

HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING



HANSARD
SOCIETY



1 : Private Members' Bills May 2003

1 Introduction: The Hansard Society has begun a review of its 1993 Commission report *Making The Law* to highlight critical issues in the legislative process, stimulate and promote debate and identify options for change. We will produce a series of 'Briefing Papers' on a number of legislative issues and in 2004 these papers will be compiled and published with an overview of the legislative process and an update of developments. This first paper considers Private Members' Bills (PMBs), a subject which the 1993 Commission did not cover in any detail.

Even though there has been considerable modernisation within Parliament, there have been few changes to PMBs in recent years. The Modernisation Committee has recently drawn attention to MPs' concerns about the PMB process and the Procedure Committee has begun an inquiry into the subject. PMBs give backbench MPs the ability to introduce legislation of their own choosing and attract attention to an issue. The procedures represent a freedom from the tight whipping and large Government majorities that characterise the Commons. However despite the considerable time allocated to them, few PMBs become law. This paper considers the difficulties in the current system and considers new approaches to PMBs.

2 The development of PMBs: PMBs represent a form of law making which is distinct from the Government Bills which make up the vast majority of legislation that passes through Parliament. The system of PMBs began in its current form in the late 1940s and enshrined the notion that certain parliamentary time should be made available for legislation by individual MPs. In the 1960s PMBs were used (with the Government's active co-operation) to change the law in ways which have since had profound and lasting impact.¹ The reluctance of governments (of both parties) in the past 25 years to provide significant extra time in the parliamentary timetable means that it is unlikely that a succession of such important Bills could

now be passed in this way. The more common approach to such 'conscience questions' (for example on hunting and the age of consent) is for these matters to be introduced in Government Bills and for MPs to be given a free vote.

3 The purpose of PMBs: In much analysis of PMBs there is discussion about their position within wider executive and legislature relationships. The 13 days each year formally set aside for PMBs signifies a commitment to provide some freedom from the normal constraints that 'Government business shall have precedence at every sitting'. PMBs have a variety of purposes:

- Issues of social reform on which public and parliamentary opinion may be too sharply divided for the Government to wish to take the initiative (for example, abortion law);
- Matters of special interest to particular groups (for example, animal welfare);
- Technical changes to existing laws that the Government may not have time to introduce; often known as 'Handout Bills', the Government seeks a willing MP to take through a Bill.

However the passage of legislation is not the sole determinant of the success of PMBs.

- They can be ways of attracting publicity for a proposed change in the law. Sometimes a PMB's sponsor will know that the Bill has no chance of becoming law but will proceed solely for the publicity and raised awareness.

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- PMBs can be a way to ensure that the Government reveals its intentions in a specific area. Ministers sometimes promise to bring in legislation to avoid the passage of a Bill with which they are not content. For example, a succession of PMBs on rights for disabled people from 1992 onwards eventually led to the Government passing the Disability Discrimination Act 1995.
- 4 PMBs: different methods:** Aside from the Ballot Bill procedures outlined in Box A and PMBs introduced in the Lords, (see Box E) there are two other methods of introducing PMBs: Ten Minute Rule Bills (TMRBs) and Presentation Bills.² A considerable amount of both parliamentary and Government time is expended on these types of PMBs which rarely make progress or reach the Statute Book. Both TMRBs and Presentation Bills are in reality used mainly as means of attracting publicity and raising public and parliamentary awareness for an issue. Reforms might recognise this fact rather than continue with the fiction that the procedures are there primarily for legislative purposes.
- The time for TMRBs could be used to allow MPs to raise issues formally on the Floor of the House in ‘prime-time’.
 - Reforms could also consider using the time for short speeches advocating a law change, votes on Early Day Motions or consideration of Petitions.
 - Presentation Bills could be replaced by allowing each MP to publish one draft Bill a year at public expense.
- 5 The success rate of PMBs:** The central test of any legislative process should be whether law is actually produced. Over the past twenty years or so approximately 39% PMBs introduced into the Commons have become law. (This proportion applies solely to PMBs introduced through the ballot and as Table 1 shows this figure is much reduced if other methods of introducing PMBs are included.) Furthermore a significant number of these successful Bills are either very minor or Government ‘Handouts’. The success rate is obviously far below that achieved by Government Bills.
- 6 A difficult system: virtue or vice?:** There are those who are content with the current PMB system and believe that the alleged obstacles and difficulties are in fact its virtues. The proponents of this position argue that Governments and legislatures have an in-built tendency to over-produce law and that new mechanisms to make even more are not needed. Furthermore, with particular reference to PMBs, they fear that legislation might become driven by populist instinct or by agendas dictated by pressure groups or the media.
- 7 Hurdles and Problems:** There are a number of specific procedural hurdles that any PMB must pass successfully if it is to stand any chance of becoming law. Even those MPs placed towards the top of the ballot will have no certainty that their Bill will be able to complete all the necessary stages within the prescribed time and must recognise that the Bill may ultimately be

Table 1 : Success rates of Government and Private Members’ Bills

Session	Government Bills	Private Members’ Bills
1981-82	97.8	10.8
1982-83	100.0	11.0
1983-84	100.0	12.4
1984-85	96.4	21.1
1985-86	96.1	18.4
1986-87	92.3	17.6
1987-88	100.0	10.9
1988-89	100.0	6.3
1989-90	94.4	9.2
1990-91	94.2	16.0
1991-92	86.8	22.0
1992-93	100.0	10.5
1993-94	100.0	13.8
1994-95	94.9	14.5
1995-96	97.7	16.5
1996-97	100.0	26.2
1997-98	98.1	6.7
1998-99	87.1	7.7
1999-00	97.5	5.8
2000-01	60.8	0.0
2001-02	100.0	7.0

Source: House of Commons Sessional Digests.

BOX A THE CURRENT SYSTEM

A PMB can be introduced by a Member of either House who is not a Minister. The most effective route is through the Ballot held early in each Session which selects 20 Members to have first claim on the time available. Key points include:

- On many Fridays debate on the first Bill will take nearly the whole of the sitting so that not even all 20 Ballot Bills have the chance to be debated.
- A Member who is placed lower than seventh in the Ballot will have to put the Bill down for Second Reading on a Friday on which it will not be the first to be debated. If the Bill listed first on that day is not controversial a debate during the remaining time available may be possible. Otherwise, the MP may hope to have the Bill given a Second Reading without debate at 2.30 pm but with this option, if a single Member shouts object, the Question cannot be put on Second Reading - even if no other Members are opposed.
- Another major hurdle for Bills at Second Reading and also at Report stage can be the necessity to secure the Closure which requires the support of at least 100 Members. This requirement can be difficult to meet, especially on Fridays when many MPs have constituency business. A Bill that gets a Second Reading will be committed to a Standing Committee.
- A further procedural trap on a PMB Friday is when opponents of a Bill test the quorum of the House. If fewer than 35 Members are recorded as voting in the division, then the quorum has not been achieved and the House moves immediately on to the next Bill.
- At Report stage, small numbers of opponents can table a series of amendments designed to take up time and ultimately block the Bill's passage.
- The Third Reading stage is usually a formality and no PMBs have fallen at this stage in recent years.
- Once a PMB has passed through the Commons, it must be taken up by a Peer and pass through all stages in the House of Lords. Although the Lords may make amendments of detail and clarification, it is extremely rare for a Commons PMB to be defeated in the Lords.
- The 13th Friday allotted for PMBs – colloquially known as ‘the slaughter of the innocents’ on account of its attrition rate – is largely taken up with Lords’ amendments. By this point a complex order of precedence dictates which Bills can make use of the remaining time.³ Tactical manoeuvres can be used to push a Bill into legislative oblivion with little effort and no debate.

unsuccessful even if it has overwhelming majority support. As a result a great deal of parliamentary time and MP's effort is put into PMBs each year, wasting valuable resources that could be more effectively used. The following sub-sections outline some of the specific difficulties within the system:

- (i) **The effects of Government control:** The Government's attitude is probably the major determining factor in the success of an individual PMB. Few Bills with any controversial element now pass into law mainly because the Government rarely provides any extra time. Furthermore the Government has in recent years used PMBs as a means of getting "Handout Bills" on to the Statute Book. Because such Bills come with Government assistance and support in their preparation, and because the Whips will allow them through their various stages without objecting, they stand a good chance of becoming law. A significant proportion of PMBs are "Handout" Bills; for example, in 1998-99, eleven out of the 20 presented under the ballot were reckoned to be in this category.⁴ The Government may have a number of legitimate reasons for objecting to the passage of a Bill. For example, it may disagree with its objectives, or may intend to introduce similar legislation itself. It may not wish the Bill to pre-empt financial resources, although the Government has the exclusive power to move money resolutions. For any of these reasons it is frequently Government whips who object to PMBs to prevent them from making further progress.
- (ii) **Chance and Luck:** There is a considerable element of chance involved in the PMB process: firstly in getting a good position in the ballot. Thereafter, securing time for Second Readings and subsequent stages can depend on factors over which an individual MP may have little or no influence. A list of precedence determines which Bills and which stages are taken in particular order. As a result tactics, rather than the merits or level of support, can determine a Bill's fate.
- (iii) **The absence of a timetable:** The only way to alter the situation whereby the procedures can destroy a Bill would be to develop some form of timetabling for PMBs. It is possible to devise mechanisms to allow certain bills to have the advantages of timetabling and therefore the likelihood to pass all stages, if both House consent. It should be the ability to secure a majority,

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not the ability to be so inoffensive as to attract no opposition, that should be the hurdle that a PMB should have to surmount.

(iv) Complexity: The PMB process is highly complex and ‘would baffle an intelligent alien.’⁵ MPs can find the procedure mystifying and frequently have to rely on the support and expertise of pressure groups for drafting, legal and tactical advice.

(v) Support: The ten Members placed highest in the ballot may claim up to £200 in expenses for help in drafting their Bills. This figure was fixed in 1971 and inexplicably has not since been revised. If it had been uprated for inflation it would now be worth around £1700. In Scotland a Non-Executive Bills Unit has been established to address the support needs of MSPs. Distinctive features of the Scottish Parliament’s approach are outlined in the Box B.

8 Proposals for Reform: The principle benchmark of the PMB process should be the ability to command a majority in the House of Commons. A procedure that allows even strong, well-supported Bills to fail is surely against the public interest and arguably brings Parliament into disrepute. According to Marsh and Read, the PMB process and the loss of Bills which have achieved clear majorities at Second Reading leads:

‘not merely, or mainly, to a dissatisfaction with the private members’ bills procedure, which few understood, but to a more general disillusionment with Parliament, and the legislative process’.⁶

BOX B PROCEDURES IN THE SCOTTISH PARLIAMENT

There are 129 MSPs, of whom 20 are members of the Scottish Executive, and one is the Presiding Officer. The remaining 108 MSPs are each entitled to introduce two Members’ Bills in every four-year parliamentary session. In Edinburgh once a Member has received sufficient support for their proposal and they table a Bill, it will remain ‘alive’ until the Parliament is dissolved.

- Bills are timetabled by the Parliamentary Business Bureau, and are subject to the same scrutiny by parliamentary committees as legislation proposed by the Executive. Thus, the opportunities for ‘killing off’ a PMB that exist at Westminster do not arise in Edinburgh. A Bill’s failure to progress is usually the result of insufficient parliamentary support for a proposal, that the Bill has met insurmountable legal or drafting hurdles, or that another Member has introduced a Bill on the same issue that has received greater support.
- There is considerable support for Members wishing to introduce Bills from a Non-Executive Bills Unit which assists with drafting, procedural, technical and legal advice. The Unit looks into the background, current law, the Executive’s position and European issues and helps identify relevant research.
- Members wishing to initiate legislation have two options. The first is to propose the introduction of a Committee Bill. The mechanism for this is by submitting a draft proposal to the Parliamentary Bureau, who then refer the proposal to the relevant Committee. After consideration the Committee decide whether or not to make a proposal for a Bill. The second, and generally favoured, option for a Member is to lodge an individual proposal for a Bill.

BOX C PRIVATE HIRE VEHICLES (LONDON) BILL 1997/98

The proceedings of this Bill are a good example of the merits and defects of the current system. It shows how a PMB can be a very useful tool in introducing important legislation but also demonstrates how a Bill that has strong cross-party support can be potentially so easily scuttled by just one single-minded Member. It also highlights the crucial importance of government support. Drawn fourth in the Ballot, Rt. Hon Sir George Young MP introduced, with the support of the three main parties, a PMB that sought to provide for the licensing of London’s mini-cab trade which, unlike the London Black Cab trade, had no regulation at all. The Bill obtained a Second Reading and the necessary resolutions needed by 16 March 1998 and the Committee Stage was scheduled for 20 March. However, by objecting on three successive Private Members’ Fridays, an MP was able to block the Bill’s progress into Committee to the point where it was due to be considered on the last Private Members’ Friday. It was feared that the Bill would be lost in the ‘slaughter’ that occurs on this day so the Government agreed to allocate the Bill to a Standing Committee. It then passed all stages and received Royal Assent in July 1998.

(i) The scope of reform: An improved success rate for PMBs will not occur without some form of fundamental reform. For this to happen, Government as well as Parliament must consent to change. It is inevitable, and understandable, that the Government will wish to stop PMBs to which it is fundamentally opposed. It will not wish to allow its mandated programme to be derailed or be forced to implement measures with which it disagrees. Any reforms should seek to put into place mechanisms that recognise this reality. In this paper, we do not make formal recommendations but instead present options which appear to address the difficulties identified. The various options do not amount to a blueprint for reform. Some of the options identified would only work if other elements of the process were also changed. But, in total, they are intended to promote greater awareness of the difficulties in the PMB process and stimulate discussion about ways in which the system could be reformed. In essence, the distinction is whether large scale reform of the system should be introduced or whether more limited or minor changes should be made to the current system.

(ii) Devising a mechanism to timetable a PMB: Many of the procedural devices that can be deployed to destroy a PMB derive their potency from the fact that PMBs are not timetabled.

(iii) A PMB select committee: One method to provide a PMB with a timetabled passage would be through a specific Private Members' Bill Select Committee. A PMB Select Committee could be constituted in a number of ways; possibly by nomination of the whole House or by appointment of the Liaison Committee. If the Committee decided – through unanimous or overwhelming vote – that a PMB had merit, it should have the power to present the Bill for timetabling. The requirement to have all-party support would ensure that the interests of the governing party, and indeed other parties, could not be abused and that only Bills which commanded wide support could make use of a timetabled passage.

A number of commentators have made proposals of this sort. For example David Marsh in *Private Members Bills*⁷ suggests that a specific Committee should be

used to plot the course for a Bill to prevent it from being talked out. Under this proposal if a Bill was non-controversial and no MP (or perhaps just a small number of MPs) registered opposition, then such a Committee could place it in a different category from Bills which were opposed.

(iv) Existing select committees: Select committees could also take a role in legislation. If a Committee wished to put forward a Bill, it could find a sponsoring MP who would submit the proposal to a Private Members' Bill Committee.

(v) Using a Business Committee: If a Business Committee were established to formalise the organisation of parliamentary business⁸ including the legislative programme, such a body could have a role in moving PMBs towards a timetabled passage. Such a committee could also programme Lords PMBs so that they did not run out of time at the end of the Session.

(vi) Introducing a threshold: A different method to test support for a Bill and smooth its passage would be to introduce certain thresholds at Second Reading. Procedures could be introduced that moved a Bill towards a timetabled passage if it received clear backing at Second Reading. However if a certain number of votes were cast against the Bill (say, 40 votes reflecting party balance or 80 votes without party balance) this would prevent the Bill from being timetabled. As the Procedure Committee noted in its 1995 Report, 'it is matter of debate whether a majority in the House, not supported by an electoral mandate, should be allowed to overcome serious objections from a minority of Members on one issue.'⁹

9 Changes to elements of the PMB process: A number of specific changes would improve the PMB process, regardless of whether other major changes were adopted, including:

■ The introduction of carry-over motions for certain well supported Bills to prevent them being lost at the end of the Session;

- Greater use of draft Bills to allow for some form of pre-legislative scrutiny;
- Taking Report Stage in Standing Committees so that the 13 PMB Fridays are used entirely for Second and Third Readings;¹⁰
- Introducing methods for MPs to sponsor PMBs in addition to the ballot.
- Changing the timing of the ballot to the spillover period in October to allow more time for drafting and pre-legislative scrutiny.

BOX D A PMB SELECT COMMITTEE?

Andrew Dismore MP has recently put forward proposals involving a new Select Committee to be established to look at a PMB's purpose and provide the Government with an opportunity to express any reservations of a practical nature that it may have.¹¹ The Committee should have the power to make recommendations along three lines and in accordance with certain criteria agreed by the Committee. Mr Dismore has likened these options to a green, yellow and red light system.

- Green - It is a sensible Bill, one that meets the criteria and should proceed, unaltered, with a timetable;
- Yellow - The Bill in principle is fine but it needs some work doing to it. The Committee should suggest amendments and if agreed to by the MP in charge, the Bill should be given a timetable. If not, the PMB would proceed as now;
- Red - The Bill does not meet the criteria. The Committee could recommend dropping the Bill. The promoter could then start a new PMB at the back of the queue or proceed with the original Bill under existing procedures without a timetable.

10 Increasing the time for PMB business: At present PMB business is normally confined to Fridays, a difficult day for many MPs to attend. Since the change to the Commons' hours in January 2003 extra time exists on Tuesday and Wednesday evenings, which could be allocated to PMBs. There are a number of different options. The existing Fridays could remain for uncontroversial Bills. These often take up very little time and there is usually no need for many MPs to attend the proceedings.

A specific number of evenings (perhaps 13) could be allocated to more complex but timetabled Bills. Extra time could also be granted where a specific Bill was felt to need more consideration or the extra time could be granted to prevent logjams at the end of a Session. Also Westminster Hall could be used as a forum for PMBs to provide more time.

11 Improving support for parliamentarians: If MPs are to undertake their role efficiently and effectively, they need to be fully supported in these tasks.

- The model of the Scottish Parliament's Non-Executive Bills Unit should be examined to establish whether it might be suitable for Westminster;
- The allowance for drafting support should be increased to meet the current cost of legislative drafting;
- MPs should have access to training courses and updated resource materials on PMB procedures.

12 Making the process more simple and transparent: The PMB system at present is remarkably complex. Even informed commentators, and MPs themselves, find the procedures arcane in the extreme. The public must be mystified as to why and how apparently well-supported Bills can be defeated.

The procedures should be made much more straightforward and open. It is important that if the Government, or some other party, wishes to oppose a Bill there should be an assumption that the reasons for this position should be stated openly rather than hidden behind procedural subterfuge.

BOX E PMBS AND THE HOUSE OF LORDS

This paper concentrates on PMBs introduced in the Commons. This box outlines procedures for PMBs introduced in the Lords and identifies some possible changes. Some of the options for reform identified elsewhere in this paper may be suitable for the Lords whereas others would not.

- In the House of Lords, Peers have an unrestricted right to introduce PMBs. Bills which have completed all their stages in the Lords are sent to the Commons where they must be taken up by an MP.
- They are then treated as any other PMB and must pass all the normal stages. If amendments are made, the Bill goes back to the Lords.
- Lords' Bills often fail to find time to be considered in the Commons as they arrive late in the Session and find themselves placed behind Commons' PMBs.
- On the other hand the Lords generally give sufficient time to a Commons' PMB so that it can pass through the Lords if it can secure a majority.
- PMB processes in the Lords are relatively straightforward compared to the difficulties encountered in the Commons. This may be because all concerned know that it is during its Commons' stage that a Lords' PMB is likely to come to grief.
- A Bill's Lords' sponsor must find a Commons' sponsor to take-up the Bill. A handful of PMBs introduced in the Lords are successful in each session.
- The same reform issues arise; specifically, the chance to get the Bill timetabled through Committee intervention and the possibility of carry-over to counteract the problems of late arrival.
- One possibility might be to have the same Bill introduced into both Houses both to indicate its wide support and to maximise its chances of becoming law.

13 Conclusion: There has been very little change to the PMB system in recent years, despite evidence of dissatisfaction with the way it operates. The procedures exist for parliamentarians to express themselves in a legislative capacity, regardless of who is in Government. But relatively few PMBs succeed, especially if the minor, technical and 'Handout Bills' are taken out of the equation, because the procedure makes them so easy to oppose and ultimately destroy. As a result considerable resources and time are wasted in every session. An overall aim should be to devise a system that has certain principles:

- It would allow a limited number of well-supported Bills to pass through Parliament without the need for active Government support.
- Such Bills would not be able to be hijacked by minority opponents but would provide for legitimate objection by a significant minority.
- By having all-party committee input or voting thresholds party political manipulation should be avoided.
- There should be the underlying principle that the PMB system must avoid the passage of legislation which is of poor quality or has unintended consequences.

Reforms, such as increasing the time available and improving support to MPs, could be introduced without other fundamental changes to the current system. The limited time available means that only relatively few MPs will be successful under any system. If new methods are considered to have merit, they should be implemented on a pilot basis and then fully evaluated to ascertain whether the changes have improved the operation and outcomes of the PMB process.

The drawbacks in the current PMB process appear to outweigh the benefits. This paper has identified a number of options; some are relatively minor, others are much more far-reaching in their implications. The time is right to consider new approaches and for a parliamentary and public debate about the role that individual parliamentarians should play in making the law.

ENDNOTES AND REFERENCES

- 1 Such measures included the initial experimental abolition of capital punishment in 1965, the Abortion Act 1967 liberalising the abortion laws, the Sexual Offences Act 1967 abolishing criminal penalties for homosexual acts and the Divorce Reform Act 1969.
- 2 For further information on Ten Minute Rule Bills and Presentation Bills, and all other procedural matters on the PMB process, see *Parliament: Functions, Practice and Procedures*, Second Edition, Blackburn, R and Kennon, A, Sweet and Maxwell, (2003).
- 3 The order of precedence includes consideration of Lords' amendments, Third Readings, new Report stages, adjourned Report stages, adjourned Committee proceedings, Bills appointed to Committees of the whole House and Second Readings.
- 4 See Note 2, page 544.
- 5 *Private Members' Bills*, Marsh, D, and Read, M, Cambridge University Press, (1988).
- 6 *British Private Members' Balloted Bills: A Lottery with Few Winners, Small Prizes, but High Administrative Costs*, Marsh, D and Read, M, Essex Papers in Politics and Government, University of Essex, 1985.
- 7 See *Private Members' Bills*, Marsh, D, and Read, M, Cambridge University Press, (1988).
- 8 See *Opening Up the Usual Channels*, Rush, M and Ettinghausen, C, Hansard Society, (2002) and *The Challenge for Parliament: Making Government Accountable*, the Report of Hansard Society Commission on Parliamentary Scrutiny, Chairman, Rt Hon Lord Newton of Braintree, (2001).
- 9 Procedure Committee, Fifth Report, Session 1994-95, *Private Member's Bills*, HC 38, Para 16.
- 10 Standing Order 92 allows for this.
- 11 Memorandum in evidence to the Procedure Committee inquiry into the Procedures for Debates and Private Members' Bills and the Powers of the Speaker, January 2003.

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The views expressed in this report are those of the author and the Hansard Society, as an independent non-party organisation, is neither for nor against. The Society is, however, happy to publish these views and to invite analysis and discussion of them. This paper was written by Alex Brazier, Senior Researcher, Parliament and Government Programme, Hansard Society with additional research undertaken by Matthew Towey and Michael Jacobs (Hansard Society).

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