

HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING



HANSARD
SOCIETY



2 : Standing Committees July 2003

1 Introduction: The Hansard Society is undertaking 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.¹ We are producing a series of 'Briefing Papers' on a number of legislative issues and in 2004 these papers will be compiled along with an overview of the legislative process and an update of developments. This second paper considers the role and effectiveness of Standing Committees in the House of Commons, an area of the legislative process that has been widely criticised but remains largely unreformed. It also proposes possible reforms to improve the process of legislative scrutiny.

2 What are Standing Committees? A Standing Committee (STC) is a temporary committee set up to scrutinise a Bill in detail. STCs consider Public Bills, including Government and Private Members' Bills and have an average of 18 members.² Members are appointed by a Select Committee known as the 'Committee of Selection', which in fact appoints on the basis of nominations made by each of the parties. The Members will include the relevant Minister (or possibly Ministers). The Chairman is appointed by the Speaker from a panel of MPs and his role is like that of the Speaker in the House itself – to maintain order and put questions to the vote when necessary. Most STC proceedings are open to the public.³

STCs are a central part of the legislative process enabling backbench MPs to fulfil their role as legislators. However, the nature of the present STC system means that like many other parts of the parliamentary process, the governing party, or more specifically the Government, dominates the system leaving little room for real input from MPs and marginalising their capacity to develop and influence legislation.

3 Severe and widespread criticisms: The Modernisation Committee has made clear its criticisms of STCs:

The Committee stage of a Bill, which is meant to be the occasion when the details of the legislation are scrutinised, has often tended to be devoted to political partisan debate rather than constructive and systematic scrutiny. On Bills where policy differences are great, the role of Government backbenchers on a Standing Committee has been primarily to remain silent and to vote as directed. By contrast the Opposition has often set out to devise methods designed simply to extend debate. The Government has then been forced to bring in a guillotine which has often been draconian, as a result of which large sections of the Bill have not been considered.

Modernisation Committee, First Report, July 1997, HC 190.

Other commentators have been more trenchant. Andrew Tyrie MP cites colleagues on both sides of the House who describe STCs as "desperate", "dire" and a "pointless ritual."⁴ Such criticisms are not new. Richard Crossman in his diaries described STCs as inane and a waste of time.⁵ According to Peter Riddell "The system has been geared entirely to getting Bills through regardless of whether they are properly scrutinised. During the Standing Committee stage of line-by-line scrutiny government backbenchers are actively discouraged from participating lest their speeches delay progress on a Bill, so they can be seen doing their constituency correspondence, and depending on the season, their Christmas cards."⁶

ISSUES IN LAW MAKING

4 What's wrong with Standing Committees? In theory, it is during the STC stage that a Bill passing through the Commons is scrutinised in detail. STCs provide MPs with the opportunity to consider the meaning and powers of a Bill and its likely outcomes. STCs can have a considerable impact over the final content of legislation and it is commonplace for Ministers to assert that any difficulties that have been identified (for example in the Second Reading debate) can be considered during the detailed scrutiny of the STC stage. It is for these reasons that pressure groups and lobby organisations make considerable effort to influence STCs. In reality such effort is often wasted as usually only amendments that are acceptable to the Government are passed.

As a basic model it is sensible and practical for a relatively small group of legislators to spend many hours, over several weeks, examining the minutiae of a Bill's provisions. Indeed, on occasion, when provided with enough time, when the Members are well informed and when the Minister taking through

the Bill is prepared to engage in genuine debate, STCs can provide an effective form of scrutiny and can tease out the details of a Bill.

However even STCs' greatest admirers would concede that this outcome is all too rare. More generally there are widespread criticisms, even within Parliament itself, that STCs in practice do not provide anything approaching consistent or genuine scrutiny.

(i) Programming: curtailing scrutiny? Programming was introduced, originally experimentally in 1997, to create timetables on the basis of consensus between all parties. However, it is now used for virtually all Government Bills, and many complain that the idea of it representing a consensual agreement between the parties has virtually been abandoned. Bills in STCs have traditionally been subject to the imposition of guillotines which are motions proposed by the Government if they are unhappy with the amount of progress made on a Bill.

BOX A THE CURRENT STANDING COMMITTEE SYSTEM

- Following a Bill's Second Reading it is sent to a STC for in-depth analysis of its contents. Amendments may then be tabled in the name of one or more Members, whether by Ministers, Opposition Spokesmen or backbenchers of any party. The Committee goes through the Bill dealing with each Clause and Schedule in turn.
- When called by the Chairman, MPs propose amendments and others can speak in favour or against them. The Minister will then respond, explaining the reasons why the amendment should or should not be accepted. The amendment may then be put to a vote.
- The Chairman has discretion to decide which amendments are discussed. Not every amendment is pressed to a vote: often the promoter will withdraw it if the Minister promises to make changes.
- Sometimes it might be a 'probing' amendment designed to draw out information about Government intentions. The Government will propose amendments of its own, sometimes simply to clarify language but often to make major changes.
- An STC is bound by the House's decision on Second Reading in favour of the principle of the Bill and should not amend it in a way that destroys its main principles. STC proceedings can be guillotined. Bills may be further amended at Report Stage or in the House of Lords.
- In addition to STCs used for detailed scrutiny of Public Bills, there are other STCs including the Scottish and Welsh Grand Committees, the Northern Ireland Committee and the rarely used Regional Affairs Committee which exist to debate matters referred to them by the House.
- STCs are also appointed to consider various forms of delegated legislation, such as Regulations or Orders which derive from statute.
- There are three European Standing Committees. These were introduced in 1980 to enable debates on EU documents to be held off the floor of the House. They have a fixed membership of 13. As with STCs for delegated legislation, other MPs may attend and put forward amendments, but not vote or be counted in the quorum.

BOX B CASE STUDY: THE CRIMINAL JUSTICE BILL

The Criminal Justice Bill was published in November 2002. The Bill's provisions have caused considerable controversy. For example, the Home Affairs Committee report on the Bill stated, 'we have serious concerns about some of the provisions, which we believe will shift the balance too far towards the state'.⁹ However despite the importance of the Bill, the concerns raised by the select committee and the fact that it would directly affect the liberties of citizens, the STC was not able to scrutinise all its provisions.

- The STC considering the Bill began its proceedings in December 2002, met on 32 occasions and reported to the House in March 2003.
- However, before Report Stage the Government introduced significant new additions to the Bill (almost 500 amendments and 28 new clauses)¹⁰, which had not been considered by the STC. This move attracted strong criticism.¹¹
- The Government replied that it was granting extra, unprecedented time for the Report Stage although this step did not appear to satisfy the critics. Despite this the Bill had its Third Reading in May 2003 and was sent to the House of Lords.

A programming sub-committee meets to set out a timetable for the discussion of the Bill including a date by which the STC should complete its deliberations and report the Bill. The sub-committee normally includes the principal Members of the Committee – the Minister and Opposition Spokesmen, the Whips and one or two backbenchers – and is chaired by the Chairman of the Committee. It estimates the number of meetings that are likely to take place and attempts to identify the 'pressure' points in the process including which clauses and schedules are likely to be contentious.

However, it is not always possible to anticipate accurately these issues in advance and scrutiny of Bills can remain partial and haphazard. If the time runs out the full Bill may not be properly scrutinised, leaving many amendments without any

consideration at all of their meaning or implications. Potentially, this diminishes the quality of legislation produced by Parliament.

- (ii) **Government control limits genuine scrutiny:** At the heart of the problem is the limited extent to which STC scrutiny results in significant changes to a Bill which are not the result of changes in Government policy. The Government usually controls STCs through use of its majority and exercises this control to resist all but the most innocuous amendments proposed by the opposition parties. In fact, STCs can be viewed as a particularly acute symptom of executive dominance over the legislature. As the STC's composition reflects the balance of parties in the House of Commons and as the governing party usually has a majority, Government amendments will almost certainly get passed whereas most Opposition amendments will fail.

The key point is the Government's desire to get its legislation onto the Statute Book in a form that it considers acceptable and thus act upon its mandate from the electorate. On the other hand it is the duty of the opposition to oppose. These legitimate functions conflict with the desirability of some form of more dispassionate analysis of merits and implications of the measures contained in the Bill.

- (iii) **Inability to deal with controversial issues:** When a Bill is controversial the STC scrutiny process can be particularly ineffective. According to Peter Riddell, "the more important and controversial the Bill, the less likely is Parliament to play a creative part in its scrutiny. The result is a mass of hastily considered and badly drafted Bills, which later have to be revised."⁷

STCs can spend disproportionate time on a small number of clauses while other parts of the Bill can be completely ignored.⁸ Furthermore once the STC proceedings have finished the Government can introduce new clauses that may be subject to little or no scrutiny by the Commons. The problem of partial scrutiny can be exacerbated by the operation of programming. If the timetable is too short, even if there has been co-operation between the parties, it is inevitable that significant parts of the Bill will not be debated.

ISSUES IN LAW MAKING

5 Reforming the system: It should be the responsibility of all MPs sitting on a STC, regardless of their political allegiance, to ensure that the legislation in question has been fully and effectively scrutinised and debated. Some essential questions should always be asked;

- Is the proposed law as clear and unambiguous as possible?
- Are the measures practical and likely to be administratively sound?
- What are the law's possible unintended consequences?
- The potential list of issues is lengthy and will vary for each Bill. However there should at least be some broad criteria and benchmarks for scrutinising legislation and these do not appear to exist at present.

(i) Changing the methods of working: At present STCs are constituted and operated to reflect the Commons as a whole. It is obviously proper that the composition should reflect the balance of parties in the Commons and therefore acknowledge the Government's mandate. However, in other respects STCs might attempt to introduce different methods of working and presentation.

For example, their appearance and layout could be changed to a round table model rather than the current adversarial set-up. Also the procedures used, and the language and style of the meetings could be made more accessible.

(ii) Greater use of Special Standing Committees: A Special Standing Committee (SSC) is a temporary committee that combines the functions of a Select and Standing Committee. They tend to be used for non-controversial Bills, albeit ones that may involve complex or novel questions of policy. They are however very rarely used.

- The Chairman of the relevant Select Committee usually chairs the SSC during evidence-taking sessions and another Chairman takes the subsequent stages. SSCs usually include some members of the relevant Select Committee.

- A SSC can hear oral evidence at up to three sittings within 28 days after the committal of the Bill; written evidence may also be called for. At the conclusion of these proceedings, the committee reverts to working like any other STC.

- Greater use of SSCs has been frequently proposed to address the failings of STCs. For example *Making the Law* recommended that Bills should be committed more regularly to an SSC and believed that this would allow for expert witnesses to be called and provide an additional forum for consideration and scrutiny.

- The Conservative Party's report, *Strengthening Parliament*, also recommended that following Second Reading, Bills should be referred to a SSC unless the House directs otherwise, thereby reversing the current relationship.¹²

- One possibility would be to obtain advance agreement that SSCs (or other forms of close scrutiny by Committee) should be used where the Bill in question has particular technical, administrative or implementation issues. Obvious recent candidates would be subjects such as Child Support and Tax and Pension Credits where the legislation's success relies as much, possibly more so, on the detail in the Bill as on the policy intentions underpinning it.

(iii) A semi-permanent Standing Committee? Another possibility to improve STCs scrutiny function might be the formation of a STC that lasted for a Session or a Parliament and which considered all the legislation on a particular subject area.

- At the very least a pool of MPs could be called upon to form the nucleus of such a committee. These MPs might consequently build up greater subject knowledge and legislative scrutiny skills.

- Such a proposal would be a major change to the way that the Commons works. However many reports have talked of promoting different career paths in Parliament and such a designated legislative role may be one way of achieving this goal.

- Alternatively, a system could be devised to allow a

chairman to sit on a number of Bills of similar subject matter over the course of a Session or a Parliament. Even though the role of the chairman is impartial and non-interventionist, there may be advantages for the scrutiny process if the chairman were able to develop the status, knowledge and expertise in a similar way to that developed by select committee chairmen.

(iv) Improving collegiality: It is frequently asserted that select committees manage, at least for the most part, to put aside party loyalties in pursuit of holding Government to account and promotion of the public interest. Their terms of reference and their methods of operation often mean that they achieve a more collegiate and consensual approach to the issues before them.

One change to the composition of STCs would be to include more members from existing Select Committees on STCs considering Bills relevant to their subject. This happens to a limited extent at present but greater overlap might be considered as a matter of course. Introducing similar institutional structures to those used in Select Committees might be a way to improve the quality of scrutiny by STCs.

(v) Combining Select and Standing Committees: Another option that has been proposed to improve the

scrutiny stage of the legislative process is to introduce some dual-purpose committees that combine Standing and Select Committee functions on a permanent basis (as opposed to the temporary nature of Special Standing Committees). Such combined committees are the norm in many other Parliaments including those in Scotland and most of Europe.

The Hansard Society report *The Challenge for Parliament* proposed the introduction of larger Select Committees working through a variety of sub-committees to carry out legislation and scrutiny work.¹³ It noted that the expertise built up on Select Committees means that Bills would receive a much closer level of scrutiny than under the current system of STCs. The report also proposed that one or two dual-purpose committees, which would undertake both scrutiny and legislative functions, should be established on a pilot basis and their performance evaluated by the Liaison Committee.

(vi) Further options for reform: A number of specific reforms might improve the operation of STCs, including:

- Slitting the detailed scrutiny of the Bill between a Committee of the whole House and STCs. This was raised in the 1997 Modernisation Committee report

BOX C LEGISLATIVE COMMITTEES IN THE SCOTTISH PARLIAMENT

The Scottish Parliament's Subject Committees deal with a particular subject of public policy and combine the functions of Westminster's Select and Standing Committees. They can also initiate their own legislation and an important part of their work concerns pre-legislative scrutiny. Prior to introducing a Bill, a Minister can advise a committee on proposals for legislation and outline the proposed consultation exercise. There are three stages of a Bill's passage:

Stage 1: The Bill is referred to the relevant subject committee, known as the 'lead committee' which may take evidence at this stage. Other committees may be involved, such as Equal Opportunities or Finance. Once the lead committee has reported on the Bill, the Parliament itself considers the general principles as well. The Bill may be referred back to the lead committee for a further report on the principles of all, or any part, of the Bill before Parliament makes its decision on the general principles;

Stage 2: The Bill receives more detailed 'line-by-line' consideration by the lead Committee;

Stage 3: Parliament debates and decides whether the Bill should pass. At this point, up to half of the sections of the Bill may be referred back for further Stage 2 consideration by the relevant committee(s). The Parliament then considers whether to pass the Bill.

ISSUES IN LAW MAKING

and used for Bills such as the Sexual Offences (Amendment) Act (2000). This procedure might allow for clauses requiring greater scrutiny and consideration to be considered in depth by a STC whereas other parts of the Bill, which required a lighter touch, could be detached.

- Formal agreement to ensure that all parts of a Bill are discussed in Standing Committee. This suggestion was raised in the 1997 Modernisation Committee report. Although this would appear to deal with the obvious problem of parts of the Bill failing to get any detailed scrutiny at all, in reality, there is a danger that such an agreement would break down at the first hint of a difficulty in the Government's legislative timetable.
- Further consideration of the *Making the Law* recommendation that if there are many new areas to be further debated at Report Stage, Bills should be re-committed to a Special Standing Committee for that purpose.
- Changes to composition and methods of selection: for example, if the whips had less control and if the Committee of Selection was ended it would reduce the grip of partisanship over committees. Additionally experts might be allowed to sit on committees (but not vote).
- Changing the name to Legislative or Legislation Committee, to reflect the role more accurately to a wider public.
- Evaluation of the merits of the system used in the Scottish Parliament to ascertain whether Westminster could learn any lessons (See Box C).

6 Introducing real scrutiny: If STCs are unable or unwilling to provide detailed scrutiny of legislation, other mechanisms should be introduced to ensure that this occurs. Perhaps a starting point would be acknowledging that STCs as they currently operate, do not usually provide a complete form of genuine consideration.

The key issue in improving legislative scrutiny is to bring in expert advice at an early stage of the process to consider practicalities, effects and unintended

consequences of new legislation. There is much more chance of such scrutiny making a difference before the battle lines are drawn, rather than after hostilities have commenced. There are a number of ways of bringing in some dispassionate consideration of legislation:

(i) Pre-legislative scrutiny: One way to achieve this would be through greater use of pre-legislative scrutiny and consideration of Bills in draft. The Modernisation Committee in 1997 stated that it attached 'the highest importance to pre-legislative scrutiny' and recommended 'the Government continue to increase

BOX D DETAILED SCRUTINY OF LEGISLATION IN THE HOUSE OF LORDS

STCs do not exist in the House of Lords; instead

- Fourteen days after Second Reading the Bill proceeds to its committee stage;
- Bills usually go to a Committee of the Whole House where they are examined line by line;
- Unlike the Commons, all amendments can be considered. As there is no guillotine, debate on amendments is unrestricted with all members eligible to participate.

There are procedures that may replace the Committee of the Whole House:

- Grand Committee: which works in the same way as a Committee of the Whole House, but no votes can be taken;
- Public Bill Committee: A limited number of peers are selected to conduct the Committee Stage of Government Bills of a technical and non-controversial nature. Other Lords can participate but may not vote;
- Special Public Bill Committee: This is analogous to the Special Standing Committee procedure in the Commons.

with each session the proportion of Bills published in draft'.¹⁴ Although there has been some progress on this front, and the number of Bills subject to such scrutiny has increased, the use of pre-legislative scrutiny is still the exception rather than the norm.¹⁵

(ii) Advance consultation: Another method would be to have some sort of in-built consultation stage after the presentation of a Bill and before its Second Reading (or maybe just after). This would involve a formal invitation to outside bodies and individuals to send in comments on the Bill. (Most Bills already have had some form of consultation process, on a White Paper or Green Paper basis, but that consultation process rarely includes the actual text of a Bill.) These comments would be published by the House, perhaps by a specific Scrutiny Committee, indicating the comments made about the Bill and that could form the basis of the discussion.

(iii) Joint Commons/Lords Committees: Pre-legislative scrutiny can also involve the formation of an ad-hoc committee made up of Members of both the Commons and Lords. This process was used for pre-legislative scrutiny of the Financial Services and Markets Bill and was considered a successful precedent in bringing expert advice and knowledge to consideration of a complex and highly technical Bill. The Bill was subject to extensive pre-legislative scrutiny to highlight defects and allow changes to be made before the legislation reached the adversarial environment of the chambers.

(iv) Involving STC Members: All the above examples to introduce extra scrutiny mechanisms might result in greater expertise being introduced into the process. However most pre-legislative scrutiny is carried out by MPs who do not eventually sit on the STC itself. Arguably it is the actual Members of the STC themselves who need to undertake such scrutiny if such work is to improve significantly the quality of the legislation produced by Parliament.

7 Conclusion: This paper has outlined inadequacies in the way that Standing Committees work and identified a number of ways in which the scrutiny of legislation, which is supposed to be the prime function of Standing Committees, might be improved. It is one of Parliament's prime functions to make the law and Standing Committees, charged with looking at the detail of a Bill, must take a large share of responsibility for the resulting legislation. Despite widespread, and often severe criticisms, Standing Committees remain relatively unchanged.

There are some positive examples of Bills being subject to close and genuine consideration and making a real difference to the Bill at hand. However, STCs' scrutiny is generally patchy and haphazard; many clauses can easily pass through an STC without any scrutiny at all. This can be the case even when the provisions might have direct effects on the financial well-being or even the liberties of the electorate. Given the volume of legislation that the Government wishes to get through Parliament, and the political imperatives that drive the entire process, it is perhaps inevitable that the system works in the way that it does.

There are, however, mechanisms that can be introduced which bring some detachment and expertise into the system and which might, if the culture and motivation were correct, actually improve the quality of legislation that is passed by Parliament. The Hansard Society hopes that there will be a debate within Government and Parliament, and all those concerned with the legislative process, on ways in which STCs can be reformed and scrutiny of legislation significantly improved.

ENDNOTES AND REFERENCES

- 1 The report of the Hansard Society Commission on the Legislative Process, *Making The Law*, (1993), chaired by Lord Rippon of Hexham.
- 2 Very minor bills can have a form of committee stage within the chamber itself, known as 'Committee of the whole House'. Some Bills of major constitutional significance are also handled in this way. Consideration of some Bills can be split between the Committee of the whole House and a Standing Committee. The annual Finance Bill is almost always handled in this way.
- 3 For further information on STCs see *Parliament; Functions, Practice and Procedures*, Second Edition, Blackburn, R, Kennon, A, (2002).
- 4 *Mr Blair's Poodle, An agenda for reviving the House of Commons*, Andrew Tyrie MP, Centre for Policy Studies, (2000).
- 5 The Crossman Diaries, Richard Crossman: *The Diary of a Cabinet Minister*, Volume 3, Secretary of State for Social Services 1968-70 (1977)
- 6 *Parliament Under Blair*, Riddell P, London, (2000).
- 7 *ibid.*
- 8 See for example *Failure in British Government, The Politics of the Poll Tax*, Butler, Adonis and Travers, (1994).
- 9 Home Affairs Committee, (2002-03), *Criminal Justice Bill*, HC83
- 10 See HC Deb 20/5/03, vol 405, col 842-3.
- 11 See *Justice on Trial, The Commons must improve this Bill*, The Guardian, 19 May 2003 and complaints from MPs e.g. Graham Allen MP, David Heath MP HC Deb 20/5/03, vol 405, col 842-3.
- 12 *Strengthening Parliament: The Report of the Commission to Strengthen Parliament*, (2000)
- 13 *The Challenge for Parliament: Making Government Accountable*, Hansard Society Commission on Parliamentary Scrutiny, Chairman, Rt Hon Lord Newton of Braintree, (2001).
- 14 Modernisation Committee (2001-2002), *A Reform Programme*. HC 1168-I.
- 15 Paper 4 in this series of Briefing Papers will look at pre-legislative scrutiny.

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The views expressed in this report are those of the author and the Hansard Society, as an independent non-party organization, is neither for nor against. The Society is, however, happy to publish these views and to invite analysis and discussion of them.

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This is a Hansard Society Findings Paper Number 2 in a series of papers to review elements of the legislative process. A final report will be published in 2004.

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