

# HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING



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5 : Pre-Legislative Scrutiny

July 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 a final publication will draw together these papers along with additional essays on the legislative process. The first four papers in this series looked at Private Members' Bills, Standing Committees, Delegated Legislation and Programming of Legislation. This fifth and final Briefing Paper looks at Pre-legislative Scrutiny.

One of the most significant and positive developments in legislative reform in recent years has been the marked increase in pre-legislative scrutiny. Such scrutiny can allow for more measured consideration of a bill's principles, questioning of new policy initiatives contained within it and consideration of any practical and technical issues which might arise from the proposed provisions.

Pre-legislative scrutiny can also utilise expert evidence and provide a forum for a wide range of interested parties to influence legislation at an early stage. It can provide an important mechanism for collaboration between the executive, legislature and electorate.

Crucially, it is widely acknowledged that it is easier for a Government to amend a bill at the pre-legislative stage, before it enters the formal legislative process, so that such scrutiny can be seen to make a real difference to a bill's final form. This paper looks at the development of pre-legislative scrutiny and considers how it may further strengthen the way that Parliament makes the law.

**2 Making the Law:** The Hansard Society has long advocated the introduction and development of pre-legislative scrutiny. In 1993, *Making the Law* made a number of recommendations to improve the scrutiny and quality of legislation, stating that:

'there should be as full consultation as is practicable on draft bills and clauses... We therefore recommend 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... Parliament could play a greater part by pre-legislative inquiry in the preparation of legislation.'

The report also argued that it was important to connect the legislative process with wider parliamentary and public opinion:

'There are occasions, and topics, on which some broader political input at the stage when legislation is being considered and prepared could be helpful for all those concerned. For example, parliamentary debate or inquiry could promote more public discussion on the policy options, could encourage consultation or could help smooth the passage of the legislation through Parliament.'

**3 Development of Pre-legislative Scrutiny:** *Making the Law* noted that very few pre-legislative inquiries on draft bills had then been undertaken by select committees or other parliamentary forums. However, it had not been unusual for select committees to hold inquiries on Green and White Papers or other consultative documents relating to proposed legislation. Such inquiries allowed evidence-taking and deliberation on broad principles, but were usually unable to focus on the specific, legally expressed, proposals that the Government was intending to bring forward.

During the 1992-97 Parliament, the Conservative Government published a number of bills in draft for consultation purposes but they were not subject to

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formal scrutiny by parliamentary committees. The major step forward came with the first report from the newly-formed Modernisation Committee following the 1997 General Election. The report concluded:

‘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. ....Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.’<sup>2</sup>

Since 1997, there has been a significant increase in pre-legislative scrutiny. Between the 1997-98 and 2003-04 Parliamentary Sessions a total of 42 draft bills were published.<sup>3</sup> In the current (2003-04)

Session, a number of important bills have been published in draft, including those on Charities, Disability Discrimination, Gambling, Identity Cards and School Transport.

In May 2002, the Commons adopted guidelines for core functions and duties to be carried out by select committees, including ‘to conduct scrutiny of any published draft bill within the committee’s responsibilities’. To supplement the existing officials working for select committees, a Scrutiny Unit was established to provide resources and support for select committees undertaking pre-legislative scrutiny.<sup>4</sup>

#### 4 A range of methods: Pre-legislative scrutiny of draft bills can be undertaken by:

- The existing departmental select committees;
- Other existing committees of either House;
- Ad hoc select committees of either the Commons or Lords;
- Joint Committees of both Houses established for individual draft bills.

## BOX A WHAT IS PRE-LEGISLATIVE SCRUTINY?

- Prior to a Government bill being formally published in final form, it may be published in draft as a Command Paper. It need not be referred specifically to the relevant departmental select committee but if a temporary committee is appointed to consider it, (such as a Joint Committee of both the Commons and the Lords), then the draft bill is referred to that committee. This committee will consider the contents of the draft legislation before the Government brings forward a formal bill.
- There is no requirement that legislation should be subjected to pre-legislative scrutiny and those bills put forward in draft form are done so at the discretion of the Government’s business managers. Presently, only a relatively small (but growing) proportion of Government bills are subject to pre-legislative scrutiny. Whether bills are presented in draft or not may depend upon the parliamentary time available and the resources of the Parliamentary Counsel.<sup>5</sup> An additional factor is the Government’s ability to agree well in advance its forthcoming legislative programme.
- The Government will publish a list of bills that will be considered in pre-legislative form at the beginning of each

Parliamentary Session. Draft bills require additional time and resources from both the relevant Government department and from the select committee charged with examining the proposed legislation. This can add considerable time to the process of passing legislation through Parliament.

- When considering legislation in draft form, select committees are able to call witnesses for oral evidence and take written evidence from external sources. Select committees are then able to report their findings in detail and explain why they either support or oppose the proposed bill and explain the amendments that they would deem to be appropriate.
- As ministers tend to commit less political capital to draft legislation than to formal legislation, they do not necessarily regard recommendations for changes to a draft bill as a defeat. It may even be considered more advantageous to ministers if their draft legislation is altered at this stage, to permit smoother passage in the formal legislative process. The Government is not obliged to accept the alterations from the Committee, but in many cases has done so.

In practice, the two main options regularly adopted have been reference to the appropriate departmental select committee or to a Joint Committee of both Houses specially appointed for the task. However, since the adoption of core duties, there is a general assumption that select committees will carry out pre-legislative scrutiny.<sup>6</sup> The methods and outcomes are similar to a standard select committee inquiry i.e. written and oral evidence is usually taken and a report is issued that makes conclusions and recommendations.

Departmental select committees undertaking pre-legislative scrutiny are generally able to establish their own terms of reference and methods of working for the inquiry, though they may be under some time constraint. There is no agreed formal procedure and this means that committees are able to concentrate on what they believe are the most important parts of a bill, whether principles or individual clauses. On the other hand, the motions establishing Joint Committees to consider a draft bill include their terms of reference. This almost always includes a deadline that limits their discretion, but such committees can still choose which issues to prioritise. Pre-legislative scrutiny can also look at:

- Human rights implications (The Joint Committee on Human Rights looks at all draft bills to assess their compliance with the European Convention on Human Rights and other internationally-accepted human rights standards);
- Spending implications;
- Regulatory impact assessments;
- Delegated powers.

**5 The impact of pre-legislative scrutiny:** Pre-legislative scrutiny is advisory only. Unlike standing committees, which have powers to change a bill, select committees looking at a draft bill make recommendations that the Government is at liberty to accept or reject. One obvious method to judge the impact of pre-legislative scrutiny is to assess which of the committee's recommendations have been accepted. In many cases it is obvious that the committee has had a significant impact and that the Government has accepted the committee's proposals, either in spirit or to the letter. For example, the Government accepted 120 of the 148

recommendations made by the Joint Committee looking at the draft Communications Bill in 2002.

Pre-legislative scrutiny can have other important effects. For example, it can stimulate and assist public and media debate on a subject. It can provide a mechanism for pressure and lobby groups to campaign on an issue and such bodies may provide evidence to the committee, the House as a whole and to the media (see paragraph 6 on Connecting with the Public). Commenting on the report of the Joint Committee on the draft Gambling Bill, *The Guardian* argued;

'Too many laws which have gone through Parliament in recent years have been badly drafted and hastily adopted. [Pre-legislative scrutiny has ensured] a much more serious public debate on gambling has been generated than would have been the case under the traditional flawed system. And all this without a major legislative vote being taken. This is good for Parliament, good for law-making and good for politics. The process should be extended to all Government bills as a matter of routine.'<sup>7</sup>

Another important benefit is that members of the committee that conducted the scrutiny will become better informed about the bill and the issues that it addresses. Therefore they are able to make more expert contributions when the formal bill is introduced, whether in standing committee or in debate, thus raising the quality of debate and scrutiny.

From the Government's point of view, draft bills can be used as a form of 'consolation prize' to a department if there is no room in the main legislative programme for a formal bill. This may build up sufficient momentum to ensure the introduction of a bill in the following session. Conversely, the Constitutional Reform Bill is an example where pre-legislative scrutiny was not built into the process. This was despite the fact that the Constitutional Affairs Committee believed it was a clear candidate for pre-legislative scrutiny and that 'Draft bills are appropriate whenever there is any significant proposal, which is complex, introduces fundamental change and is controversial.'<sup>8</sup> In the event, the House of Lords referred this bill to a select committee for further scrutiny.

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Pre-legislative scrutiny has tended to be carried out on uncontroversial bills (at least those bills considered uncontroversial in party political terms). However, some bills that are considered controversial in a wider sense, such as the Gambling Bill, have been put forward for pre-legislative scrutiny. The fundamental question is whether pre-legislative scrutiny has improved the quality of legislation. It is impossible to give a definitive answer, as there are no agreed criteria by which to judge. However, all indications would suggest that it has been an extremely positive development. As the Liaison Committee noted in its Annual Report for 2003:

“Consideration of bills once they are published can be second best to examining bills in draft report. If bills are reported on as they are going through the House, and are amendable, committees may find themselves ‘attempting to hit a moving target’.”<sup>9</sup>

**6 Connecting with the public:** The Modernisation Committee’s 1997 report stated that pre-legislative scrutiny ‘opens Parliament up to those outside affected by legislation’. It does this by offering considerable scope for involving a greater number of people in the legislative process. There are numerous benefits to this: legislators can canvass a sense of public opinion around an issue and utilise the expertise and experience of relevant organisations and individuals to assess potential consequences. Being involved in the formal process of pre-legislative scrutiny can also improve Parliament’s relationship with the public.

Currently, the majority of citizens, whether working individually or as part of a group or network, rarely participate in this process. There are many reasons for this lack of involvement, including:

- Public knowledge of the law-making process is very limited. Very few people would have any idea that they could contribute in any way;
- Consultations are not well advertised, and may only reach those who are already engaged with the political process;
- The language used throughout the legislative process is often prohibitively obtuse and technical. Explanatory notes are helpful, but even these are fairly dense and not very user-friendly.

One recent development that has helped engage the public is the use of online consultations.<sup>10</sup> For example, pre-legislative scrutiny of the draft Communications Bill was enhanced by the use of a Hansard Society moderated online forum that created two-way channels of communication between citizens and the parliamentary committee that was scrutinising the bill. It was the first online

## BOX B OTHER FORMS OF LEGISLATIVE SCRUTINY

- The main forum for detailed legislative scrutiny in the Commons is in a Standing Committee. Occasionally the Committee stage is taken on the floor of the House of the Commons, known as the Committee of the Whole House. In the Lords such scrutiny is conducted on the floor of the Chamber or in a ‘Grand Committee’. (See Briefing Paper 2 on Standing Committees). In both the Commons and Lords, further scrutiny and debate takes place in the Chamber in other stages such as the Report Stage.
- Before the advent of regular pre-legislative scrutiny, there was already a mechanism for committees to take evidence on bills. This was done through the use of a Special Standing Committee (SSC), which is a temporary committee that combines the functions of Select and Standing Committees. They have tended to be used for non-controversial bills although they have been very rarely used. *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 Hansard Society Commission report *The Challenge for Parliament* proposed the introduction of dual-purpose committees that combine standing and select committee functions.<sup>11</sup> Such combined legislative and scrutiny committees are the norm in most other Parliaments including those in Scotland and most of Europe.
- The Commission report noted that the expertise built up on select committees would make it more likely that bills would receive a closer level of scrutiny than under the current system of standing committees. The report also proposed that one or two dual-purpose committees should be established on a pilot basis and their performance evaluated by the Liaison Committee.

consultation to consider a specific piece of legislation in draft form. The success of this pilot can be seen by the fact that two of the committee's key policy recommendations came directly from suggestions made on the forum.

**7 Outstanding Issues:** The Government maintains key control over pre-legislative scrutiny. It decides which bills will be published in draft and whether parliamentary committees will have time to scrutinise them. For example, the Work and Pensions Committee wished to examine the Pensions Bill in draft but this request was declined by the Government because they wanted to proceed immediately with a formal bill.<sup>12</sup>

One concern that has been raised is that increased pre-legislative scrutiny by select committees might reduce the time available for their oversight and accountability functions. At present there seems little evidence that this has become a major problem; some committees have not undertaken pre-legislative scrutiny at all or have undertaken just one inquiry in a session. However, if pre-legislative scrutiny were to be extended to cover all, or almost all, bills – a reform that many including the Hansard Society would wish to see – there might be a danger that scrutiny and accountability functions would come to be squeezed. To address that potential difficulty, there are a number of possible solutions. The size of committees could be increased to allow the work to be shared more widely or sub-committees could be formed, either on a standing basis or established to consider particular draft bills.<sup>13</sup>

One view put forward is that the select committee system has not adapted sufficiently to changes in Government, most particularly in relation to the development of 'cross-cutting' initiatives. The departmental select committees concentrate on the work of a particular department. In fact, some bills contain proposals that have inter-departmental implications and therefore there may be a strong case for greater use of joint select committee inquiries or committees of both Houses to reflect different interests.

Blackburn and Kennon summed up the sense that pre-legislative scrutiny is still at a relatively early stage of development:

'Pre-legislative scrutiny is still experimental and lacks structure. Further development depends more on Government than on Parliament, and on the ability of the cabinet and the "business managers" to decide in advance their future legislative programme, on a department's ability to give drafting instructions, and in particular on the limited resources of the Parliamentary Counsel.'<sup>14</sup>

**8 Proposals for Change:** A number of other reports have recommended that pre-legislative scrutiny should be more frequently used and made more effective. In 2000, the Conservative Party report, *Strengthening Parliament*, recommended that the publication of draft bills should become the norm, not the exception:

'We recommend that bills normally be published in draft. We recognise that this will not be possible in all cases (bills at the start of a new Parliament, emergency bills, finance bills) but we think that the presumption should be that a bill will normally be published in draft. A draft bill should be referred to a departmental select committee. If it is a cross-cutting bill, or a bill that a departmental select committee declines to consider, the appointment of an ad-hoc select committee should be considered by the Liaison Committee. For big and complex bills, ... a joint committee of the two Houses may be appropriate.'<sup>15</sup>

In 2002, the Modernisation Committee returned to the subject of pre-legislative scrutiny, stating that 'we hope eventually to see publication in draft become the norm. We recommend that the Government continue to increase with each Session the proportion of Bills published in draft.'<sup>16</sup> Also in 2002, the Lords Committee on Procedures proposed that virtually all Government bills should be subjected to pre-legislative scrutiny, adding the proviso that 'the quality of pre-legislative scrutiny is maintained at a high level and also that pre-legislative scrutiny committees are not required to work to unreasonably tight timetables or to consider draft bills that are incomplete.'<sup>17</sup>

## BOX C PRE-LEGISLATIVE SCRUTINY IN THE SCOTTISH PARLIAMENT

- Pre-legislative scrutiny operates in a similar fashion in Scotland to the Westminster model in that committees have a prominent role in examining proposed legislation. However, unlike Westminster, the majority of proposed legislation in Scotland is subject to pre-legislative scrutiny (unless it is emergency legislation).
- As there is no set procedure for pre-legislative scrutiny, the relevant committee examining a draft bill is able to call upon external witnesses who may also have an input into proposed legislation in a similar fashion to the consultation exercises at Westminster.
- Pre-legislative scrutiny is considered an essential aspect of the Scottish Parliament; it enables the general public and external organisations to have effective input into the formulation of policy. Pre-legislative scrutiny also ‘allows for an influence on the translation of this policy into proposals for new laws’.<sup>18</sup> The originator of the draft bill may frequently invite consultation from external bodies.
- In addition to pre-legislative scrutiny, it should be noted that the first formal stage of a bill’s passage through the Scottish Parliament entails a bill’s principles (rather than any specific details) to be considered by the relevant subject-based committee. This committee, being the primary committee examining legislation, is known as the ‘Lead Committee’.
- In this formal first stage of the process, the Parliamentary Bureau will refer the new bill to the Lead Committee for them to consider its merits and consult interested parties. Once this has been done, the Lead Committee will discuss and amend the detail of the bill.
- The Lead Committee may also refer a bill to other committees that have an interest, such as the Finance Committee. Their views will appear in the Lead Committee’s final report. Evidence at this stage (as well as the pre-legislative stage) may also be taken from external witnesses when considering the aspects of a bill.

More recently, Phil Woolas MP, Deputy Leader of the House, signalled the Government’s intention to further increase the number of bills receiving pre-legislative scrutiny, stating that ‘my view, and more importantly the Government’s view, is that a bill should be published in draft form unless there are good reasons for not doing so.’<sup>19</sup>

- 9 **Specific Reforms:** Before pre-legislative scrutiny becomes more widespread there are a number of issues that need to be addressed. For example, one of the current limitations of pre-legislative scrutiny is that it often considers solely the outline of proposed legislation and the framework of powers and provisions contained within it. However, the real impact of a piece of legislation is often contained in its detail, which is introduced after enactment in the form of regulations (delegated or secondary legislation). The accompanying regulations are not usually ready when the draft bill is published. As a result pre-legislative scrutiny committees can miss out on the real substance of the bill. The Joint Committee on the draft Civil Contingencies Bill recommended,

‘that in future all enabling Bills published in draft should be accompanied by a comprehensive set of draft secondary legislation.’<sup>20</sup>

There are practical difficulties with the timetable for drafting and presentation of draft bills. The Modernisation Committee drew attention to the fact that draft bills tend to be published towards the end of the Session. As a result, the timescale allowed for pre-legislative scrutiny is frequently considered to be too short. The Committee hoped that it would be possible for work on draft bills to continue in parallel with work on bills which have already been introduced, with the result that pre-legislative scrutiny can take place throughout the Session and not just towards its close. The Committee also recommended that where it is not possible to produce a complete legal text the Government should submit proposals for pre-legislative scrutiny on the basis of a detailed statement of policy.

The introduction of ‘carry-over’ of bills from one Parliamentary Session to the next could potentially help to mitigate the problems of a constrained

timetable. One of the main reasons given for introducing carry-over was to allow greater time for scrutiny of bills including pre-legislative scrutiny.

The first major public bill to be subject to carry-over, and which had previously been subject to pre-legislative scrutiny, was the Financial Services and Markets Bill. Greater use of carry-over may be a way for pre-legislative scrutiny to become a more routine part of the legislative process.

One notable innovation in recent years has been the introduction of programming of legislation.<sup>21</sup> It has been argued that the advent of programming, and the consequent greater certainty for the Government of getting its legislation through, places an obligation on the Government to provide better scrutiny and explanation of its measures. One obvious measure to meet this obligation would be for the Government to commit itself to pre-legislative scrutiny for all bills (with the exception of emergency bills and other specified cases).<sup>22</sup>

In 2000, the report *Parliamentary Scrutiny of Draft Legislation 1997-1999* looked at pre-legislative scrutiny in practice.<sup>23</sup> Its conclusions and recommendations included:

- The purpose of pre-legislative scrutiny should be to 'highlight key issues and frame the subsequent debate' and its objectives should include the technical improvement of the bill;
- Pre-legislative scrutiny committee members should be able to speak in subsequent standing committees but be barred from voting (this recommendation was also made by the Liaison Committee but was rejected by the Government);
- Pre-legislative scrutiny committees should have input on determining the amount of time spent on parts of the bill during its passage;
- Pre-legislative scrutiny committees should provide a 'handbook' for standing committees to enable significant issues to be highlighted;

- Government departmental officials could be deployed to work on pre-legislative inquiries in Parliament to provide extra support and expertise and strengthen the support functions of the Committee Clerks. The report argued that such a move would be in both the interests of Parliament and Government.

- No body had overall responsibility for pre-legislative scrutiny and the report proposed a specific role for the Liaison Committee or a designated Pre-legislative Steering Committee to take responsibility.

**10 Conclusion:** The Hansard Society welcomes the increased use of pre-legislative scrutiny and supports the extension of its use. This paper has outlined a number of ways that such scrutiny can be improved in practice. Adopting a number of key recommendations would help to achieve this end. These include;

- The Government should continue to work towards producing all bills in draft form, for pre-legislative scrutiny, unless exceptional circumstances apply.
- Additionally there should be an aim to have some continuity of membership between committees that examine draft bills and the standing committees that subsequently examine the formal bill.
- Parliament should also continue to experiment with different methods of pre-legislative scrutiny, and should commission research to evaluate and monitor their effectiveness.

If pre-legislative scrutiny and indeed other forms of legislative scrutiny are to be successful, the commitment of MPs and Peers is required. As the Modernisation Committee noted in 2002, 'Improving the scrutiny of legislation will only be achieved if members of Select Committees and Members of the House show discipline in giving priority to pre-legislative scrutiny'.

## 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 Modernisation Committee, (1997-98), *The Legislative Process*, HC 190
- 3 The breakdown of the total shows: 1997-98, two bills; 1998-99, six bills; 1999-2000, six bills; 2000-01, two bills; 2001-02, six bills; 2002-03, ten bills; 2003-04, ten bills.
- 4 For more information on the adoption of guidelines for core duties, see HC Deb 14 May 2002, vol. 385, col. 649-731. The Scrutiny Unit includes lawyers, accountants, economists, an expenditure specialist and a statistician.
- 5 Parliamentary Counsel are Government lawyers who are expert in legislative drafting and who draft all Government bills.
- 6 Since 1997-98, pre-legislative scrutiny has taken place in the following forums: departmental select committees: 17, Joints Committees of both Houses: 8, Temporary Committees (Commons or Lords): 2, Other existing committees of either House: 2.
- 7 Gambling Bill: Lucky Losers, *The Guardian*, 8 April 2004.
- 8 Constitutional Affairs Committee, (2003-4), *Judicial Appointments and a Supreme Court (Court of Final Appeal)*, HC 48
- 9 Liaison Committee (2003-04), *Annual Report for 2003*, HC 446
- 10 The Hansard Society report *New Media and Social Inclusion* (2000) looked at ways that excluded groups could be brought into the consultation process through the internet.
- 11 *The Challenge for Parliament; Making Government Accountable*, Report of the Hansard Society Commission on Parliamentary Scrutiny, chaired by Lord Newton of Braintree, (2001)
- 12 See 'Playing Ball and Raising The Game', Peter Riddell, *The House Magazine*, 10 May 2004.
- 13 See *The Challenge for Parliament; Making Government Accountable*, Report of the Hansard Society Commission on Parliamentary Scrutiny, chaired by Lord Newton of Braintree, (2001) which recommended that there should be an assumption that all backbench MPs should sit on a select committee and that enlarged committees should work through sub-committees.
- 14 Blackburn, R. and Kennon, A., (2003), *Parliament; Functions, Practice and Procedures*, London, Sweet and Maxwell.
- 15 *Strengthening Parliament*; The report of the Conservative Party Commission to Strengthen Parliament, chaired by Professor the Lord Norton of Louth, (2000).
- 16 Modernisation Committee, (2001-2002), *Modernisation of the House of Commons: A Reform Programme*, HC1168-I
- 17 House of Lords Select Committee on the Procedures of the House, (2001-02) HL58
- 18 Scottish Parliament Fact-File, 3rd Ed, May 2003.
- 19 Phil Woolas MP, HC Deb, 24 February 2004, vol 418 col 19 WH
- 20 (2002-03) HL Paper 183 and HC 1074 para 226.
- 21 Paper 4 in this series looked at Programming of Legislation.
- 22 See *Mr Blair's Poodle*, Andrew Tyrie MP, Centre for Policy Studies, (2000)
- 23 *Parliamentary Scrutiny of Draft Legislation: 1997-1999*: G. Power, The Constitution Unit, University College London, (2000)

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The views expressed in this report are those of the author. 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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