committee</i> |
|-----------------------------------------------|----------------------------------------|
| Pension Sharing on Divorce | Social Security Select Committee |
| Limited Liability Partnerships | Trade and Industry Select Committee |
| Freedom of Information | Public Administration Select Committee |
| Electronic Communications | Trade and Industry Select Committee |
| Insolvency | Trade and Industry Select Committee |
| | |
| Food Standards | Ad hoc Commons Committee |
| Freedom of Information | Ad hoc Lords Committee |
| | |
| Financial Services and Markets | Joint Committee of both Houses |
| Local Government (Organisation and Standards) | Joint Committee of both Houses |

Of the four bills in this study, the motivations differ according to Committee.²¹ The Social Security Committee was approached informally by Secretary of State Harriet Harman and Ann Taylor about their interest in scrutinising the draft Bill. The Committee was given a powerful incentive by Social Security Ministers who told the chair that it would be given the opportunity to scrutinise a draft Child Support Bill, a subject far closer to the Committee's main interests, once it had examined the pension-sharing bill.²² Although the issue of pension-sharing was highly technical and marginal to the Committee's main interests, the Committee did have an interest in the process and, given the amount of high-level encouragement, it was to some extent duty-bound.

²¹ The notable omission in this study is scrutiny by a Joint Committee of both Houses. Interviews were carried out with some of the key participants in the Financial Services and Markets bill and the Local Government bill and these inform the rest of the study. However, research into these bills was not as thorough as the others and it is difficult to make generalisations.

²² At the time of writing the draft CSA bill has yet to appear.

The Trade and Industry Committee felt a similar duty to examine the draft LLP bill. Although not formally charged with the task of examining the legislation, the Committee decided at an early stage that it would be right to conduct an investigation. However, it noted that had it not been for the Modernisation Committee's report it is unlikely that the Committee would have examined the legislation, "given the volume of other work of an apparently higher priority to which we were committed."²³

In stark contrast, the Agriculture Committee had a powerful interest in the issue of Food Standards. It had previously published a report on the subject and the chair of the Committee (Peter Luff MP) approached the whips requesting that the committee be given the opportunity to scrutinise the draft bill. However, because the issue cut across Health and Agriculture Departments an ad hoc Commons Committee was established through the usual channels. The putative committee chair (Kevin Barron MP) was approached by the chief whip and agreed to put his name forward although he had no previous experience in either health or agriculture and no particular expertise in the subject. Some members of the Committee were drawn from the relevant select committees, others had no particular experience.

The Committee on Public Administration (CPA) made it clear at an early stage that it intended to scrutinise the draft FOI bill. Unlike other Committees the CPA had a degree of expertise in the subject because of their report on the White Paper and members were keen to use this knowledge in the scrutiny of draft legislation. However, the matter was complicated by the fact that, in the first place, the bill was a Home Office matter and should, in theory, have gone to the Home Affairs Select Committee. However, Chris Mullin, chair of the Home Affairs Committee, had indicated that his Committee had no objection to CPA scrutiny given its previous interest in the area.

FOI was a politically contentious issue and given the controversy surrounding the content of the bill and the CPA's determination to undertake the scrutiny, it would have been difficult for the government to have sent the bill to an alternative committee. However, members of the Lords had also indicated their desire to scrutinise the legislation and some peers were expecting the government to establish a joint committee of both Houses. According to more than one participant, it was a "cock-up" which saw a separate ad hoc Lords Committee established. Lord Archer of Sandwell, the Committee chair, was approached by the Government Chief Whip, and the other members were appointed through the usual channels.

Although the Opposition members were generally appointed because of a long-standing interest and expertise in FOI, some of the Labour members appear to have been chosen for more

²³ Trade and Industry Committee, Fourth Report (1998-9) *Draft Limited Liability Partnership Bill*, HC 59, para 1

political reasons. One participant commented that this had not been obvious at the outset. It is unusual for party politics to intrude into Lords Committees, but during the final report it was clear that a couple of Labour peers were intent on toning down the report's criticism of government. This was, apparently, less to do with the content of the Bill than it was to do with the fear of upsetting Government on what was a clearly contentious issue.

The whips and the Leader of the House played an influential role in determining the type of scrutiny that each bill underwent. It was for the business managers to decide on the sort of committee and, in the case of the ad hoc committees, the membership was determined via the usual channels. As a result some of these decisions were undoubtedly intended to minimise the damage to Government (e.g. Lords FOI Committee). However, in the case of the Public Administration Committee, the business managers clearly felt that the political repercussions of preventing the Committee from examining the bill were too great. The fact the bill was already controversial and had generated a good deal of media coverage meant that the CPA was successful where the Agriculture Committee was not.

The role of the scrutiny committees

Although the original decisions on the choice and formation of the committees was heavily influenced from the centre of government, there was little guidance given to either departments or committees on the role and purpose of PLS. The interest of the business managers seemed to wane once the process was underway as they were diverted to more pressing concerns such as the passage of controversial legislation. Some departmental officials commented that they sought advice from the Cabinet Office, but this appears to have been mainly informal and technical advice on the process.

Almost all the participants interviewed commented on the lack of clarity surrounding the purpose of pre-legislative scrutiny. Specifically, there was no sense as to how Committee scrutiny should complement the work of the department or inform the legislative process. According to one committee chair their task was identified only in so far as "we were given a draft bill and told to write a report on it." As such the Committee had considerable leeway in determining the nature and scope of their investigation. The Committees had to decide firstly how to conduct the investigation (whether they should concentrate on the detail of the legislation or adopt a broader approach) secondly, identify the key issues for examination, and thirdly, in the light of these decisions, gather oral and written evidence. In practice the committees discussed their options with departmental officials, and to varying degrees worked with (or against) the civil servants.

The conduct of the investigations

The conduct of each inquiry was largely determined by how the Committee saw its role in relation to the legislative process. The Trade and Industry Committee, according to one participant, saw its task as examining the Bill, assessing why it had been presented in draft form, identifying the problems that the Bill intended to solve and in the light of these questions, ensuring that its provisions were broadly right. Its report was very specific as to how it should influence the subsequent passage of the bill,

From our scrutiny of the legislative proposals on the creation of LLPs, we consider that, while unlikely to be politically controversial, the Bill merits a Second Reading on the floor of the House; that the Committee stage can be expected to be reasonably brief; and that the draft Regulations will require further examination by this Committee before being laid, at which point they will require affirmative resolution. Whatever the perceived urgency in getting the Bill onto the statute book, the due process of parliamentary scrutiny must not be artificially abbreviated.²⁴

Other committees were less prescriptive. The Social Security Committee, given the complexity of the bill and the shortage of time to examine its details, trod a line between the detailed drafting and the broad policy issues. One senior member of the Committee explained that “our role as parliamentarians was to flag up what needed to be done in Standing Committee. We were in a sense, producing the handbook for the Standing Committee stage of the Bill.”

The department had a similar view of the committee’s work. According to one civil servant,

The actual discussions with the Committee weren’t very technical, they weren’t going through the Bill line-by-line. But equally it was more detailed than, say, a Second Reading debate ... they broke the Bill down into around a dozen topics and explored those with some thoroughness.

The Food Standards Agency Committee stated bluntly in its report that “There was no appropriate precedent for us to follow in deciding how to examine the draft Bill.”²⁵ However, given the contents of the bill the committee decided not to look solely at the drafting of the bill as a,

purely technical examination would be a waste of an opportunity for us to look a little deeper into the proposals for the [Food Standards] Agency on behalf of the House. We therefore decided to examine the proposals set out in the draft Bill, obviously concerned if any of the drafting should prove defective, but more concerned to establish whether they would properly reflect the hopes and expectations for the Agency from all the

²⁴ *ibid*

²⁵ Select Committee on Food Standards, First Report (1998-9), HC 276, para 13

various bodies affected. We saw our role as examining as much what was not in the proposals as what was in them.²⁶

The members of the Committee on Public Administration discussed in advance how PLS should complement the legislative process. It was acknowledged that Standing Committee scrutiny was deficient and it was felt that this process offered the opportunity for outside experts to comment directly on the legislation. This was an improvement on the standing committee process in that expert advice is filtered through the MPs moving amendments. The Committee had not firmly decided whether to follow the standing committee method of taking the Bill clause by clause or subject by subject, or whether they should concentrate on the drafting of the bill or the policy that lay behind the Bill. In the end their approach was determined by the content of the bill and the extent to which it differed from the White Paper.

None of the Committees sought to undertake detailed line by line scrutiny of the legislation. This may partly reflect the fact that the committees were given on average about eight weeks to conduct their enquiry. As such a detailed examination of the drafting would have been impossible in that time. However, it is also a rational analysis of how that time could be most effectively used. MPs are not, in general, skilled parliamentary draftsmen, nor are the committees able to draw on the resources of Parliamentary Counsel, and any attempt to re-draft the bill would have taken up an enormous amount of time from the committee staff. It is not then surprising that the principal interest of the committees was policy rather than technical detail.

Defining the key issues

All of the Committees were in regular contact with departmental officials. However, the extent to which the Committees' investigations were influenced by the department varies enormously, with Pension-Sharing representing one extreme and FOI the other.

The Pension-Sharing on Divorce bill was a model of collaboration between committee and department. In the first instance, both Harriet Harman, Secretary of State, and John Denham, the Minister responsible for the draft bill, were keen to emphasise the importance of the process. At the press conference which launched the draft bill Harriet Harman highlighted her personal commitment to pre-legislative scrutiny and the importance of the select committee investigation. In so doing the Secretary of State set the tone for the subsequent investigation, not least because she had flagged up to the department that this process should be taken seriously.

²⁶ *ibid*, para 14

Following Harman's comments there were high-level discussions between Ministers and the Committee chair, Archy Kirkwood, about what both sides should get out of the process. This undoubtedly smoothed the relationship between department and committee and following publication the Committee set up a series of meetings with departmental officials. The civil servants went through the key policy areas in the draft Bill and explained some of the technicalities involved in drafting such legislation. Both the Committee and Department found this a useful process. It ensured that the basic concepts of the bill were clear by the time the committee started to take oral evidence.

The contact between the department and the Committee helped to identify the key policy areas. Although Ministers and Committee members deny that the Committee's agenda was dictated by government, Ministers did alert the Committee to areas where policy needed clarification and where they felt the Select Committee's attention would be useful. Moreover, the inquiry was conducted on the tacit understanding that the Committee would not re-open areas where policy was settled.

Subsequently some have commented that the Committee was co-opted and became simply another part of the Government's policy-making process rather than an independent scrutineer of policy. For their part, members of the Committee argue that because there was cross-party agreement on the underlying principles of the draft Bill their approach was the most logical and productive one they could have adopted. Yet the relationship between department and committee does raise fundamental questions about the purpose of PLS. Clearly, those involved at the DSS and the Social Security Select Committee believed their relationship was productive, but this was, at least in part, determined by the content of the bill.

At the other extreme the Committee on Public Administration (CPA) challenged the policy underlying the draft bill. Whereas the consensus over the aims of the Pension Sharing bill informed the work of the Social Security Select committee, so the high-level of disagreement and political controversy surrounding the FOI bill conditioned the CPA's approach.

The pitch of its investigation was set by the content of the draft Bill, the extent to which it differed from the White Paper and the climate surrounding its publication. The Committee took a decision at the outset not to simply compare the draft Bill with the White Paper and produce a report that highlighted the differences. Rather there was a determination to try to improve the Bill by testing its provisions and arguing for greater degree of openness.

However, members of the Committee argue that their investigation was not solely about pushing for greater openness, but that they highlighted areas where the Bill was unworkable or where the Bill would have had a different impact from the one the Government was claiming. Tony Wright, chair of the CPA states that the Committee "sought to look at both the details of

the Bill, but also the fundamental principles that lay behind the Bill.” There were, he argues two contrary forces operating - Home Office Ministers clearly wanted to test the Bill and were willing to accede some of its more unworkable aspects, but at the same time the Government had made a number of policy decisions and were duty-bound to defend them. Unfortunately, the two were often integrally linked.

The content of the two other bills also determined the other committees’ approaches. The highly technical and non-controversial nature of the Limited Liability Partnership bill meant that most of the co-ordination was conducted between the committee clerk and the bill team leader in the department. Whilst according to one member of the Food Standards Committee they took the view that “At the end of the day the Government’s view was likely to prevail on policy issues, and a committee was unlikely to achieve results if it simply came out in flat opposition to what was government policy. It was better to couch our views in terms of suggestions or possible policy compromises.”

Overall, the approach of the Committees was remarkably similar, each of them started by identifying the key policy issues, either in discussion with the department (as with pension-sharing) or independently (as with FOI), and working through them. Although the CPA and the FOI committee in the Lords did challenge government policy, the other committees took the view that they would be most productive by addressing issues either where there was no settled policy (LLP) or by paying equal attention as to what was omitted from the legislation (FSA).

Committee hearings

The committees adopted a broadly similar strategy to that used for normal select committee hearings in trying to find representatives of groups who would be affected by the proposed legislation and individuals with a particular expertise. One committee clerk did raise concerns that he feared the committee hearings would allow those with a particular opposition to government policy ‘a second bite’, so that the committee would become, in his words, “a repository for gripes”. Apart from those who gave evidence on FOI, in general witnesses seemed to accept that the major policy issues would not be re-opened. As one witness before the social security select committee commented, “I didn’t think there was any possibility of them re-opening the political rationale of the Bill. I wouldn’t have expected them to. Once a political decision has been made I’d expect them to stick to it.”

This may reflect the background of the witnesses themselves. The committees dealing with pension-sharing, limited liability partnerships and food standards had in some ways a narrower range from which to draw contributions than FOI. In the first two cases there was considerable interest from the legal and financial professions, but little interest elsewhere. Food standards relied similarly on a combination of highly technical and professional advice. As such many of

these witnesses were used to appearing before select committees and understood the parliamentary process. Many were in regular contact with civil servants about policy developments and given this experience a number of witnesses were able to distinguish between the role of the Select Committee and the role of the departmental officials. For more than one witness it was the opportunity to discuss the issues with legislators and civil servants that made the process a success. One commented that whilst he could discuss the technical detail with departmental officials from the DSS and the Lord Chancellor's Department, he could raise broader issues before the Select Committee.

It was also a pleasant experience for those used to the standing committee process. A representative of one organisation concerned with LLP commented that the nature of Standing Committee scrutiny meant that companies had to employ professional lobbyists to represent their interests on relevant legislation and could then only hope for one or two points to be conceded. In contrast, the draft Bill process allowed the practitioners to speak directly to legislators and department officials, as such, the process was "100 per cent more efficient, because it is technical and not party political."

However, for several individuals, it implied the start of a dialogue which was not continued. A number complained that they were given no explanation as to why certain recommendations had been accepted and others not. A common recommendation was that the committee (or the department) should provide an explanation of how the bill had changed, why and a summary of the implications.

Some were critical of the process and a QC who gave evidence on PSD regarded it as a waste of time, commenting, "I don't think it would have made that much difference if the Government had simply published a Green paper with a Bill attached and we'd simply submitted our comments directly to the department. ... at the end of the day its for the department to accept or reject it." This same witness criticised the Committee's lack of technical expertise. He believed that a Select Committee was not the proper vehicle for scrutinising highly technical legislation but that they were better suited to subjects that were less technical and more 'political', or as he put it, "issues to which people react in a human way" such as the CSA.

Although others were less critical, a number of people who appeared before the social security, trade and industry and food standards committees raised an eyebrow at the generality of the questions they were asked. It is perhaps inevitable that experts in a particular field will be faced with what they regard as general questions, but it did cause some witnesses to question the purpose of the process. They had expected to be faced with questions about the detail of the legislation, but found themselves dealing with more general policy matters which they were not expecting.

This concern stems from the complaint common to all witnesses about the lack of time for preparation. Although experts in the field, witnesses complained that issues covered by the Committee were often unexpected and they would have benefited from advance briefing. The time constraints meant that such matters were largely beyond the control of the Committee, but such factors have implications for the quality of the PLS process.

The committees dealing with FOI had a broader range of witnesses to call upon but faced similar problems. There was a deliberate attempt on the part of the CPA to get evidence from individuals who would be directly affected by the proposed legislation rather than solely from experts. It was hoped that the committee would highlight some of the practical implications of the legislation rather than simply relying on the evidence of experts. The result, though, was disappointing in that these witnesses had often not developed their thoughts far enough for sustained questioning from a committee. In general the quality of the oral hearings was perhaps not as reflective as it might have been and several clerks testified that, so desperate were they for oral evidence, they had to do some serious arm-twisting to persuade witnesses who wanted more time.

Conclusion

The issues that most concern those involved with the committee hearings relate to timing, resources and the amount of extra work. All the Committee reports mentioned that the standard eight week consultation period caused them problems in preparing the committee, collating evidence, and approaching witnesses. Moreover, three of the draft bills (PSD, FSA, FOI) were conducted at the same time as government consultations which placed further constraints on the committees. A new pre-legislative scrutiny unit was established in the clerks department in early 2000 which may help to ease some of the extra burdens caused by PLS. However, it is unlikely that the new unit will improve the co-ordination or leadership of the process. This is a matter for the business managers and the usual channels.

The lack of clarity surrounding Parliament's role, particularly in relation to the legislative process and the departmental consultation, means that the Government's objectives for PLS are confused with those of Parliament. However, as the pension sharing and FOI bills illustrate, PLS involves distinct costs and benefits to Parliament which can coincide with those of Government, but can also differ entirely. There are, as such, few clear criteria by which to judge Parliament's performance.

This ambiguity might have allowed the Government to influence the work of the committees, however, despite their important role in the choice of committees, once the committees had embarked upon their work the business managers had little direct involvement. The Government departments did influence the approach of each of the committees in highlighting

the key policy areas, but the extent to which they worked together was determined less by the department's overtures than it was by the content of the bill. Factors such as the level of professional and political support for the key aims of the bill and the extent to which policy was developed turned out to be the most influential factors in deciding a committee's approach to the legislation.

This is likely to remain the most important factor, even if clearer guidelines are introduced. Although Government might seek to influence the choice of Committees, the content of their work is largely beyond Government control. Parliamentary scrutiny, in that sense, might appear to be more of a potential cost, than a potential gain for the Government in deciding to publish legislation in draft. However, the risks are manageable. The danger for Government is in presenting bills which are poorly thought through or where there is disagreement about their purpose.

4 – ‘Later stages’: The effect on the legislative process

The guidelines set out in the Modernisation Committee report²⁷ could to a large extent apply either to the objectives of Government or Parliament. While there is inevitably an overlap of interests, their objectives are not identical – both seek better legislation but this may involve different methods. This chapter examines the areas of common interest and the areas where interests diverge by using four of the objectives set out in the committee report, namely, that PLS should i) allow MPs ‘a real input’ into the form of the final legislation, ii) open up Parliament to those outside affected by legislation, iii) mean that Ministers will be more receptive to suggestions for change and iv) save time at later stages in the Parliamentary process.

The influence of MPs

Assessing whether MPs had ‘a real input’ is difficult given the confusion of objectives. It depends on what the process was designed to achieve, and it was never made explicit what the input of MPs should be, nor what the committee investigations should add to the government department’s own consultation.

For instance, a number of participants remarked that the scrutiny committees did not raise any new issues. Civil servants in the Home Office, referring to the Freedom of Information bill, claimed that for all the heat that was created by the committee investigation it did not highlight any issues which they had not already identified. A clerk on a different bill similarly noted that the civil servants would not have learnt much from the committee hearings.

However, it must be asked whether the value of the scrutiny committees should be seen solely in terms of providing information for the department. The bill team responsible for developing the legislation and taking it through Parliament will have a far greater knowledge of the issues than a committee conducting an eight-week investigation. Rather, the value of the parliamentary committee may lie more in, firstly, bringing a political dimension to the issues surrounding the legislation, and secondly, the political weight that is carried by a parliamentary committee report.

The departmental officials working on the Limited Liability Partnerships Bill felt the committee’s report was beneficial in this respect. As one official noted

²⁷ Select Committee on Modernisation of the House of Commons, *First Report - The Legislative Process, 1997-8*, HC 190

In terms of the technical detail I don't think the committee added or raised anything we hadn't already talked about. It didn't add any nuance to the arguments that we had already been given by other people. However, in terms of where it left us in our relationship with external organisations and in terms of taking the bill through Parliament, I think it will be very valuable. The committee report has been enormously helpful in our discussions with the business community, for instance, where we regularly highlight the issues that the committee raised.

The input of the Members of Parliament was clearly regarded as valuable, by Committee and department, because it reinforced Government thinking. However, this does not provide a practical benchmark. The Public Administration Committee, for example, was more likely to be judged by how far it amended the FOI legislation. Rather, the significance of the Member's input lies in the fact that it provides the first political appraisal of Government policy. The value of the committee report thus lies in how far it influences of external opinion and the legislative process. These are dealt with in more detail below.

The other significant point to make is the value to Parliament in giving backbench MPs a voice. The nature of the Committees means that the MPs involved are, in theory, much freer from party discipline than they are in any other aspect of their parliamentary work. The cross-party nature of the committees, and the fact that they are dealing with mainly non-contentious legislation, means that their commitment to the committee can override their commitment to party policy. There are very few other areas where backbench MPs can enjoy independence from party whilst also carrying some influence.

However, the treatment of the Freedom of Information Bill highlights some potential problems. In the first place it was (and still is) a hugely controversial piece of legislation. It was evident from the comments of members of the Lords committee that examined FOI that some of its members had been chosen more because of their party loyalty than their expertise. Where ad hoc committees are used to deal with contentious bills this may continue to be a problem. Of more concern to some is the danger of politicising the departmental select committees by using them to examine controversial draft bills. One ministerial adviser involved in the process suggested that chairs of certain committees would find difficulty reconciling their partisan role with their committee role,

The legislative process is adversarial and the Government has a right to get its legislation. Giving select committees legislation would make them adversarial. For people such as Gerald Kaufman [chair, Culture Media Sport Committee], or Martin O'Neill [chair, Trade and Industry Committee], who are clearly Labour loyalists, but are not afraid to criticise the Government in their committee role, introducing legislation would present them with an enormous problem.

According to some members of the Committee on Public Administration this problem did arise in their examination of FOI. One participant commented “many members of the committee had almost a ‘split personality’ on the issue. They were government MPs but sympathised with the wish to make the bill more liberal.” If more legislation of the calibre of the FOI bill is put to select committees it seems likely that the party Whips will take a greater interest in the process and bring greater pressure to bear on its MPs.

The influence of outside evidence

In this area it is perhaps most difficult to distinguish between the effect of PLS as against the departmental consultation. For three of the four bills the government consultation ran parallel with the committee’s investigation of the issues and in all cases the substance of the evidence was similar, if not identical.

For the clerks servicing these committees and charged with responsibility for finding witnesses the parallel consultation presented many problems. The timescale on which the committees were working meant that clerks often discussed with the department the key organisations and individuals. If the Committee was coming new to the subject they had to rely on the expertise of the departmental officials. Often this meant that the Committees not only replicated the evidence given to the departments but also received evidence only from ‘organised’ interests. The Committee chairs seemed almost resigned to this, as one commented, given the constraints, “most of the witnesses selected themselves as representing the main interests in the area”. The Committee on Public Administration, given their previous work in this area did attempt to get evidence from interested individuals but again struggled to get worthwhile evidence from anyone new.

The Trade and Industry Committee investigating Limited Liability Partnerships did have the relative luxury of being able to start its investigation two weeks after the government’s own consultation had closed “so that witnesses would have had time to reach a considered view on the proposals.”²⁸ This appears to be a much more productive method of consultation, allowing the Committees, departmental officials and witnesses greater time for reflection, and perhaps allowing them to raise new substantive points in the Committee hearings. In view of one Committee participant, “scrutiny was easier because the ground had been well-ploughed, and the contributors had a clear idea of about the content of the bill and what they were being asked.”

The volume of evidence was also a problem. Each of the Committees were helped by departmental officials who distributed copies of all the evidence they received. However, as

²⁸ HC 59 (1998-9), para 2

one clerk noted, although PLS was in many ways similar to other select committee investigations no other committee enquiry had generated so much evidence. As such, simply trying to assimilate the evidence was a major task for the committee staff, a problem exacerbated where there was simultaneous consultation. For instance, the ad hoc committee examining the Food Standards draft bill received 650 submissions from the department after the committee had reported.

The Public Administration Committee argued that, under current arrangements, the committee's report becomes simply another response to the departmental consultation and that if parliamentary scrutiny is to be taken seriously "it needs to be a separate stage of the consultation process, rather than simply an aspect of the normal consultation arrangements."²⁹ All of the Committee reports recommended a change in the timing of the scrutiny process so that they had more time to prepare and were able to take into account responses to the government consultation before they began their work. The analysis of the Public Administration Committee sums up these problems,

We are not the first Committee which has undertaken a pre-legislative scrutiny to remark on the extreme time pressure experienced in this type of inquiry. The usual two month period allowed by the Government to exercises of this type has presented a considerable challenge to the Committee. The Home Office allowed us a period after the official closure of the consultation process to finish our report, but the late publication of the draft Bill reduced this in practice. We have sought to rise to the challenge through some quite intensive evidence taking. We have held 12 evidence sessions an one informal meeting, and heard from 52 witnesses. We have addressed many written queries on the Bill to the Home Office, and we are grateful to them for responding promptly. ... We have also received copies of responses to the Consultation Document submitted to the Home Office. We have tried to take as many of them in to account as possible; but the vast majority have arrived at or after the end of the consultation process, giving us little or no time to read them and use them in our deliberations.³⁰

The strength of the select committee hearings, according to a number of participants, was that for the first time the arguments of interest groups seeking to influence legislation were heard in public. Under standard legislative procedures interest groups seek to influence civil servants through direct correspondence or meetings, or at a later stage by briefing MPs in standing committees. It is rare for their arguments to be tested rigorously in public. As one committee clerk pointed out,

²⁹ Select Committee on Public Administration, *Freedom of Information Draft Bill*, HC 570-I (1998-9), para 9

³⁰ HC 570-I, para 9

Although it gave pressure groups a voice in Parliament, it made the lobbying process public. Pressure groups had to justify their arguments and views in discussion with the select committees. This is a vast improvement on the normal situation where opposition MPs in standing committees are desperate for information and take on trust the briefings from various lobby groups.

Overall, because the choice of witnesses by the committees often closely reflected those consulted by the department, it is unlikely they will generate much new or original evidence. Some participants suggested reforms that would improve the process. One was that the select committee took a more 'disinterested' line with witnesses so that they saw their role as simply bringing together witnesses and departmental officials in a public forum, the select committee simply acting as mediators. Another suggestion was that if the select committees were keen to pursue the logic behind the policy it might be useful for them to follow the practice of the Public Administration and Food Standards committees in having departmental officials present to offer guidance, or even representatives of Parliamentary Counsel to explain why certain clauses had been drafted in a particular way. The merits of these recommendations are moot, but the committees will need to address the duplication of evidence and their own status as part of the government consultation.

Changes to legislation

One of the main advantages of draft bills over the normal legislative process was that they allowed Ministers to amend legislation in a less confrontational setting. In this area the draft bills relating to pension sharing and limited liability partnerships worked (one assumes) almost as the government must have desired when PLS was introduced. They were highly technical bills where the key issues were identified in advance by the committee in conjunction with the department. The hearings were held in a predominantly non-adversarial fashion, the content of the legislation allowing both department and committee to co-operate in the scrutiny of the draft bill.

Although the government did not accept all the recommendations of the committee the response from the government to the committees' reports were favourable. Committee and department appear to believe, in both cases, that the legislation was improved by parliamentary scrutiny of the draft bill.

For example, the Government response to the report of the Trade and Industry Committee, stated that "We found this form of pre-legislative scrutiny to be extremely valuable, and have taken on board many of the Committee's recommendations. We believe that the Bill, when it is

formally introduced, will be significantly better than would otherwise be the case.”³¹ The key, according to one departmental official, is that the committee reinforced the government’s approach,

the committee looked at a particularly large policy issue, which at that stage was unresolved ... it was extremely helpful to us that the committee recommendations were going in the direction we wanted to go. ... we will make what collateral we can of it and use it to our advantage where we think its appropriate.

On both bills the committee broadly validated the thrust of the policy behind the draft bills.

The Food Standards Committee was also predominantly non-contentious. As with the other committees the key issues were identified in conjunction with the department. The Committee thus avoided a number of potentially controversial issues that related to genetically modified food and devolution. However, the committee did address the controversial issue of a levy on organisations which came under the remit of the proposed Food Standards Agency. There was strong opposition to the government’s proposals in this area and although the committee did not explicitly oppose the levy it did raise concerns. The Government, “in the light of the consultation”, dropped the proposal. This was the only major policy change, but one witness felt that this decision alone justified the committee’s work. It is not clear how far the policy change was due to the findings of the government’s own consultation as opposed to the committee’s report.

It could be argued that the Freedom of Information draft bill is the most significant test of the PLS process. The report of the Committee on Public Administration (CPA) raised a host of perceived problems with the FOI bill, most of which challenged Government policy. The Committee report stated that the draft bill process provided the Home Office with the opportunity to “explore the reaction to their proposals, and to modify them in relative leisure, rather than in the rush of the Bill’s actual passage through Parliament.”³²

The Government’s response to the Committee report published three months after the original committee report (27 October 1999)³³ made several changes including the removal of the notorious ‘jigsaw clauses’ which would have allowed the Government to prevent the release of information if they believed it might trigger the release of further information they regarded as harmful. The Government also amended the bill’s provisions relating to the powers of the

³¹ *Government observations on the Fourth Report from the Committee (session 1998-9) on the draft Limited Liability Partnership Bill, (1998-9), HC 529, para 3*

³² HC 570-I, para 6

³³ *Government Response to the Third Report from the Select Committee on Public Administration on Freedom of Information (1998-9), HC 831*

proposed Information Commissioner, obligations of public authorities to disclose and information relating to health and safety.

However, the CPA felt that these changes went nowhere near far enough in amending the bill. The Committee published a further report stating that “we are disappointed that the Government has not amended the basic structure and scheme of the draft bill.”³⁴ The Committee felt that the Commissioner’s powers should be further enhanced, criticised the number of class-based exemptions in the bill and the use of ‘prejudice’ as opposed to ‘harm’ as a test of whether information should be released, stating “We hope that the Government will take note of our disappointment about these aspects of their response, and take the opportunity to look afresh at them before the Bill is introduced”³⁵

Although the Home Office did make some further amendments the CPA took the unusual step of publishing a further report when the final bill was published, noting “with some disappointment that most of the points we found unsatisfactory in our report of a few weeks ago remain part of the Bill. We also note that some of the revisions which have been made may be less effective in practice than they appeared.”³⁶

Some participants in the FOI scrutiny, both witnesses and committee members questioned whether the effectiveness of the committee could be judged in terms of changes to the legislation. Departmental officials claim they had made many of the points about defects in the bill before it was published in draft, most notably over the jigsaw clauses, which they had told Ministers were unworkable. As one civil servant, who seems reluctant to give the Committee any credit states,

The committee did not pick up the fundamental technical issues. ... We picked up one or two infelicities in the bill but not directly because of the committee questions. The Committee had an impact on policy, although most of their points had been made by advisers prior to draft publication, the committee reiterated them with a more powerful voice. ... In any case, the changes that were made before presentation that would have probably come out during the passage of the bill.

Others believe the Committee was more influential in shaping the legislation, but more for political than technical reasons. According to one of the participants on the Committee side,

³⁴ Select Committee on Public Administration, Fifth Report (1998-9), *Freedom of Information Draft Bill: The Committee’s Response to the Government’s Reply*, HC 925 para 3

³⁵ *ibid.* para 3

³⁶ Select Committee on Public Administration, First Report (1999-2000), *The Freedom of Information Draft Bill*, HC 78, para 3

The committee did not achieve all the changes it wanted, it achieved some – whether those changes would have been conceded either in standing committee as a result of the broader consultation I don't know, I suspect that probably they would have done. I think the committee may have contributed to that process by making the government aware that the feeling on the Labour side was pretty near unanimous against certain provisions in the bill.

This view is reiterated by David Hencke, a Guardian journalist specialising in FOI who states that the power of the Committee lay in reflecting the mood of Parliament, convincing Home Office ministers that certain parts of the bill would not be sustainable during its legislative passage. Such points were conceded as a direct result of the Committee's report.

It can be argued that all of the Committees had a tangible impact on the Government's approach to legislation. The impact is clearly more noticeable where the Committee is in direct opposition to Government and forces changes of policy. However, even where there is broad agreement between the committee and the department, most participants believe that the committee report has a wider political significance. In their report on LLPs the Trade and Industry committee states that scrutiny committees cannot speak on behalf of the House nor can they bind the House. But in concentrating on the key policy issues, as most of the committees appear to have done, their reports provide the first *political* judgement on the legislation, and thus provide some political validation (or otherwise) of the government's plans. The reports appear to be one of the most important factors in determining the tone of the subsequent political debate.

Impact on subsequent passage of legislation

Although participants disagree about the extent to which the scrutiny committee reports influenced the subsequent passage of the legislation, it is evident that parliamentary debate was informed by the content of the reports.

Several committee members were concerned that the standing committee might assume that the scrutiny committee had done their work for them. Rather than improving scrutiny, one form of examination (PLS) might simply replace another (standing committee). Despite marginal differences in approach each of the scrutiny committees had a broadly similar perception of their role, that their report should complement and not replace other forms of parliamentary scrutiny. As mentioned, one select committee chairman summed up that his committee being to “produce the handbook for the standing committee stage.” The Trade and Industry Committee was most prescriptive in this regard, stating where further examination was

required and emphasising that “Whatever the perceived urgency in getting the Bill onto the statute book, the due process of parliamentary scrutiny must not be artificially abbreviated.”

In general it is difficult to assess how far PLS saved time at later stages of the legislative process. The Pension Sharing on Divorce Bill illustrates some of the problems. Following scrutiny in draft the bill was subsumed into the omnibus Welfare Reform Bill, which contained some contentious clauses relating to disability benefits. The general perception amongst those involved in the scrutiny committee was that the clauses relating to pension-sharing were given scant attention compared with the more politically controversial aspects of the bill. According to one participant,

When it came to the clauses relating to pension-sharing there was an evident sense of relief amongst the committee members that the party political stuff had been got out of the way. But the pension sharing element received less scrutiny in committee stages than did other parts of the bill. The effect of the committee was therefore, rather than highlighting the parts of the bill that required more attention, it meant that they got less scrutiny

However, figures collated by departmental officials show that 14 hours were spent on pension-sharing in Standing Committee, more than any other issue apart from stakeholder pensions. The explanation for this, according to a civil servant working on the bill is simple, namely, pension sharing was the third issue that the committee discussed. If it had been one of the later sections of the bill it would have got less scrutiny.

Nevertheless there was a sense that the clauses relating to pension-sharing required fewer amendments than would otherwise have been the case. However, even this is difficult to ascertain because the sections relating to pensions were substantially revised in the Lords so that the bill conformed to the Family Law Act. This re-drafting amounted to a ‘total re-write of the pensions-sharing bill’.

Similar problems have faced other bills. The Financial Services and Markets Bill which, during its passage had over 1,000 amendments put down, so that according to one senior peer, it was difficult to tell how the provisions of the bill had changed. The Local Government draft bill, on the other hand, was not amended before its presentation to Parliament because of lack of time. Instead, some of the other recommendations of the scrutiny committee were incorporated during its passage through Parliament. Whether PLS overall saves precious legislative time is a moot point which requires greater attention than is possible in this study.

Despite these problems, it should be stressed that PLS is an improvement on standing committee scrutiny. By going through the key issues before the bill is presented to Parliament it

means that MPs are clear as to the purpose of the bill before it reaches 2nd Reading. At a very practical level this means that there is no need for the number of probing amendments which normally accompany most bills.

Although a scrutiny committee report might mean that the opposition is better informed than usual on a bill, the process also has an undoubted benefit for the government. It allows Ministers and civil servants to identify the key issues and arguments and test the strength of their own views. According to one Minister it “provided us with a round 1 so that we were better prepared for round 2.”

A number of officials commented that the debates in the scrutiny committees prepared them better for the standing committee stage. The committee process meant that the policy was closely tested and although the eventual policy might not differ from the original, “it forced Ministers and officials to weigh up the options perhaps rather more rigorously than we might otherwise have done.” This official believes that even where things are not changed the process means that the policy is stronger. Whilst his minister believed that “it gives you a dry run out on your major arguments. You see whether the position you have taken is as robust as you think it is. That is very difficult to do in standing committee.”

Pre-legislative scrutiny does not, though, overcome some of the problems that are inherent in standing committee scrutiny. For example, opinions differ as to the impact that the Public Administration Committee report had on the standing committee stage of the FOI bill. Home Office officials claim that few of their recommendations were taken up in standing committee. Others associated with the Committee believe that the report informed the debate by identifying the key issues.

However, this difference of opinion may be more to do with the complexion of the Committee. None of the select committee members were appointed to the committee. The Conservative Party does not agree with a statutory Freedom of Information Act and its stance in committee could be described as ambivalent. Of the Labour members appointed only one, Mark Fisher, had an interest and expertise in the issue. However, the influence of the whips meant that the rest of the Labour members contributed very little. According to Guardian journalist David Hencke, “The government was prepared to have one token rebel, but the other Labour members were told not to say anything at all throughout the whole process”.

Conclusion: Distinguishing between draft bills and Parliamentary scrutiny

In each of the four areas set out by the Modernisation Committee it is difficult to identify with any precision what parliamentary scrutiny added to the consideration of draft bills. This is not to suggest that the process was not valuable, but the lack of specific objectives and the

conflation of Government's interests with those of Parliament, mean it is difficult to identify what effects were the result of Parliament alone.

Whereas the main impetus for publishing bills in draft is to improve the quality of legislation and to amend the legislation in the light of expert advice the purpose of parliamentary scrutiny is less definite. The status of the committee's report in relation to the government's own consultation or the rest of the legislative process has not been specified. The Public Administration Committee report remarked that the parallel consultation meant that the committee simply became another respondent to the government's own enquiry, rather than having its own distinct role within the legislative process.

For many participants it was not clear at the outset what the scrutiny committee would, or should, add to the consultation process. Many expected PLS to refine or develop the investigations undertaken by the department. However, a parliamentary committee, regardless of its expertise, is unlikely to be able to match the depth or breadth of the departmental inquiry. The committees do not have the same resources nor do they have the time. To expect the committees to match the department's grasp of technical detail is therefore unrealistic. For most MPs on a select committee a highly technical issue such as pension-sharing or LLPs is likely to be marginal to their main concerns. For the swiftly composed *ad hoc* committees the level of expertise is likely to be lower. Select committees investigate policy issues and, it could be argued, this is where their specific value lies.

Where the scrutiny committees do provide an influential voice is by putting the draft legislation into a political context. Where the department's consultation is seeking expert comment on the technical detail of the bill, the committees, tended to isolate the main policy issues. They were able to provide a less technical, more policy oriented and political perspective on the issues in the draft bills, the approach described by one committee chair as providing the handbook for standing committee. One Minister drew a distinction between the technical detail and the policy issues stating, "If you are dealing with highly detailed stuff I think it's better to get the outside technicians in on the drafting of the bill and leave the select committee to look at issues of practice and principle." It may be that this distinction should inform the work of the Committees.

5) Analysis: Balancing costs and benefits

Although the draft bill process has tended to be regarded as a universally 'good thing', the publication of draft bills and their scrutiny by Parliament has potential costs and benefits for Government and for Parliament. For Government, the opportunity to secure greater legitimacy for a bill, broader support for Government policy and better drafted legislation has to be balanced against the possibility of providing a focus for resistance, raising expectations too high and creating extra work.

For Parliament, PLS potentially gives committees a more powerful voice, extends the influence of backbench MPs and provides the opportunity to directly influence Government policy, but it means devoting considerable time and resources for uncertain gains, and brings with it the danger of having their independence compromised by being co-opted into the policy process. This chapter summarises how far the interests of Government and Parliament were met through PLS and recommends a series of changes to clarify its purpose.

Government interests and pre-legislative scrutiny

For two of the bills - Pension-Sharing on Divorce and Limited Liability Partnerships - pre-legislative scrutiny served a useful purpose for Government. The Committees broadly validated their underlying objectives and, in some ways, gave them greater legitimacy. The key to their success appeared to be that the Government already had the support (or at least agreement) from the professions on the key tenets of each of these bills. As a result, the purpose of consulting on the detail was clear from the outset. The majority of the participants approached the consultation with the understanding that their task was to refine and fine-tune the legislation.

For the government this consensus was invaluable. It did not prevent new issues arising but because the bills were well-developed the Government had set the context for the consultation in much the same way as they would do for a departmental consultation. The possibility of the bills attracting criticism from influential individuals or organisations was small. Their preparation meant that the purpose of the bill was not fundamentally questioned.

Scrutiny served a similar purpose for the draft Food Standards bill. Although there were one or two unresolved policy issues, the bulk of the committee's work reinforced the Government's approach. With some minor reservations each of the Committees gave a sign to Parliament that the bills were, broadly, acceptable to Parliament in their existing form. As such, they validated and legitimised the legislation.

Parliamentary scrutiny also gave Government a tactical benefit. The select committee hearings allowed Government to test their arguments in a Parliamentary setting. PLS thus alerts Ministers and officials at an early stage as to any issues which might arise during the passage of the bill. It allows Government either to amend the bill in the light of criticism or to identify, anticipate and neutralise any potentially difficult issues.

In the case of Freedom of Information, Parliamentary scrutiny highlighted to Government what was likely to be acceptable to its own backbenchers and what they would oppose. A leaked paper which highlighted Cabinet discussions over FOI was published in the *Guardian* and quoted Jack Straw as saying that in the light of the Committee's report it would be very difficult to persuade Parliament to sustain a particular part of the Bill. According to several MPs the Committee acted as a conduit for backbench concerns to Government.

Although in some ways the Committee scrutiny allowed Government to amend the bill, FOI is not a good example of PLS as far as the Government is concerned. However, this relates almost entirely to the preparation of the bill. In contrast to the other bills there was almost no political, professional or journalistic agreement on the content of the legislation. The bill differed greatly from the White Paper the Government had published eighteen months earlier and this set the tone for the subsequent debate. With no consensus on the objectives of the bill it would have been difficult for the Committee to approach its work in any other way. It is impossible to focus on the detail of legislation when there is such disagreement on the underlying principles.

FOI illustrates very clearly one of the drawbacks of consultation highlighted in the Cabinet Office guidelines, in that the draft bill became the focus for resistance, creating 'difficult public presentation issues'. The *Guardian* newspaper launched a campaign for greater openness after the bill was published and David Hencke, a *Guardian* journalist specialising in FOI, admits that the pre-legislative process enabled the paper to launch their campaign and run with it over a much longer period. Had the Bill been published two weeks before Second Reading, as is usual, it would have been difficult to build up a head of steam around the issue. As it was the draft Bill and the Committee hearings allowed the *Guardian* to run a number of related stories around the theme of greater openness.

Parliament and pre-legislative scrutiny

Whilst FOI might not be seen as a net gain for Government it may well be regarded as such by Parliament. This paper has highlighted the fact that pre-legislative scrutiny is at the Government's initiation. The government controls the choice of legislation, the timing of publication and sets out a framework for the consultation. Parliament's role is a reactive one. It can only act within the boundaries set by the Government. In this respect the work of the

Committee on Public Administration (CPA) amply demonstrated that Parliament, if it chose, could ignore and operate beyond the influence of Government.

It was clear that a number of the Government's business managers would have preferred the FOI bill to have been examined by another committee, but the CPA ensured that it carried out the scrutiny. The Lords Committee, despite attempts to manipulate its membership, came to similar conclusions as the CPA. The CPA report forced amendments to the bill before it was presented to Parliament because it highlighted the strength of Parliamentary feeling. But it also set the tone for subsequent Parliamentary debate: at Report Stage, debate was dominated by the Committee's recommendations, and Jack Straw accepted further revisions to the bill.

However, the value of PLS to Parliament should not be seen in terms of how far Parliament was able to force the Government to change its mind. The significance of the process is that it gives the Committees a powerful political voice. Regardless of whether the Committees agreed or disagreed with Government policy, their reports were the first political judgement on a Government bill. As such, they not only set the tone for Parliamentary debate but also had an influence outside Parliament. As the civil servant quoted in the previous chapter noted, the Trade and Industry Committee's report validated the Government's policy to the business community, something which they would use it in subsequent negotiations.

However, it is this collision of interests which concerns some, and the fear that Parliament could simply be used as a seal of approval for Government activity. The Pension Sharing on Divorce bill highlights the dangers most keenly. The level of preparation and the level of professional consensus on its aims meant that the Committee was not likely to take issue with any of the bill's main tenets. That the Committee agreed with Government is less important than the fact that scrutiny was undertaken on the tacit understanding that certain policy issues would not be re-opened. As such it immediately limited the scope of the investigation. Whilst this made the process more attractive to Government it can in no way be said to enhance Parliament.

Members of the Committee state that this was the most practical approach to their inquiry, and given the high level of agreement surrounding the policy, one could argue that it does not matter. Yet Parliament can only respond within certain confines and, in this case, the Government further limited how Parliament could react. Whilst it is up to Government to indicate the key issues for investigation, it is for the Committee alone to decide whether to accept or ignore them. It is a dangerous precedent for a Committee to embark on an inquiry with certain issues already out of bounds.

Recommendations for reform

Reforms to the process should reflect that Parliament and Government have distinct, but often complementary interests, and should seek to clarify, co-ordinate and properly resource PLS.

i) Clarification – what is the point of pre-legislative scrutiny?

Government departments conducting their own investigations seemed unsure as to what PLS would add. Both Parliament and Government seek better legislation, but their means of achieving this may differ. The department's consultation should achieve all that the department wants in terms of technically improving the bill. It is inevitable that the Committee will touch upon issues covered by the department, but it should not duplicate their approach. Parliament should add another dimension to the departmental consultation. The four following objectives are suggested as possible means of achieving this aim.

- *PLS should clarify the purpose of the Bill to Parliament*

The principal function should be to inform the legislative process. Parliament does not scrutinise legislation as effectively as it might. PLS does nothing to change the problems of standing committee, but it can highlight the key issues and frame the subsequent debate. The purpose and contents of the bill should be clear to all MPs by the time the bill is presented to Parliament, so that, at a very basic level, it removes the need for time-consuming probing amendments.

The recent report from the Liaison Committee³⁷ recommended that Committee members who had been involved in the scrutiny of the draft bill should be able to speak (but not vote) in the Standing Committee stage of the bill. This sensible recommendation was rejected by the Government,³⁸ however, it is a worthwhile recommendation that deserves further consideration.

The pre-legislative committee might also indicate how much time should be spent on parts of the bill during its passage. The Modernisation Committee announced in July 2000 its proposals for programming legislation³⁹ which included the recommendation that the 'usual channels' should establish programme motions for each bill. The scrutiny committee could play a useful role in this process.

³⁷ Liaison Committee, First Report (1999-2000) *Shifting the Balance: Select Committees and the Executive*, HC 300, para 62

³⁸ *The Government's Response to the First Report from the Liaison Committee on Shifting the Balance: Select Committees and the Executive*, Cm 4737, (1999-2000), para 43

³⁹ Select Committee on Modernisation of the House of Commons, *Programming of Legislation and Timing of Votes*, (1999-2000), HC 589

- *PLS should provide the 'handbook' for standing committee*

Given the expertise, time and resources available to Committees to undertake an investigation it is not possible nor desirable for them to replicate the department's method of consultation. The Committees in this study, almost by default, chose to identify between six and ten key issues for investigation and then test how far the bill met the stated objectives. PLS should highlight the significant issues for subsequent parts of the parliamentary process and so far as possible, in conjunction with the department, iron out the big anomalies before presentation of the bill to Parliament.

- *PLS should provide a political judgement on the Bill*

Although the Committees are likely to focus on policy issues, they should not ignore the detail of the bill entirely. However, it must be accepted that even where the Committee is examining the technical detail it is likely to do so from a more political perspective than the department. The report will be the first political judgement on the Government's bill and the Committee's report should be written with this in mind. It should aim to influence and inform the subsequent political debate.

- *PLS should assess the impact of the Bill on outside groups*

Civil servants in a particular department are likely to be in regular contact with the professional interests in a particular field. The Committee should seek to provide a different perspective on the bill and aim to raise the concerns of those not represented in the departmental consultation. They should perhaps focus more on the service users and those affected by the legislation, than those with a professional interest in the bill. (However, it is acknowledged that Committees face time and resource restrictions, and often that on highly technical legislation the professional bodies are often the service users.)

ii) Timing and resources

One of the biggest problems facing all of the Committees was that of timing. The Committees often had little notice of the timing of legislation and little time to prepare. It would be sensible for the Committees to be warned in advance, through the usual channels, of the publication of draft bills. This would allow departmental Select Committees, in the words of one clerk to 'clear the decks' and prepare for the bill. Where ad hoc Committees are to be used, they should be established and resourced by the time the bill is published.

Ideally the Committee's investigations would be held once the department's own consultation had finished. This would allow witnesses, Ministers, MPs and officials to consider the results and feed them into the Committee. In practice this would add another two months delay to the department's production of the bill and is therefore unlikely to be seriously considered. As it is the simultaneous consultation is a problem for the committees and affects the quality of their evidence, and their final report. A possible compromise would be to start the committee

investigation midway through the departmental consultation. Assuming an eight week consultation, the committee would start after four weeks and report a month after the departmental consultation had closed. The Committee could learn from the department and investigate key issues in more depth. It would produce more considered evidence from all the witnesses and enhance the quality of the final report.

The new PLS unit in the Clerks department might ease some of the burden on the Committees by providing administrative and technical support. However, even with longer warning and more resources it may be difficult for Committees to inform themselves on the details of what are often highly technical and complex bills, and which are tangential to the Committee's main interest (this was the case with Pension-Sharing and Limited Liabilities, and for different reasons Food Standards). They rely on specialist advisers, often appointed at short notice - to clarify the key issues. The FSA committee and the FOI committee had civil servants present during their hearings to advise and clarify certain points. This created extra work for the departmental officials (particularly so for the Home Office civil servants who were servicing a Commons and a Lords Committee simultaneously). However, the departmental officials have a vested interest in the outcome of the committee hearings and in ensuring that their recommendations are based on a correct interpretation of the legislation. It would therefore appear to be a worthwhile use of their time.

iii) Leadership and co-ordination

Many of the problems faced by the Committees in dealing with draft legislation stem from a lack of leadership. There is no one department, office or politician who is identifiably responsible for pre-legislative scrutiny. Although business managers took a firm interest up to the point when the Committees were established, once they were up and running there was little central interest. Combined with the lack of clarity surrounding its purpose, it is not surprising that there was some confusion as to the role of the Committees.

As with all other Parliamentary reform the success of PLS will rely on the political will to make it succeed. Ideally this political leadership would lie within Parliament in a Parliamentary steering committee or re-vamped Liaison Committee. As it is, the only person who could provide this leadership is the Leader of the House (in conjunction with the Leader in the Lords). The role would include co-ordinating the timing of draft bills, ensuring that the Committees are warned in advance, that ad hoc committees are established prior to publication and ensuring that both department and Committee understand the purpose. The Leader should also seek to disseminate best practice and encourage new methods of taking evidence.

The concern of many is that by putting co-ordination of the process under the control of the Leader of the House it will allow greater government influence over the process. Government already controls the timing and content of draft bills. The Leader of the House's role would be

one of co-ordination and setting down guidelines for PLS (such as those set out above). Government would still be free to advise Committees on their inquiry, but Committees would remain free to ignore that advice.

If it is to succeed then pre-legislative scrutiny needs a political sponsor, somebody who can push the process through. The danger of it falling into disuse is not because it is fundamentally detrimental to Government, but because it is poorly-managed.

Appendix: List of draft bills published since 1992

| Date | Details | Department | Bill published |
|-------------|------------------------------------------------------------------------------------------------------------------------|----------------------------|--------------------------------------------|
| 13/07/93 | <i>Sunday Trading</i> , draft bill published as annex to White Paper (Cm 2300), no consultation period | Home Office | 19/11/93 |
| 13/10/94 | <i>Environment Agencies</i> , draft bill, no consultation period | Environment | 01/12/94 as part of Environment Bill |
| 30/03/95 | <i>Reserve Forces</i> , consultation paper with draft bill | Defence | 16/11/95 |
| 02/94 | <i>Arbitration</i> , consultation paper with draft bill | Trade and Industry | see below |
| 07/95 | <i>Arbitration</i> , consultation paper with draft bill | Trade and Industry | 18/12/95 |
| 19/07/95 | <i>Defamation</i> , consultation paper with draft bill | Lord Chancellor's | 08/02/96 |
| 19/07/95 | <i>Chemical Weapons</i> , consultation paper with draft bill | Trade and Industry | See below |
| 02/11/95 | <i>Chemical Weapons</i> , revised draft bill, no consultation period | Trade and Industry | 16/11/95 |
| 03/11/95 | <i>Hong Kong (Overseas Public Servants)</i> , draft bill no consultation period | Foreign Office | 16/11/95 |
| 28/03/96 | <i>Adoption</i> , consultation paper with draft bill | Health, Scottish and Welsh | |
| 27/06/96 | <i>Merchant Shipping & Maritime Security</i> , consultation paper with draft bill | Transport | 24/10/96 |
| 17/07/96 | <i>Employment Rights (Dispute Resolution)</i> , consultation paper with draft bill | Trade and Industry | 09/07/97 |
| 24/07/96 | <i>Commonhold</i> , consultation paper with draft bill | Lord Chancellor's | |
| 08/08/96 | <i>Competition</i> , consultation paper with draft bill. (Also subsequent consultation, beginning 08/08/97, see below) | Trade and Industry | See below |
| 18/03/96 | <i>Building Societies</i> , consultation paper with draft bill. (revised draft bill published 12/96, see below) | Treasury | See below |
| 17/09/96 | <i>Contract (Scotland)</i> , based on Scottish Law Commission Report no. 152 | Scottish | 01/11/96 |
| 12/96 | <i>Building Societies</i> , revised draft bill, no | Treasury | 28/02/97 |

| | | | |
|----------|--------------------------------------------------------------------------------------------------------------------|--------------------|----------------------------------------------|
| | consultation period | | |
| 17/02/97 | <i>Plant Varieties</i> , consultation letter and draft bill | Agriculture | 12/06/97 |
| 10/03/97 | <i>Community Care (Residential Charges)</i> , consultation paper with draft bill | Health | |
| 08/08/97 | <i>Competition</i> , consultation paper with draft bill | Trade and Industry | 15/10/97 |
| 07/01/98 | <i>Lotteries (Frequent draws)</i> , consultation letter with draft bill | Home Office | |
| 11/02/98 | <i>Offences Against the Person</i> , consultation paper with draft bill | | |
| 08/06/98 | <i>Pension Sharing on Divorce</i> , consultation and draft bill | Social Security | 10/02/99 Welfare Reform and Pensions Bill |
| 30/07/98 | <i>Financial Services and Markets</i> , consultation document and draft bill | Treasury | 17/06/99 |
| 27/01/99 | <i>Food Standards Agency</i> , draft bill as an annex to Cm 4249 | Agriculture | 10/06/99 |
| 24/05/99 | <i>Freedom of Information</i> , published as Cm 4355, 'Freedom of Information: Consultation on draft legislation | Home Office | 18/11/99 |
| - | <i>Tobacco Advertising</i> (originally promised in Queen's Speech 1997) | - | - |
| 01/09/98 | <i>Limited Liability Partnerships</i> , consultation document and draft bill | Trade and Industry | 23/11/99 |
| 01/09/98 | <i>Criminal Justice (Terrorism and Conspiracy) Bill</i> | Home Office | 02/09/98 |
| 24/03/99 | <i>Local Government (Organisation and Standards) Bill</i> , published as Cm 4298, 'Local Leadership, Local Choice' | Environment | 25/11/99 |
| 18/04/00 | <i>Regulatory Reform Bill</i> , consultation document and draft bill, Cm 4713 | Cabinet Office | - |
| 07/07/00 | <i>Football (Disorder) Bill</i> . Bill published in draft. Revised draft bill published 12/07/00 | Home Office | 13/07/00 |

In the 1999 Queen's Speech, specific reference was made to three draft bills: Commonhold and Leasehold Reform; International Criminal Court; and Water. These bills are expected to be published in draft in the summer of 2000.