

# HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING



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## 4 : Programming of Legislation April 2004

**1 Introduction:** The Hansard Society is undertaking a review of its 1993 Commission report on the legislative process, *Making The Law*, to highlight critical issues, stimulate debate and identify options for change.<sup>1</sup> We are producing a series of five 'Briefing Papers' and in December 2004 we will publish a final report that will draw together these papers along with an overview of the legislative process and an update of developments. The first three papers in this series looked at Private Members' Bills, Standing Committees and Delegated Legislation.

This paper looks at programming of legislation (the system is also known as 'timetabling'). Since 1997 there have been a number of significant developments in this area and most Government bills are now subject to a form of programming in the House of Commons. Programming was intended as a means to allow more effective and consistent scrutiny of proposed legislation while recognising both the need for the Government to get its legislation through and the Opposition to have debates and votes on the parts of a bill that it considered important. To its critics, however, programming has not achieved these goals and has resulted in greater executive dominance over the legislature. This paper will look at the history and context of programming of legislation, recent reforms, criticisms, and further proposals for change.

**2 What is Programming?:** All bills have to pass through a number of stages before they can become law. Before 1998, there were two ways in which the House of Commons could timetable the various stages of a bill:

- 'Informal timetabling'; when Government and Opposition whips - through the 'usual channels' - agreed on a timetable for the passage of a particular piece of legislation<sup>2</sup>;
- 'Guillotine' motions; instigated by the Government to curtail the time spent on one or more bills. This practice dates from the 1880s but its usage became more widespread from the 1970s onwards.

Governments have used guillotines to speed up a bill's passage when they have been unable to reach voluntary agreements through the usual channels or when the Opposition engaged in what the Government perceived to be 'blocking' tactics.

Since 1998, programme motions have been introduced into the House of Commons (but not the House of Lords) to allocate the amount of time that will be spent on the bill in question. Programme motions are moved after a bill's Second Reading and outline the timetable for future stages in the Commons. They specify the number of days on the floor of the House reserved for stages taking place there (e.g. Report Stage and Third Reading), while leaving the actual dates for those proceedings to be determined in the usual way. Programme Motions also specify a date by which proceedings in Standing Committee must be concluded, known as the 'out-date'. A programming sub-committee meets to decide the timetable for the Standing Committee. (Box A provides more details on the operation of programming.)

**3 Making The Law:** In 1993, *Making The Law* made a number of recommendations related to programming of legislation. It recognised that programming was potentially controversial, although the Commission regarded the issue as a problem for the Commons rather than for the Lords, where it believed informal arrangements worked well. The report noted that the majority of those submitting evidence to the Commission were in favour of introducing programming.

The Commission's main recommendation in this area was for the establishment of a Legislation Steering Committee (LSC) to organise the shape of the legislative programme and deal with matters such as

## BOX A HOW PROGRAMMING WORKS

- Initial programme motions are moved immediately after Second Reading by a Minister. At this stage they are not debatable or amendable. In the case of a bill committed to a Standing Committee, the initial motion specifies a date by which proceedings in Standing Committee must be concluded ('the out-date'). The motion also specifies the number of days on the floor of the House reserved for the main stages taking place there (Report Stage, Third Reading and, in the case of bills not committed to a Standing Committee, Committee of the Whole House), while leaving the dates of those allotted days to be determined in the usual way.
- Before the first meeting of a Standing Committee, a programming sub-committee meets to make proposals about sitting times and the internal division of time within the parameters already set in effect by the Government (i.e. the date of the first meeting and the 'out-date'). This sub-committee consists of one of the Chairmen of the committee plus seven members of the Standing Committee, nominated by the Speaker. It always has a Government majority.
- The sub-committee can propose 'internal knives' which are the times at which proceedings to a certain point in the bill are to be concluded. These are intended to ensure that the most time is available for those parts of the bill that are likely to be contentious or of particular interest. The end of the time allocated for a certain part of the bill is known, informally, as the point when the 'knife' falls. Any clauses not dealt with in that period are effectively lost.
- The initial proposals from the sub-committee almost always reflect the Government's view on how time should be divided, and seek to ensure that no major part of a bill goes entirely undebated, although the Government is often open to representations about the precise time of 'internal knives'. Any clauses not dealt with in that allocated period are invariably agreed to without debate, with any Government amendments being made, also without debate.
- The programming sub-committee may make recommendations about a change to the 'out-date' or the programming of the Report Stage and Third Reading. In reality the sub-committee's decisions rarely do more than endorse formally what the Government agrees to, even if sometimes the Government may make concessions to the Opposition, such as an extension of Committee stage or a second day for remaining stages.
- Guillotines are now only used when the Government wishes to programme all stages of a bill. The 'guillotine' was used only once in the 2001-02 session and was not deployed at all in the 2002-03 session.

programming. The report argued that by formalising the Opposition's role in decision-making on the legislative process, it would not lose if programming became widely used. *Making The Law* pointed out that the 'so-called time weapon' led to 'long, boring, time-wasting filibusters' and guillotines which resulted in many parts of the bill escaping all scrutiny and debate. The Commission concurred with the 1985 Procedure Committee report, which argued that formal and regular timetabling of all but the least controversial bills would be necessary to ensure that all clauses were considered in committee.<sup>3</sup> The report did not consider how programming might work in practice because it assumed that a mechanism (through the LSC) would work out the details.<sup>4</sup>

*Making The Law* also proposed a number of changes to the legislative process, including:

- greater use of pre-legislative scrutiny;

- the introduction of carry-over of legislation so that bills could be considered over two sessions;
- the use of re-committal to deal with bills which would require lengthy or complex debate at Report Stage.<sup>5</sup>

The report stated that programming would be needed if such proposals were to be successfully implemented and so regarded programming, to some extent, as a means to a greater end:

'It would be difficult for the Government's business managers to accept some of our recommendations for more effective scrutiny of bills unless there were some compensating assurance, through time-tabling, that these would not cause unacceptable delays in the passage of legislation.'<sup>6</sup>

'If parliamentary scrutiny of bills and delegated legislation is to be improved... much more extensive formal time-tabling of all legislation will have to be accepted.'<sup>7</sup>

## BOX B PREVIOUS PROPOSALS FOR PROGRAMMING

- Although the routine use of programming is a recent development during the period of the Labour Government since 1997, a number of previous reports have recommended its use. In 1985 the Procedure Committee examined the proposal that every Government bill should be timetabled. It cited a survey carried out by the All-Party House of Commons Reform Group that found that nearly three-quarters of all MPs supported this proposal.
- The 1985 report of the Procedure Committee recommended the creation of a Legislative Business Committee (LBC). The LBC would propose a limit on the number of hours of debate in Standing Committee for all bills which, in its opinion, were likely to require more than 25 hours. A business sub-committee of the Standing Committee would then propose a detailed allocation of time within the total limit proposed by the LBC.<sup>8</sup>
- In 1986 the Committee returned to the subject recommending that the functions which it had originally envisaged for the LBC should be conferred instead on the business sub-committee of the Standing Committee. However none of the proposals on programming or for a LBC were adopted.<sup>9</sup>
- In 1992 the Report of the Select Committee on Sittings of the House, known as the Jopling Report, recommended that a timetabling provision should be applied to all stages of Government bills after Second Reading. Many of the Jopling proposals were adopted in 1995 but programming of public bills was not implemented.
- During the 1992-97 Parliament, the Procedure Committee made further recommendations on programming but no action was taken. According to Blackburn and Kennon, 'by the time of the 1997 election the accumulation of proposals behind some form of timetabling reform meant that the time was right for some modest procedural change to take place.'<sup>10</sup>

**4 Developments since 1997:** It was not until after the 1997 General Election that the introduction of programming moved a step closer with the first report of the Modernisation Committee, which had been established that year. The Committee recommended the introduction of programming which it described as 'more formal' than the usual channels but 'more flexible than the guillotine'.<sup>11</sup> For a trial period, during the 1997-98 session, certain bills were selected to be subject to a 'programming motion'. The first programme motion was put down in January 1998 in respect of the Scotland Bill and was hailed as the 'first ever all-party programme motion'.<sup>12</sup> During the period 1997-2000, however, programming motions were not frequently used.

Following a Modernisation Committee review, new sessional orders on programme motions were passed in November 2000. Subsequently new orders giving more power to Programming Committees and Programming Sub-Committees were passed by the House in June 2001. They also reduced the amount of time normally available for debate on programme motions. These orders had effect until the end of the 2001-02 session but have been subsequently renewed and remain in force. During this period, the number of bills subject to programming increased markedly. By the 2000-01 session almost all Government bills were programmed, a situation which continues today.

**5 Increasing Controversy:** Since 1997, three distinct stages of programming can be identified. The first phase was programming with cross-party agreement. In the period following the 1997 General Election, the main Opposition parties gave programming their support and initial proposals in the 1997 Modernisation Committee report were passed unanimously. Although the Opposition was not overly enthusiastic about programming, they felt that it might at least bring more certainty to the legislative process and would perhaps allow more time for developments such as pre-legislative scrutiny. This phase of programming essentially ended because agreement could not be reached after the initial consensus broke down.

The second stage, from the 1999-2000 Session onwards, involved programme motions, which were

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non-consensual, but were debatable. The motions were, however, essentially carried by the votes of the Government party against the wishes of the Opposition and it was during this period that programming became routinely used for Government bills.

The third stage, which represents the situation at present, involves programme motions which are generally not debated. At least as far as critics of the system are concerned, the 'out-dates' simply represent the Government's decision on how long the committee stage should take. Many within the Opposition parties consider that programming has further diminished their influence over the legislative process and delivered yet more power to the Government. While the Government appears to be content with programming, the idea of a programme representing the outcome of negotiations between parties appears to have been abandoned.

The tensions between oppositionalism and effective scrutiny, and between duties to Parliament versus partisanship, have had an enormous impact on programming in practice. The Opposition routinely

votes against programme motions and the Government imposes its programming orders through the use of its majority. According to Blackburn and Kennon, 'there is a suspicion that this important procedural innovation has fallen foul of party politicking'.<sup>13</sup>

**6 Programming in Practice:** Aside from the difficulties caused by the partisan nature of the Commons, there are further concerns that the system of programming is flawed in its operation. Programming was intended to eradicate, or at least greatly reduce, the gaps in scrutiny which occurred when time on a bill ran out and many important clauses were left undebated. Yet, although programming is meant to be flexible, it is not always possible to predict in advance the time that will be needed to give full consideration to parts of the bill or predict which clauses will attract most attention or controversy. For example, in the 2002-03 session, 23 Government bills were subject to a programme order; in six cases, the committee ran ahead of timetable; in the remaining 17 cases the 'knives' fell to leave clauses and schedules undebated. In a number of cases, significant parts of the bill received no scrutiny at all.<sup>14</sup>

## BOX C TIMETABLING IN THE SCOTTISH PARLIAMENT

- In the Scottish Parliament, the system of timetabling of legislation is significantly different to Westminster. The Parliamentary Bureau is responsible for the timetabling of all bills and is independent of the Scottish Executive. The Bureau determines the deadline for how and when bills should be debated. The Presiding Officer determines when a subsequent vote should be taken. Agreement on programming is then reached by the Bureau members.
- The Bureau has responsibility for drafting the Business Programme. The Programme sets out the agenda for debating legislation in the Scottish Parliament over a given period and is distributed to every MSP.
- The Parliamentary Bureau consists of the Presiding Officer (who acts as Chair and has the casting vote) and members of the Scottish Parliament. It meets in private to discuss timetabling of bills from both the Executive's legislative programme and individual MSPs. Members of the Parliamentary Bureau are nominated from each of the parties represented in the Scottish Parliament. (Smaller parties and independent MSPs can come together to nominate a Bureau member.)
- Compared to the Westminster model of parliamentary programming, there is greater independence from the Executive when planning forthcoming bills and debates. The Executive has limited influence in the process, rather than the considerable power which is enjoyed by the UK Government at Westminster.
- Unlike at Westminster, there are no 'informal' structures in place whereby the Scottish Executive can negotiate with other parties (through 'usual channels'). There is no equivalent position of Leader of the House. This renders the structure for the programming of bills within the Scottish Parliament both more formal and transparent than at Westminster.

## BOX D PROGRAMMING CASE STUDY: THE ENTERPRISE BILL

- The Enterprise Bill was described as ‘part of the Government’s programme to raise the underlying economic performance of the country and tackle those areas that hold back innovation, productivity and growth.’<sup>15</sup> It contained provisions for reforms on existing competition, consumer and insolvency laws. The bill was also intended to address issues such as competition, merger and monopoly, as well as amending the powers of the Office of Fair Trading.
- The bill was among the most lengthy and complex pieces of Government legislation before Parliament in the 2001-02 session and was subjected to a programming timetable immediately after Second Reading in April 2002. It finally consisted of 274 clauses and 26 schedules.
- The timetabling details of the bill were:
  - After Second Reading, the bill went to a Standing Committee, in which the proceedings were timetabled;
  - The Programming Sub-Committee divided the bill into the allotted time for each part of the bill (specifically examining the clauses of the bill) for a total of 18 sittings at the Committee Stage between 16 April and 16 May 2002;
- The programming motion was subsequently amended to extend the conclusion of the Standing Committee from 14 May 2002 to 16 May 2002;

The Commons debated a programme motion for the bill for the last time on 13th June 2002.

When the bill was debated, there was a great deal of criticism, primarily from the Conservative benches, that timetabling had resulted in a lack of available time to scrutinise a significant portion of its provisions. The view was expressed that such a multi-faceted bill should have been subjected to more pre-legislative scrutiny and have had greater time for consideration at all stages allocated to it:

‘We have never been able to understand why the Government have been so enthusiastic about pushing the bill through at such a gallop. The bill is not only large but extremely complex.’<sup>16</sup>

- The Enterprise Act received Royal Assent on 7th November 2002.

One principle underlying the introduction of programming was that an easier legislative passage - with consequent benefits for the Government - would be balanced by better pre-legislative scrutiny and wider consultation and consideration of parliamentary and public concerns. There has undoubtedly been an increase since 1997 in pre-legislative scrutiny of bills, whether by Select Committees or other types of committee, such as Joint Committees of both Houses. Such scrutiny was a central recommendation of *Making The Law* and this development is welcome.

The legislative process is, however, still defective in many ways. The Modernisation Committee identified The Planning and Compulsory Purchase Bill in 2002-03 as an example of where programming had not worked well; many clauses were not scrutinised at all. These flaws essentially arise from the operation of non-consensual programming with little flexibility. In addition, other reforms, such as pre-legislative scrutiny, have not been linked to programming. As a consequence almost all Government bills are now

routinely timetabled, regardless of whether or not they have been the subject of adequate consultation or pre-legislative scrutiny.

Despite the controversies and difficulties, programming has brought greater certainty, even rationality, to a legislative process that could previously appear bizarre and unpredictable. Some observers believe that Standing Committee proceedings have become more brisk and businesslike in recent years, partly because of programming. In the past, Standing Committees had been characterised by a culture of late hours and long debates, often for their own sake. In a programmed system, filibustering and delay simply reduces the time available for constructive debate; programming may therefore have provided some inhibition to such practices.

There is no Business Committee or Legislative Steering Committee at Westminster. It is significant that many other Parliaments organise their legislative process to include a much greater degree of timetabling than is the case at Westminster, even taking into account the post-

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1997 developments. (See for example Box C on procedures in the Scottish Parliament.) In these systems, Opposition, backbench and public concerns can be accommodated and the overall process appears more straightforward and transparent.<sup>17</sup>

**7 Proposals for change:** Programming appears to be here to stay. In the view of its supporters, it has had a number of positive effects. However problems with its operation have ensured that calls for reform continue to be made. One central reform proposal is for the introduction of a Business Committee or Legislation Steering Committee to allow greater input and agreement between all interested parties in the Commons about the shape and timing of the legislative programme.<sup>18</sup> In the absence of a Business Committee one option for reform would be to link the application of programming more explicitly to other reforms of the legislative process. One suggestion might be that programme motions should only be moved immediately after Second Reading without debate if at least one of the following four conditions had been met:

- (i) the bill had been subject to pre-legislative scrutiny;
- (ii) the bill is to be subject to carry-over between sessions (a procedure intended to increase the overall time for scrutiny);
- (iii) the bill is to be committed to a Committee of the Whole House or a Special Standing Committee;
- (iv) there is cross-party agreement on the terms of the programme.

In other circumstances, the Government could be prohibited from moving a programme motion until after a Standing Committee had sat for four sitting days and such subsequent motions would be debatable. The Government would then at least need to make the case publicly as to why proceedings were not progressing adequately without a programme being in place. Another suggestion, responding to concern about parts of a bill that go wholly undebated, would be to make provision for 'injury time' in Standing Committee specifically to debate the most important provisions lost to earlier 'internal knives'.

**8 Specific Reforms:** The Modernisation Committee in its November 2003 report, *Programming of Bills*, put forward a number of conclusions and recommendations, including:

- The Government must ensure that, where significant new material is inserted at Committee Stage, it is tabled to allow the Programming Sub-Committee to incorporate it into the timetable;
- Where large numbers of late amendments are tabled, the Programming Sub-Committee should propose a revised out-date, which the Government should support;
- Discussions on a programme motion should begin soon after a bill is introduced, rather than waiting until after Second Reading. There may be a case for a delay between Second Reading and the fixing of the out-date so that points raised during the Second Reading debate may be taken into account;
- In the case of lengthy bills, the Programming Sub-Committee should not normally make detailed proposals about the allocation of time to the bill until after several sittings of the Standing Committee, and should keep the operation of the 'knives' under careful review;
- Long delays between the out-date and Report Stage should be avoided. Generally Report Stage and Third Reading are completed on a single day but the complexity of some bills may mean that two days (or more) may be required.

Standing Committees could be given greater control over the timetabling of the legislation. For example, Paul Tyler MP made a number of proposals, including that, in exceptional circumstances, if the full Standing Committee agrees by majority vote, that the time allocated has ceased to be sufficient (e.g. because the Government has produced substantial new clauses or amendments), then the Chairman should be able to report to the House, and seek a new 'out-date'. Otherwise, the Chairman could recommend to the Government (through its whips and business managers), the time required to achieve adequate scrutiny for the bill's remaining stages. The Programming Sub-Committee could then agree the optimum allocation of time, including 'knife-points', for the Report Stage. The Committee Chairman should report to the House which parts of the bill had *not* been debated in Standing Committee.<sup>19</sup>

Andrew Tyrie MP in *Mr Blair's Poodle* advocated that timetabling should be applied to all stages of a bill.<sup>20</sup> He recognised that a margin of uncertainty exists for unprogrammed bills and that the Government would

therefore gain from the removal of that uncertainty. In that case, the adoption of programming should not give the executive something for nothing. He argued that the minimum trade-off for timetabling should be thorough pre-legislative scrutiny of bills by Select Committees, reform of Standing Committees and a commitment that after a certain point, major amendments, fundamentally altering the bill, would not be allowed. One possibility would be for the Speaker to have the power to rule on whether a bill had been so altered that it could be returned for another Second Reading.

The central rationale of such proposals is that if the Government obtains greater assurance of getting its legislation through, Parliament and the country should get a more thorough explanation of the measure. Adequate scrutiny mechanisms should therefore be in place to ensure that this happens. In particular, Andrew Tyrie has identified an important role for Select Committees in improving the legislative process. This would include taking evidence from Ministers and expert parties (along the lines of a Special Standing Committee) and would involve identifying the clauses on which there is consensus or which appear straightforward and, conversely, to identify those parts of the bill that need closer consideration and scrutiny. One related reform might be to introduce one day each week when the chamber does not meet to allow committees the time to expand their role accordingly.<sup>21</sup>

**9 Conclusion:** The objective of rational, measured and full consideration of proposed legislation is one that all parties in Parliament should share. The timetabling of legislation is a change which has been supported by reformers of all political complexions for many years in order to achieve this goal. That goal should not be seen as the property of one party, or as having benefits only for the Government of the day and should be supported by all who wish to see an effective Parliament.

It is clear that the fundamental bargain which needs to be struck is that the gain of greater certainty about the Government's legislative timetable should be balanced against the opportunity for less rushed, more thorough, and more effective scrutiny. Legislative reform should be seen as a total package; changes in one part will affect another. Programming

cannot be seen in isolation. Proposals for a Business Committee, to organise parliamentary business including legislation, are particularly relevant and should be revisited. Increased use of draft bills, the regular use of Special Standing Committees which can take evidence, and the provision of adequate time for Report Stages on the floor of the House should accompany the development of timetabling.

One of the main problems with programming as it stands is that it has become detached from other 'reform' measures. The Modernisation Committee identified the criteria for an effective legislative process in its 1997 report:

- The Government of the day must be assured of getting its legislation through in reasonable time (provided that it obtains the approval of the House).
- The Opposition, in particular, and Members in general must have a full opportunity to discuss and seek to change provisions to which they attach importance.
- All parts of a bill must be properly considered.<sup>22</sup>

To its supporters, programming is seen as an essential part of achieving these criteria and represents a means to a greater end: higher quality legislation. To its critics, programming has become an end in itself – easing the burden on the Government's business managers – rather than a means of securing better legislative scrutiny.

Despite recent developments, and some improvements, many bills are still subject to partial and haphazard scrutiny. A genuinely effective and efficient legislative process should not allow such gaps in consideration. The true test of the value of programming is whether it has helped restore Parliament's active participation in the making of the law, rather than representing another mechanism to ensure legislation, essentially by Government diktat. In the view of many involved in the law-making process, by this measure, it is failing at present. However, by implementing further reform, that view could be changed.

## ENDNOTES AND REFERENCES

- 1 *Making the Law*, The Report of the Hansard Society Commission on the Legislative Process chaired by Lord Rippon of Hexham, (1993).
- 2 See *Opening Up The Usual Channels*, Rush, M, Ettinghausen, C, Hansard Society (2002).
- 3 Procedure Committee, (1984-85), *Public Bill Procedure*, HC 49
- 4 See endnote 1 (para 516)
- 5 Re-committed to a Standing Committee or Special Standing Committee which is able to take evidence.
- 6 See endnote 1 (para 81)
- 7 See endnote 1 (para 121)
- 8 Procedure Committee, (1984-85), *Public Bill Procedure*, HC 49.
- 9 Procedure Committee (1985-86), *Allocation of Time to Government Bills in Standing Committees*, HC 324.
- 10 *Parliament, Functions, Practice and Procedures*, Blackburn, R and Kennon, A, London, (2003)
- 11 Modernisation Committee, (1997-98), *The Legislative Process*, HC 190
- 12 Cabinet Office Press Notice (13/1/98).
- 13 See endnote 10
- 14 Modernisation Committee, (2002-03), *Programming of Bills*, HC 1222.
- 15 See House of Commons Library Research Paper 02/21 2002, *The Enterprise Bill*.
- 16 HC Deb 13 June 2002 vol 368 col 1033
- 17 Following the 2002 Modernisation Committee report, it was agreed that there should be collective consultations between the Government and Opposition parties about the broad shape of the legislative year including issues such as which bills should be published in draft or may be considered for carry-over. It is unclear, however, whether the Opposition has derived much influence from this development.
- 18 *The Challenge for Parliament; Making Government Accountable*, Report of the Hansard Society Commission on Parliamentary Scrutiny, chaired by Lord Newton of Braintree, (2001), also recommended the introduction of a Business Committee.
- 19 Outline Proposal for a Programming Protocol, Memorandum from Paul Tyler MP, Modernisation Committee, (2002-03), *Programming of Bills*, HC 1222.
- 20 *Mr Blair's Poodle, An agenda for reviving the House of Commons*, Andrew Tyrie MP, Centre for Policy Studies, (2000)
- 21 The report of the Hansard Society Commission on Parliamentary Scrutiny also proposed that the chamber should not sit on one day each week to allow greater work by committees.
- 22 Modernisation Committee, (1997-98), *The Legislative Process*, HC 190

Price : £5; ISBN 0 900432 37 3

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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.

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The Hansard Society is grateful to Anne Campbell MP, Paul Tyler MP and Andrew Tyrie MP and members of the Hansard Society Council for their contribution to the work on this subject. The Hansard Society is also grateful to the Regulatory Group at the international law firm DLA for its generous support for this series of papers reviewing elements of the legislative process.

This is a Hansard Society Findings Paper Number 4 in a series of papers to review elements of the legislative process. A final report will be published in December 2004.

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